

# Law and State as Holes in Marxist Theory

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*This article argues that Marx's initial critique of Hegel's Philosophy of Right (involving the acceptance of Hegel's dialectical transition from 'civil society' to the Rechtsstaat, or law-state, but its re-explanation in political economy terms) shapes and in certain respects disables much of Marx and Engels' subsequent work. In particular, neither the national form of the capitalist state, nor its form as a Rechtsstaat, can be accounted for on the basis of the unfolding of the contradictions of the commodity without reference to the emergence of capitalism from the self-negation of feudalism. The resulting theoretical impasse may be relevant to Marx's failure to complete Capital, and led Engels in later work to project back the Hegelian transition from 'civil society' to the Rechtsstaat onto classical antiquity. Subsequent Marxist theorists of law have been led to one of two courses: either to cling to the transition from civil society to the state and in the process to abandon fundamentals of historical materialism, or to borrow from orthodox academic legal theory. Recent work by China Miéville and Didier Hanne provides examples of the uselessness of both procedures.*

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## Introduction

As the title of this article indicates, my argument is that law and state are holes in Marxist theory. In sum, it is that Marx and Engels never fully settled accounts with Hegel and, in particular, clung to an interpretation of the origin of the state, which only works within the idealist terms of Hegel's dialectic, not within the theoretical terms set up by *The German Ideology*. The result is (1) that *Capital* was not capable of being finished within the terms set up by its opening, (2) that subsequent Marxist attempts to derive state and law in these terms fail, and clinging to the Hegelian derivation of the state leads to an abandonment of the fundamentals of historical materialism, and (3) that most other attempts to write on the Marxist theory of law fall back into the use of forms of liberal or conservative academic legal theory; both procedures are politically disabling.

## Hegel and Marx

### *The Substantive Legal Content of the Philosophy of Right*

I begin with the substantive legal content of the *Philosophy of Right*. This starting point is partially indicated in Marx's *Critique*, where Marx suggests that Hegel merely arbitrarily fills in the detail of constitutional law from features of his own time rather than genuinely developing it theoretically.<sup>1</sup> It also follows my own professional predilections as a legal historian. It is justifiable to ask of Hegel's text that it explain some substantive law, since Hegel claims to offer a superior explanation of law to those of both the Natural Law and Historical Schools.

Hegel begins in the sphere of *abstraktes Recht*<sup>2</sup> with the original acquisition of property. The content of this material is a stripped-down version of the *ius gentium* (natural law/law of nations) modes of acquisition of *dominium* (ownership of property) identified by the classical Roman jurists, partially as theorised by writers of the 17th- and 18th-century natural rights school.<sup>3</sup> The account is stripped down in order to make it fit with the explanation of original acquisition as in all cases *occupatio*, putting the owner's will into previously unowned things. Locke's preference for generalising on the Justinianic explanation of *specificatio* (mixing the owner's labour with things) is rejected.<sup>4</sup> Methods of acquisition which do not plausibly involve an act of will by the owner, such as *accessio* (where things become indivisibly attached to the owner's thing) and the owner's right to the fruits of the thing, disappear from the structure of the argument,<sup>5</sup> as does acquisition by

<sup>1</sup> On the executive, *ad* §§ 291–297, in O'Malley's edition, Karl Marx, *Critique of Hegel's Philosophy of Right* (Cambridge: Cambridge University Press, 1970), p. 44.

<sup>2</sup> Georg Hegel, *Philosophy of Right*, T.M. Knox (trans.) (Oxford: Oxford University Press, 1967), § 34ff (cited hereafter as *PR*). *Recht* is not translatable into modern English. The difficulty is that *Recht* means both what is called in English a legal system, in the sense of a body of doctrine ('English law', 'property law'), and an individual right, but cannot mean a statute (*Gesetz*), while the modern English word *law* means both a legal system and a statute, but cannot mean an individual right, while English *right* as a noun cannot mean a legal system. The same problem arises with latin *ius/lex*, French *droit/loi*, Italian *diritto/legge* and Spanish *derecho/ley*. The result of the decision to translate *Recht* as 'Right', capitalised, which has been generally followed, is that 'Right' is turned into a Hegelian peculiarity and a lot of intended aspects of Hegel's argument are lost. I therefore leave *Recht* and *abstraktes Recht* untranslated.

<sup>3</sup> Identified by the classical Roman jurists: the standard source is the *Institutes* or statutory elementary textbook of law promulgated by the emperor Justinian in 533 CE, cited from P. Krueger (ed.), *Justinian's Institutes*, P. Birks and G. McLeod (trans.) (London: Duckworth, 1987) (cited hereafter as *J.Inst.*) [Book] 2. [section] 1, derived in part from the considerably older elementary textbook by Gaius (c.160 CE), cited from E. Seckel and B. Kuebler (eds), *The Institutes of Gaius*, W.M. Gordon and O.F. Robinson (trans.) (London: Duckworth, 1988) (cited hereafter as *G.Inst.*) [Book] 2. [section] 66–79. Theorisation by the natural rights school: Richard Tuck, *Natural Rights Theories: their Origins and Development* (Cambridge: Cambridge University Press, 1987) is a helpful overview of aspects of this theorisation.

<sup>4</sup> John, Locke, *Two Treatises of Government*, P. Laslett (ed.) (Cambridge: Cambridge University Press, 1988) *Second Treatise*, Ch 5; *PR* §§ 50–52 & 52R.

<sup>5</sup> The lesser rights to fruits of the usufructuary (holder of a time-limited property right, usually a widow) or *bona fide possessor* (non-owner honestly in possession) are consistent with the Hegelian approach, since in both cases some voluntary action is required if they are to acquire ownership: *J.Inst.* 1.2. 35–36; J.A.C. Thomas, *Textbook of Roman Law* (Amsterdam: North-Holland, 1976), pp. 176–178 and sources and literature cited therein. Characterised as an 'accidental' in *PR* § 55R.

prescription.<sup>6</sup> Stripping out these rules results in a system of rules of acquisition of property which is superficially logically or morally coherent, but would not deal with many of the standard cases in which property rules are actually used in ancient and medieval as well as modern law: where two parties are in dispute over claims deriving from the acts of a third who is dead, insolvent or has absconded.

From property, by way of alienation of property, Hegel proceeds to contract. Here, too, he follows the Natural Law school. The result is a theory of contract that is modelled on sale and, in the result, less generally usable than the theory of contract as cooperation which can be drawn from Aristotle and Aquinas.<sup>7</sup> From contract we proceed to wrongs; and here Hegel departs from his Natural Law model, in emphasising the will of the wrongdoer to interfere with the rights of the owner, rather than the bare interference. No distinction is made between private wrongs and public crimes. This last feature can be found in Locke, but is not derived from the Roman sources or consistent with the legal practice of any period.<sup>8</sup> It is necessary to Hegel because he is not willing at this stage to presuppose the state; and also because the pure emphasis on the will is (perhaps) appropriate in relation to criminal liability, but far less clearly appropriate to questions as to whether one private party should compensate another for the results of accidents.

Both the decision to make wrong proceed from contract rather than independently from property, and the emphasis on the will of the wrongdoer, then allow the transition from *abstraktes Recht* to *Moralität*.<sup>9</sup> It is from the deficiencies of the internal forum that we proceed in due course to *Sittlichkeit*.<sup>10</sup> The apparent dialectical logic of these transitions is entirely dependent on Hegel's arbitrary decision to move from property to contract and from contract to wrong, which can only be grounded on the basis that it saves the dialectical phenomena given by the presupposition of the primacy of the will. *Moralität*, in fact, proves to be a blind alley: the transition from *Moralität* to *Sittlichkeit* in section 141 and the Remark to it simply fails as a dialectically required transition, and in *Sittlichkeit* Hegel begins again from the beginning with the family.

<sup>6</sup> Effectively rejected in *PR* § 50, where it is nonsensically asserted that 'a second person cannot take into possession what is already the property of another'; then 'explained' as a form of abandonment in *PR* § 52 & R; this theorisation loses the basis for time limitation rules, which are essential to prescription.

<sup>7</sup> Cf. J. Gordley, *Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1991), ch. 5, for the natural rights school's approach; the rival Aristotelian–Thomist approach is discussed in the earlier part of the book, and the judgment that the natural rights (and modern 'will theory') approaches are less usable is Gordley's overall judgment, albeit one shared by much modern literature on contract law.

<sup>8</sup> Locke, op. cit., *Second Treatise*, §§ 7–10, as leading to the private right to punish. Roman sources: *J.Inst.* 1.1.4 (and sources cited by Krueger therein). Legal practice in general: the supposed classic counter-example is the early medieval 'Germanic' laws and especially Anglo-Saxon law; but cf. Patrick Wormald, 'Frederick William Maitland and the earliest English Law', *Law & Hist. Rev.* 16 (1998), pp. 1–26, at p. 17ff.

<sup>9</sup> *PR* §§ n–n. *Moralität* is left untranslated because it signifies in substance not 'morality' in modern English but the ideas of the late medieval and early modern casuists of *conscientia*, the 'internal forum'.

<sup>10</sup> *Sittlichkeit* is usually translated as 'Ethical Life'. This, too, is an unhelpful translation, since Hegel clearly intends the word to refer to the Greek *ethos*, to translate into Latin, *mores*, as meaning both customs and public morality: Georg Hegel, *Natural Law*, T.M. Knox (trans.) (Philadelphia: University of Pennsylvania Press, 1975), pp. 112, 115–116.

The family law of the *Philosophy of Right* is intensely of its time. There is to be community property, in which the husband is (because of the different natures of men and women) to be the head.<sup>11</sup> ‘He for God only, she for God in him.’ The regime appears antiquated to modern eyes. But it is also antiquated in a very peculiar way. That is, it is intensely up to date in its time. It reflects the adoption in the French *Code Civil* of precisely this regime as an *innovation*.<sup>12</sup> Analogously at the same or a slightly earlier period, Tory judges in England had revived and extended the doctrine of coverture (husband and wife are one person and that person is the husband) at the expense of both local customs and equitable doctrines which had allowed the wife more autonomy.<sup>13</sup> In both cases what is involved is a relatively short-lived politics of nostalgia.

From the insufficiency of the family as a form of *Sittlichkeit* we move to an account of *bürgerliche gesellschaft*—‘civil society,’ but it could equally be ‘bourgeois society’ or, if anything more probably, ‘urban society’.<sup>14</sup> This is taken from the founders of political economy. Hegel is distinctive before Marx in recognising that the market order of ‘civil society’ leads to social polarisation and the creation of a proletariat, which Hegel deplures. His solution to the problem is *Polizei* (not ‘police’ in the modern sense but the regulatory public power<sup>15</sup>) and the role of ‘corporations’. Avineri, attempting to present Hegel as a theorist of the *modern* state, presented ‘corporations’ as generalisable to voluntary associations as such. They are in fact perfectly clearly recognisable as trade guilds with state backing, of the sort found in western Germany at the time (and also still then significant in Britain).<sup>16</sup>

<sup>11</sup> PR §§ 158ff; community property §§ 170–172, husband head §§ 165–166, 171.

<sup>12</sup> Suzanne Desan, *The Family on Trial in Revolutionary France* (Berkeley, CA: University of California Press, 2004) analyses the emergence of the *Code Civil* position as an aspect of the immediate reaction to radical challenges to family order in the revolutionary period. A valuable discussion of a particular instance of more general shifts from late medieval to early modern discourses of marriage and property right is Martha C. Howell, *The Marriage Exchange* (Chicago: University of Chicago Press, 1998).

<sup>13</sup> Cf. Susan Staves, *Married Women's Separate Property in England 1660–1833* (Cambridge, MA: Harvard University Press, 1990), *passim*. The party-political inference is my own, but I think I can make it out on the basis of the chronology of the case-law, etc., cited by Staves, as related to party shifts in judicial appointments.

<sup>14</sup> I infer this from the fact that Hegel argues at PR §§ 305–307 that the nobility (and by strong implication the peasantry), remain in the sphere of the family rather than that of *bürgerliche Gesellschaft*: that is *bürgerliche Gesellschaft* is not the whole of the society, as the political economists (and subsequent Marxist usages) would have it, but the *urban part* of the society.

<sup>15</sup> Probably, from Hegel's discussion, that of city rather than of national governments. Cf n. 14 above.

<sup>16</sup> S. Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), pp. 164–167; Avineri's reading of the Hegel texts in the later part of this passage more or less transparently contradicts his opening claim. Trade guilds in Germany: S. Ogilvie, *State Corporatism and Proto-Industry: The Württemberg Black Forest 1580–1797* (Cambridge: Cambridge University Press, 1997); on Britain, the discussion of publicly authorised monopolist groups of various sorts in Ron Harris, *Industrializing English Law* (Cambridge: Cambridge University Press, 2000), *passim*, is helpful, though 18th-century Britain is nonetheless clearly less dominated by forms of guild regulation than Ogilvie's Württemberg. Andrew Arato, ‘A Reconstruction of Hegel's Theory of Civil Society’ in Drucilla Cornell, Michel Rosenfeld and David Gray (eds) *Hegel and Legal Theory* (London: Routledge, 1991), ch. 11, reaches on more abstract grounds the conclusion that Hegel's account endeavours to save the pre-modern rather than anticipating the modern; my point is rather that Hegel's account is utterly dependent on an arbitrary selection among the immediate practices of his own time.

Civil society even with *Polizei* and corporations fails to achieve true *Sittlichkeit*, because it is not something anyone would be willing to die for. True *Sittlichkeit* thus is reached in the State.<sup>17</sup> Marx charged Hegel's account of the constitution with merely reproducing the political order of the post-1815 Restoration; Avineri and others have, on the other hand, argued that Hegel anticipates the modern constitutional state.<sup>18</sup> The truth is neither. Hegel offers us an account, in slightly Germanized dress, of the 18th-century British constitutional order, complete with the nominal monarch, the powerful House of Lords, aristocratic 'strict settlements' and the association of the aristocracy and gentry with military command, and 'corporations' (in Britain in the sense of the trade guilds as making up the voters in (some) urban constituencies) 'virtually' representing their constituents.<sup>19</sup> It was about to be swept away by the Reform Act, 1832: of which Hegel left a highly ambiguous critique.<sup>20</sup>

### *The Problem of Method*

It should appear from this very summary account that it is not merely in the *Staatsrecht* sections which Marx directly critiqued that Hegel gives content to his dialectic by simply lifting arbitrarily chosen elements from the contingent features of his own time. The whole of the *Philosophy of Right* from beginning to end is permeated by this arbitrariness.<sup>21</sup> Hegel in fact ends by recognising in the famous 'owl of Minerva' passage that his sort of philosophy can only theorise after the fact.<sup>22</sup> But the result is not even a real theorisation after the fact: rather, the substantive content of the *Philosophy of Right* leads, as Marx argues in the *Critique*, to the *Logic* and nowhere else.<sup>23</sup> In fact, the *Philosophy of Right*—a systematic study of problems Hegel had been grappling with since his youth—can serve as a demonstration in practice that the method of the *Logic* can, in fact, lead nowhere except back to itself as a mysticism.

To this empty logic which inherently flies to the abstract, Marx, in the *Critique* and in the philosophical part of the *1844 Manuscripts*, counterposes a single inversion. Hegel has stood the dialectic on its head. If, following Feuerbach, we place the human

<sup>17</sup> True *Sittlichkeit*: *PR* §§ 256–271. Willing to die: *PR* §§ 324–329, esp 325 & R.

<sup>18</sup> Avineri, op. cit., *passim*; cf. also e.g. several authors in Cornell, Rosenfeld and Carlson op. cit.

<sup>19</sup> There are numerous varying accounts of the 18th-century British constitution (which was the subject of political controversy at the time, which has continued in the modern 'Whig' and Tory historiography). Hegel had clearly read Montesquieu and Blackstone, since he cites them. The treatment of the state, and especially the abstract centrality of the Crown, in *PR*, shows some distinct resemblances to the theorisation offered in J.L. de Lolme, *The Constitution of England* (1784; cited here from the London, 1790 edition) Book II and esp. ch. 17, though Hegel does not cite de Lolme.

<sup>20</sup> Discussed in Avineri, op. cit., ch. 11.

<sup>21</sup> Engels, at least, was aware of this: Engels to Schmidt, 1 November 1891, <[http://www.marxists.org/archive/marx/works/1891/letters/91\\_11\\_01.htm](http://www.marxists.org/archive/marx/works/1891/letters/91_11_01.htm)>, accessed 21 August 2006. It is less clear that he is right when he tells Schmidt to disregard the issue on the ground that '[i]t is much more important to discover the truth and the genius which lie beneath the false form and within the artificial connections.'

<sup>22</sup> *PR*, *Preface*, p. 13.

<sup>23</sup> *Critique*, *ad* §§ 261–270, pp. 5–18.

embedded in material sense-perception at the centre of the dialectic in place of the abstract Idea,<sup>24</sup> the dialectic can now be stood on its feet: deployed to gain a real grasp of the material process of history and the road to the self-emancipation of the human species-being.<sup>25</sup> The limits of this single inversion, as far as the state and law are concerned, can be seen by the fact that in the slightly later *On the Jewish Question* Marx criticises Bauer wholly within the framework of the *Philosophy of Right*, in substance for being a bad Hegelian.<sup>26</sup> In the *Theses on Feuerbach*, the human embedded in material sense-perception is replaced by the human actively engaged on this basis in the effort to change the world: the artisan-worker, experimentalist, political activist.<sup>27</sup>

*The German Ideology* purports to settle accounts with Hegel and the sub-Hegelians. It does so, however, by adumbrating positively the outline of what was later to be identified as 'historical materialism': that is, a concrete account of human history in terms which start from the historical development of the production and reproduction of human material life. It does not begin with an explicit critique of Hegel's method, but rather displays an alternative method at work.

Marx and Engels offer in passing a comment that 'as far as Feuerbach is a materialist he does not deal with history, and as far as he considers history he is not a materialist'.<sup>28</sup> It should be visible that this is not merely a problem with Feuerbach. It displays another inversion in Hegel's method *distinct from* the primacy of the Idea. That is, although Hegel *purports to* give an account which shows a process of unfolding, this 'historical' account is in fact historically inverted, so that the world of *Sittlichkeit*—family and larger nation—should come first, and individualism and individual property develop out of it.<sup>29</sup> The logical implication is that dialectic can only be grasped as concrete history, that history is a continuous process,<sup>30</sup> and that a systematic presentation (for example, of feudalism, or of capitalism) can only be an approximation and imperfectly dialectical: a account which was fully dialectical would include, for example, the elements of slavery still present in feudalism and the elements of capitalism beginning to grow out of it.

<sup>24</sup> In the use of the *Idee* it is clear that Hegel does display a peculiar usage which is not a general German usage cannot be captured by an alternative translation, so that it is necessary to flag the peculiarity in some way. H.B. Nisbet in his translation of *PR*, Allen W. Wood (ed.) (Cambridge: Cambridge University Press, 1991), does not make general use of capitals for Hegelian concepts, but points out that in this case capitalisation is the simplest way to flag the fact that what is meant is the Hegelian self-actualising *Idee* rather than any other sense of 'idea'.

<sup>25</sup> *Critique*, ad §§ 267, 269, pp. 10–15, and *Introduction*, p. 131; *Economic & Philosophical Manuscripts*, section 'Critique of Hegel's Dialectic and General Philosophy', in R. Livingstone and G. Benton (trans.), Karl Marx, *Early Writings* (Harmondsworth: Penguin, 1975), pp. 379–400.

<sup>26</sup> <<http://www.marxists.org/archive/marx/works/1844/jewish-question/>>, accessed 21 August 2006.

<sup>27</sup> <<http://www.marxists.org.uk/archive/marx/works/1845/theses/index.htm>>, accessed 21 August 2006 (Cyril Smith's 2002 translation); Theses 1–3, 5, 8 and 11 are particularly relevant to this point.

<sup>28</sup> K. Marx and F. Engels, *The German Ideology*, C. Arthur (ed.) (London: Lawrence & Wishart, 1974), p. 64 (cited hereafter as *GI*) (Part I, B, § *Feuerbach: Philosophic, and Real, Liberation, ad fin.*).

<sup>29</sup> *GI*, pp. 42–52, I, A, §§ *First Premises of Materialist Method and History: Fundamental Conditions*.

<sup>30</sup> In fact, explicitly claimed at *GI*, pp. 49 and 57–59.

Similarly, at an early stage of *The German Ideology* Marx and Engels write that: The premises from which we begin are not arbitrary ones, not dogmas, but real premises from which abstraction can only be made in the imagination. They are the real individuals, their activity and the material conditions under which they live, both those which they find already existing and those produced by their activity. These premises can thus be verified in a purely empirical way.<sup>31</sup>

It is not made explicit—as it should be—that this claim involves a categorical rejection of Hegel’s several arguments against inductive method: (1) in the initial critique of sense-perception in the *Phenomenology of Spirit*; (2) in the rejection of ‘accidentals’ and definition of the task of Philosophy, in both the *Natural Law* and the *Philosophy of Right*; and (3) in the initial arguments of the *Encyclopaedia Logic*.<sup>32</sup> Otherwise, Hegel, or a Hegelian, could simply respond that Marx and Engels have failed to grasp Hegel’s most fundamental arguments for the priority of the Idea.

Nor is this all. On the negative side, the claim that any ‘premises can thus be verified in a purely empirical way’ entails rejection of the whole tradition stemming from Berkeley’s and Hume’s critiques of Locke—which underlies both Kant’s arguments in the two *Critiques*, and Hegel’s attempt to escape the problem through dialectic. We *should* find it easy to accept this, in the light of the demonstrations of the 20th century that neither formal logic nor any computable system can be self-standing.<sup>33</sup> On the positive side, with the acceptance of inductive reason necessarily comes the acceptance of the *controls on* inductive reason which are called ‘scientific method’. These tests are no more than a systematisation of probabilistic decision-making which we perform every waking moment. They enable the empirical material that forms the ‘first premisses’ of theory to be non-arbitrary, as opposed to Hegel’s arbitrary incorporation of factual claims to enable the superficial appearance of logical connections to be made.

The truth, therefore, is that in *The German Ideology* Marx and Engels have begun, coruscatingly, their own positive theoretical analysis; but they have only *implicitly*, not fully explicitly, settled accounts with Hegel. *The German Ideology* makes in practice a double inversion of Hegel—first at the level of the concrete unfolding of history, in which the individual emerges from the collective and not vice versa, and second at the (deeper) level of the rejection of the anti-inductivist first premisses

<sup>31</sup> *GI*, p. 42.

<sup>32</sup> Georg Hegel, *Phenomenology of Spirit*, A.V. Miller (trans.) (Oxford: Oxford University Press, 1977), pp. 1–111; Hegel, *Natural Law*, op. cit., *passim*; *PR* §§ 1–3 & especially 3R; Hegel, *Hegel’s Logic Being Part One of The Encyclopaedia of the Philosophical Sciences*, W. Wallace (trans.), Third edition (Oxford: Oxford University Press, 1975), §§ 1-78; Hegel, *Science of Logic*, A.V. Miller (trans.) (Amherst, NY: Humanity Books, 1998), expresses itself as a sequel to the *Phenomenology* (Preface to the First edition, at pp. 28–29) and therefore assumes the arguments of the first part of the *Phenomenology*). Dietzgen, in fact, makes the point more explicitly than either Marx or Engels ever do, in ‘The Nature of Human Brain Work’ in id., *The Positive Outcome of Philosophy* (Chicago, IL: Charles H. Kerr, 1906), pp. 47–132.

<sup>33</sup> Russell’s paradox; Gödel’s and Turing’s theorems.

of the *Phenomenology* and the *Logic*. But this is inexplicit. The idea of a *single* inversion of Hegel remains present in their thought from the *Critique of Hegel's Philosophy of Right* and *The Holy Family*, and it is to resurface later.

### *The Inversions and the Derivation of the State and Law*

The *Philosophy of Right* takes its apparent immediate plausibility from being a patchwork of contemporaneously fashionable ideas: natural right, the family law of the early counter-Enlightenment, early political economy, the military-imperial successes of the British state. It takes its apparent logical coherence from purporting to show the dialectical unfolding and actualisation of the Idea—specifically, the Idea of Freedom/free will. To the extent that the logic of the book works at all, it works precisely *because* it begins with the atomistic individual will expressed in abstract *Recht*—right/law—which is then successively *aufgehoben*—negated and preserved—culminating in the *Rechtsstaat* as the true actualised expression of the Idea of free will which incorporates the free wills of the individuals and the mediating partially social forms (family, civil society, corporations, and so forth). The dialectically logical structure of Hegel's argument, in other words, *depends on* the double inversion discussed above.

It should follow that Marx and Engels' account of law and the state in *The German Ideology* should, for consistency with the rest of the argument, be a fully historicised account of the development of (1) law and (2) state as aspects of the unfolding of the material division of labour from prehistory on. This is not, however, what is provided by the section 'The Relation of State and Law to Property'. Instead we get:

(1) A narrative of the evolution of property, in which 'Tribal property' evolves through 'feudal landed property, corporative movable property, capital invested in manufacture—to modern capital . . . i.e. pure private property.'

This is an empirical historical claim. As such it is not wholly false, but it telescopes the movement from communal into private property, which is almost certainly prehistoric at least in its beginnings, into a process taking place in Roman history and then repeating in the transition between the medieval and the modern. The 'purity' of the private character of modern property is considerably overstated.<sup>34</sup> There is partial correction of this telescoping in Engels' *Origins of the Family*, but the logical effect in *The German Ideology* is a tendency to reinstate the Hegelian idea that only the modern *Rechtsstaat* is a true state.

(2) 'To this modern private property corresponds the modern State.' The core of the argument requires quotation in full:

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<sup>34</sup> For an outline discussion of some problems see Kevin Gray and Susan Francis Gray, *Elements of Land Law*, Fourth edition (Oxford: Oxford University Press, 2005), ch. 2.

By the mere fact that it is a class and no longer an estate, the bourgeoisie is forced to organise itself no longer locally, but nationally, and to give a general form to its mean average interest. Through the emancipation of private property from the community, the state has become a separate entity, beside and outside civil society; but it is nothing more than the form of organisation which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests. The independence of the State is only found nowadays in those countries where the estates have not yet completely developed into classes, where the estates, done away with in more advanced countries, still have a part to play, and where there exists a mixture; countries, that is to say, in which no one section of the population can achieve dominance over the others. This is the case particularly in Germany. The most perfect example of the modern State is North America. The modern French, English and American writers all express the opinion that the State exists only for the sake of private property, so that this fact has penetrated into the consciousness of the normal man.

It is important to be clear that this is in substance a version of Hegel's movement from 'civil society' to the state: civil society, meaning here capitalism, negates the form of the family (in the form of tribal property) and is itself negated in the form of the state; but (following a line of argument in Marx's *Critique*), the state so created as independent in form is not independent in substance, because it is merely an instrument for the protection of property.

(3) 'Civil law develops simultaneously with private property out of the disintegration of the natural community.' It is therefore Roman in origin, and the re-emergence of absolute private property in capitalism carries with it the Reception of Roman law, beginning in the medieval Italian city states, and including the English case. This is a pair of empirical claims about the historical development of law, which are testable, have been tested (on the basis of historical materials which mostly became available after Marx and Engels wrote), and are fairly clearly false.<sup>35</sup>

(4) 'In civil law the existing property relationships are declared to be the result of the general will. The *jus utendi et abutendi* itself asserts on the one hand the fact that private property has become entirely independent of the community, and on the other the illusion that private property itself is based solely on the private will, the

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<sup>35</sup> 'Testable, tested and false': (1) private law is not uniquely Roman, among ancient laws, and nor is private property law. For a couple of counter-examples see, for example, *passim* in M. Roth (ed. and trans.), *Law Collections from Mesopotamia and Asia Minor* (Atlanta, GA: Scholars Press, 1985); or in A. Perikhanian (ed.), *The Book of a Thousand Judgments*, N. Garsoian (trans.) (Costa Mesa, CA: Mazda, 1997) (pre-Islamic Iran); (2) The Reception begins with capitalism in the medieval Italian city states: *perhaps* true—the literature is too extensive for citation here—but this is also the source of the *Libri Feodorum*, that is, the academic systematisation of feudal law; the later (French, Dutch, German, Scots) Reception is more intimately connected with state-building; (3) the capitalist breakthrough actually takes place in England, home of the *least* Romanised of the European legal systems, cf. Ellen Meiksins Wood, *The Pristine Culture of Capitalism* (London: Verso, 1991).

arbitrary disposal of the thing.<sup>36</sup> However, this is an illusion: the thing ‘only becomes a thing, true property, in intercourse,’ i.e. it only exists as a thing beneficial to its owner in its market context.

This argument is a response to Hegel’s moment of *abstraktes Recht*. It supports the inference, reached by many Marxists, that law is merely an ideological form in the same sense that Hegelianism is an ideological form. But this is deeply misleading. The object of Marx and Engels’ critique here is not legal reason as it is practised or even as it is *usually* ideologized, but Hegel’s specific philosophical ideology of legal reason.

The trouble with the argument as a whole is that it is still too much internal to the *Philosophy of Right*. This clinging to the moments of the negation of the family in ‘civil society’ and that of civil society in the *Rechtsstaat* has two results. The historical unfolding of the division of labour is severely foreshortened—in spite of Marx and Engels’ insistence, elsewhere in *The German Ideology*, that prehistory is also history.<sup>37</sup> And the legal practice of property is, following Hegel, collapsed not merely into early modern authors’ interpretation of the peculiar Roman concept of *dominium*<sup>38</sup> but into a philosophical concept of the concept of *dominium*.

The maintenance of the derivation of the state from the negation of civil society, without the Hegelian frame of the self-movement of the idea and in particular of *Sittlichkeit*, has the result that the derivation in fact fails, in two ways. The first is that the character of the modern state as a nation-state is present but in reality wholly unexplained: why not a world-state? The second is that the characterisation of the USA as a state solely concerned with the protection of property, and as one which has wholly lost independence of capital, is a transposition onto the real of the Hegelian *Rechtsstaat* idea. But its predictive claim has been falsified: the future of both the USA and Britain was an extension of the role of the state beyond the protection of property, and strengthened autonomy of the bureaucratic state vis-a-vis ‘its’ immediate capitalists.

<sup>36</sup> *GI*, p. 81. Many modern authors define ownership as the *ius utendi (fruendi) abutendi* (or *uti (frui) abuti* or *usus (fructus) abusus*)—the right to the use of the thing, (its fruits,) and its abuse (or alienation)—and claim that this definition is Roman. Marx seems to have shared this belief. It is actually attributable to the 16th-century French revolutionary-protestant jurist Francois Hotman (F. Piccinelli, *Studi e Ricerche intorno alla definizione ‘Dominium est ius utendi et abutendi ...’* [Firenze 1886, reprint Napoli: Jovene, 1980]; I am indebted for this reference to Professor Boudewijn Sirks). Its modern diffusion is probably due to its prominence in the Natural Law writer Joseph Pothier’s *Traité du Droit de Domaine de Propriété* (Paris, 1772), i, p. 6, and Pothier’s influence on the *Code Civil*.

<sup>37</sup> *GI* 49.

<sup>38</sup> On early modern jurists’ contribution to identifying Roman *dominium* as more absolute than may well have been the case in Roman legal practice, see e.g. Robert Feenstra in Peter Birks ed., *New Perspectives in the Roman Law of Property* (Oxford: Clarendon, 1989) Ch 8, and on some possible local politico-legal motivations for the ascendancy of absolute *dominium* theory in early nineteenth century Germany, James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton UP, 1990).

## Hegelian-Marx and Capital

It has been familiar since Rosdolsky's study in *The Making of Marx's Capital* that Marx re-read Hegel's *Logic* in the period immediately before starting work on the project that became *Capital*; and that the *Grundrisse* and the beginning of *Capital I* display heavy use of dialectical and, indeed, Hegelian terminology.<sup>39</sup> It is also familiar that the 'Capital project' is unfinished. Several modern authors have attempted reconstructions on the basis of building the account *more* systematically on the basis of the unfolding of the contradictions of the commodity.<sup>40</sup> The effect is, however, to push to one side the narrative history or 'historical materialist' elements—of the growth of capitalism out of the feudal social order—which are intensely present in *The German Ideology* and are, in fact, also quite strongly present in *Capital I*.<sup>41</sup>

In truth, it may be argued, *Capital* remains unfinished because the presentation in terms of the unfolding of the internal contradictions of the commodity—however useful it is as a counter-factual critique of Proudhon and of the more 'radical' among the political economists—cannot account for the nation-state and its place in the world market. It then becomes impossible to complete the account of the self-movement of capital as a testable account, since these institutions are incorporated in and profoundly affect the self-movement of *real existent Kapitalismus*.

This point follows from the points made above: Hegel's derivation of the state from the contradictions of civil society is, in fact, logically dependent on the frame of the self-movement of the Idea of freedom and the particular self-movement of the moment of *Sittlichkeit*. Marx and Engels' discussion of the state and law in *The German Ideology*, which clings to a part of Hegel's derivation without accepting these logical elements, is in fact led to postulate false historical claims, to introduce as a baldly unexplained element the national character of the state, and to reintroduce Hegel's abstract right in the form of substituting Hegel's concept of the concept of ownership for the legal practice of property. The idea that the nation-state can be derived out of the internal contradictions of civil society *without* the frame of Hegel's whole construction is illusory.

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<sup>39</sup> R. Rosdolsky, *The Making of Marx's Capital*, P. Burgess (trans.) (London: Pluto, 1989, 2 vols) *passim*; the reference to Marx rereading Hegel's *Logic* is at pp. i, xiii, citing K. Marx & F. Engels, *Werke*, 45 vols (Berlin: Dietz Verlag, 1954–1969) (*MEW*), vol. 29, p. 260. The translation in K. Marx & F. Engels, *Collected Works*, 50 vols (London: Lawrence & Wishart, 1975–2005), vol. 40, p. 248 (<[http://www.marxists.org/archive/marx/works/1858/letters/58\\_01\\_16.htm](http://www.marxists.org/archive/marx/works/1858/letters/58_01_16.htm)>, accessed 21 August 2006) is slightly different to that in Rosdolsky: 'What was of great use to me as regards *method* of treatment was Hegel's *Logic* at which I had taken another look **by mere accident**, Freiligrath having found and made me a present of several volumes of Hegel, originally the property of Bakunin. If ever the time comes when such work is again possible, I should very much like to write 2 or 3 sheets making accessible to the common reader the *rational* aspect of the method which Hegel not only discovered but also mystified.' (Both italic and boldface emphases in original.)

<sup>40</sup> For example, David Harvey, *Limits to Capital* (Oxford: Blackwell, 1982); and recently albeit less of a 'developed system' C. Arthur, *The New Dialectic and Marx's Capital* (Leiden: Brill, 2004).

<sup>41</sup> Examples in chs 10, 14, 24, 26–32.

The result is that the state as such is (1) left radically under-determined and (2) confused with the capitalist *Rechtsstaat* form. This is as true of any attempt to derive the state out of the unfolding contradictions of the commodity or the value form as it is of the earlier version. This is most clearly visible in the various attempts of the participants in the 1960s to 1980s 'state derivation debates'.<sup>42</sup>

It is fairly clear that Marx was, in fact, aware of the limitations of the 'systematic dialectic' approach. First, Rosdolsky quotes an important passage from the *Ur-Text* of the *Contribution to the Critique of Political Economy* in which Marx explicitly asserts that the transition in which the proletariat emerges from the petty proprietors is not explicable in terms of systematic dialectic.<sup>43</sup> Second, in the 1873 *Postface* to the second edition of *Capital I* Marx expresses himself more sceptically about Hegel than in the 1858 letter to Engels that commences the high-Hegelian phase of the work on political economy. Even in that letter, indeed, Marx also expressed the idea that it would be possible to express what was rational in Hegel's method in '2 or 3 sheets'.<sup>44</sup> It seems likely from the time Marx gave to work on the calculus in his later years that the 'what was rational' would have been something along the lines of the *temporal* dialectic found (still somewhat under-developed) in Engels' *Anti-Dühring* and *Dialectics of Nature*, rather than the *ontological-epistemological* dialectic of Hegel's *Phenomenology* and *Logic*.<sup>45</sup>

The other side of this coin is that Marx also in his later years gave a lot of time to anthropology and ancient history—time which could be said to have been stolen from the completion of *Capital*.<sup>46</sup> Engels reworked some of the material into *The Origin of the Family, Private Property and the State*.<sup>47</sup> The appropriation of the transition from civil society to state in Hegel's *Philosophy of Right* appears to

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<sup>42</sup> J. Holloway and S. Picciotto (eds), *State and Capital: A Marxist Debate* (London: Edward Arnold, 1978); S. Clarke (ed.), *The State Debate* (London: Palgrave Macmillan, 1991). Harvey, *Limits to Capital*, has the merit of openly admitting defeat (448–449); in *The New Imperialism* (Oxford: Clarendon, 2003) he falls back on the use of the unexplained 'territorial logic of power' of Giovanni Arrighi, *The Long Twentieth Century* (London: Verso, 1994), to fill the gap.

<sup>43</sup> Rosdolsky, op. cit., i, p. 190: 'This point definitely shows how the dialectical form of presentation is only correct when it knows its own limits.' The citation there is to the *Ur-Text* in the 1953 German edition of the *Grundrisse*; I have not been able to check this. Cf. also Marx to Engels on Lassalle, 1 February 1858, *MECW* 40, 258 (available at <[http://www.marxists.org/archive/marx/works/1858/letters/58\\_02\\_01.htm](http://www.marxists.org/archive/marx/works/1858/letters/58_02_01.htm)>, accessed 21 August 2006): 'It is plain to me from this one note that, in his second grand opus, the fellow intends to expound political economy in the manner of Hegel. He will discover to his cost that it is one thing for a critique to take a science to the point at which it admits of a dialectical presentation, and quite another to apply an abstract, ready-made system of logic to vague presentiments of just such a system.'

<sup>44</sup> Above n. 37.

<sup>45</sup> Marx's *Mathematical Manuscripts* (London: New Park, 1983), and on them, Peter Matthews, 'The Dialectics of Differentiation: Marx's Mathematical Manuscripts and Their Relation to His Economics', Middlebury College Working Paper Series 0203 (Middlebury College, Department of Economics 2002) available at <<http://ideas.repec.org/p/mdl/mdlpap/0203.html>>, accessed 21 August 2006. I have not been able to consult the Calcutta, 1994, edition of these MSS, which is said to be considerably fuller.

<sup>46</sup> Marx's notes were published as L. Krader (ed.), *The Ethnological Notebooks of Karl Marx* (Assen: van Gorcum, 1974).

<sup>47</sup> Preface to the first edition, <<http://www.marxists.org.uk/archive/marx/works/1884/origin-family/preface.htm>>, accessed 21 August 2006.

have been abandoned; but this is not, in fact, the case, or, at least, is not the case in Engels' use of Marx's notes.<sup>48</sup>

### Engels' Origins Approach to the State

In the writings of the 1840s the state as an entity is still—following Hegel—the capitalist *Rechtsstaat*, derived from the contradictions of civil society. The project of writing a critique of political economy through the unfolding of the internal contradictions of the commodity, or the value form, would imply that the state took its place in the same framework. It could not do so.

In the *Origins of the Family*, Engels sets out an argument about the state that appears to go beyond the limitation of the state to the *capitalist* state. Instead, the origin of the state is to be sought in the transition to class society: which is explicated in terms of (slightly) comparative ethnography as applied to prehistory and to the early history of the Greek and Roman city-states. In this theory the state appears as an autonomous body standing above society, not because of the division of society between private owners (as in Hegelian civil society and in *The German Ideology*) but because of the structural antagonisms in society caused by its division into classes. But the effect of the class order is that the state is then 'captured' by the exploiting/ruling class by virtue of its superior resources:

[H]ere was a society which by all its economic conditions of life had been forced to split itself into freemen and slaves, into the exploiting rich and the exploited poor; a society which not only could never again reconcile these contradictions, but was compelled always to intensify them. Such a society could only exist either in the continuous open fight of these classes against one another, or else under the rule of a third power, which, apparently standing above the warring classes, suppressed their open conflict and allowed the class struggle to be fought out at most in the economic field, in so-called legal form.

And:

As the state arose from the need to keep class antagonisms in check, but also arose in the thick of the fight between the classes, it is *normally* the state of the most powerful, economically ruling class, which *by its means* becomes also the politically ruling class, and so acquires new means of holding down and exploiting the oppressed class. The ancient state was, above all, the state of the slave-owners for holding down the slaves, just as the feudal state was the organ of the nobility for holding down the peasant serfs and bondsmen, and the modern representative state is the instrument for exploiting wage-labor by capital. Exceptional periods, however, occur when the warring classes are so nearly equal in forces that the

<sup>48</sup> For contrasts between the Notebooks and the *Origin* see, for example, Franklin Rosemont, 'Karl Marx and the Iroquois', <[http://www.geocities.com/Cordobakaf/marx\\_iroquois.html](http://www.geocities.com/Cordobakaf/marx_iroquois.html)>, accessed 21 August 2006, or Christine Ward Gailey, 'Community, State and Questions of Social evolution in Marx's Ethnological Notebooks', *Anthropologica* 45 (2003), pp. 45–57, at <<http://abundance.org.uk/community-state-and-questions-of-social-evolution-in-marxs-ethnological-notebooks>>, accessed 21 August 2006.

state power, as apparent mediator, acquires for the moment a certain independence in relation to both.<sup>49</sup>

The trouble is that this class-society state is still in reality the Hegelian *Rechtsstaat*. What has happened is that the *Rechtsstaat* form has been projected back onto an earlier stage of history and derived on the basis of different contradictions—using Greek and Roman materials which, since they are actually histories or mythologies of the origins of the Athenian and Roman written law-codes,<sup>50</sup> make this projection appear plausible.

What I mean by saying that the class-society state is still in reality the *Rechtsstaat* is that it is still the state as the protector of property rights: only, now, the threat to property rights has changed from being their internal individualism (as in Hegel and as in the attempted derivation of the state from political economy), to the emergence of classes and with them, of violent class conflict over the inequality of property.

In this respect Marx and Engels' theoretical accounts of the state, both early and late, are more primitive than Hegel's, since Hegel recognises explicitly the character of the state as a war-maker,<sup>51</sup> and in his *Polizei* and corporations recognises in a distorted way the role of the state as a redistributor and as maintaining social infrastructure.<sup>52</sup>

The other side of this coin is that the theorisation of *law* as such has almost disappeared. Since the theorisation of the state is grounded on the emergence of private property, law can be left more or less in the state in which it is left in *The German Ideology*, as a mere ideological reflection/ inversion of private *dominium*, that is, law as read through Hegel's *abstraktes Recht*.

## Law and Lawyers

There is a little more in Engels' 1890 letter to Schmidt on 'historical materialism':

As soon as the new division of labour which creates professional lawyers becomes necessary, another new and independent sphere is opened up which, for all its general dependence on production and trade, still has its own capacity for reacting upon these spheres as well. In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression

<sup>49</sup> <<http://www.marxists.org/archive/marx/works/1884/origin-family/ch09.htm>>, accessed 21 August 2006, emphases added.

<sup>50</sup> Compare Engels' arguments in *Origins* chs 5 and 6 with fairly conventional modern accounts in Charles Freeman, *Egypt, Greece & Rome* (Oxford: Oxford University Press, 1996), pp. 127–129 (Athens) and T.J. Cornell, *The Beginnings of Rome* (London: Routledge, 1995), chs 10–11 (Rome) and more cagey versions, for Greece, Raphael Sealey, *The Justice of the Greeks* (Ann Arbor: University Michigan Press, 1994), ch 2, and for Rome, Humbert, Lewis and Crawford 'Twelve Tables' in M.H. Crawford (ed.) *Roman Statutes* ii (London: University of London Institute of Classics, 1996), pp. 559–561; the point being (1) that the accuracy of the ancient historians' narratives is debatable and (2) that they are primarily about law, rather than about the state.

<sup>51</sup> *PR* §§ 324–328, esp. § 324 R & § 328 & R.

<sup>52</sup> Above nn. 15–16 and text and Hegel references there.

which is *consistent in itself*, and which does not, owing to inner contradictions, look glaringly inconsistent.<sup>53</sup>

But *why* the division of labour necessitates professional lawyers; and *why* ‘In a modern state, law must . . . be an expression which is *consistent in itself*’, remain wholly unexplained. The nearest approach is in the rather earlier 1872 *Volksstaat* series *On the Housing Question*. Here we find that:

At a certain, very primitive stage of the development of society, the need arises to co-ordinate under a common regulation the daily recurring acts of production, distribution and exchange of products, to see to it that the individual subordinates himself to the common conditions of production and exchange. This regulation, which is at first custom, soon becomes law. **With law, organs necessarily arise which are entrusted with its maintenance—public authority, the state.** With further social development, law develops into a more or less comprehensive legal system. The more complicated this legal system becomes, the more its terminology becomes removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the reason for its further development not out of the existing economic conditions, but out of its own inner logic, or, if you like, out of ‘the concept of will.’ People forget the derivation of their legal system from their economic conditions of life, just as they have forgotten their own derivation from the animal world. With the development of the legal system into a complicated and comprehensive whole the necessity arises for a new social division of labor; an order of professional jurists develops and with these legal science comes into being. In its further development this science compares the legal systems of various peoples and various times, not as the expression of the given economic relationships, but as systems which find their justification in themselves. The comparison assumes something common to them all, and this the jurists find by summing up that which is more or less common to all these legal systems as natural law. However, the standard which is taken to determine what is natural law and what is not, is precisely the most abstract expression of law itself, namely, *justice*. From this point on, therefore, the development of law for the jurists, and for those who believe them uncritically, is nothing more than the striving to bring human conditions, so far as they are expressed in legal terms, into closer and closer conformity with the ideal of justice, eternal justice. And this justice is never anything but the ideologized, glorified expression of the existing economic relations, at times from the conservative side, at times from the revolutionary side.<sup>54</sup>

Here the motor behind law is transparently, as in *The Origin*, the state as the *Rechtsstaat*. And as has been the case from *The German Ideology* throughout, the *Rechtsstaat* is wholly derived from the internal dynamics of the particular social group over which the state rules, and the relation *between* states and their ‘outsides’ is absent: that is, the *nation*-state is silently ‘naturalised’.

<sup>53</sup> <[http://www.marxists.org/archive/marx/works/1890/letters/90\\_10\\_27.htm](http://www.marxists.org/archive/marx/works/1890/letters/90_10_27.htm)>, accessed 21 August 2006.

<sup>54</sup> <<http://www.marxists.org/archive/marx/works/1872/housing-question/ch03.htm>>, accessed 21 August 2006, italics in original, boldface emphasis added.

### The Holes and What Has Filled Them in the Case of Law

It should now be apparent why I am arguing that state and law are holes in Marxist theory. I do not mean that Marx and Engels have nothing to say about these topics, but that what they do have to say at a systematic theoretical level—as opposed to journalism—remains throughout trapped by Marx's initial response to Hegel's *Philosophy of Right*. As a result it is inconsistent with the general argument for historical materialism, and involves variously (1) asserting postulates which are false in fact, (2) radical under-determination of state derivation, and/or (3) failure to theorise those aspects of the state which are inconsistent with the image of the *Rechtsstaat*.

My positive opinion as to how to resolve this problem, which I will not develop in depth here, is that the key is to abandon the dialectical moments of the *Philosophy of Right* altogether and analyse *law* and *state* separately within the framework of historical materialist analysis of the concrete historical unfolding of the division of labour, recognising that *law* need not be state law and that the state need not be a *Rechtsstaat*. To give a concrete example—medieval sharia is genuinely law (*Recht*), though it is not state law, and the various Sultanates, Emirates, and so on, of the same period are genuinely states though they have no, or almost no, involvement in law, that is, are not *Rechtsstaaten*.

The key has to be the *method of approach* of *The German Ideology* and *Origins*, that is (as I have already indicated) (1) that what is unfolding is the social division of labour starting with the (apparently) common human culture of the hunter-gatherers of remote prehistory, and (2) that the dialectic is grounded on inductively testable evidence which forms the basis of the abstract concepts. This second point implies that there can be no presumption that any part of Marx and Engels' concrete judgments about the historical process of unfolding is true, since (i) well under 1% of the historical and prehistoric information now available was available to them, and (ii) they discounted a substantial part of the evidence that *was* available to them by way of the 'orientalist' concept of the Asiatic mode of production.<sup>55</sup>

On the basis of an analysis of this type it should then be possible to return to Marx's original intuition that Hegel's derivation of the state had, indeed, grasped something fundamental about the modern state. That is, to the question why the dictatorship of the bourgeoisie takes the form of the *Rechtsstaat* and, conversely, why the necessary substance of the *Rechtsstaat* form (if it is to be more than an exceptionally empty ideology, as it has been in Stalinist states) is the dictatorship of the bourgeoisie.<sup>56</sup>

<sup>55</sup> Bhula Bhadra, *Materialist Orientalism* (Calcutta: Punthi Pustak, 1989), clarifies Marx's intellectual debts in this respect as well as offering an empirical critique on the basis of the Indian evidence.

<sup>56</sup> I am currently attempting this project on a larger scale in relation to the *law* side of the problem; here, it does indeed seem that private property and class are the keys to the emergence of any form of *Recht*. On the *state* side, however, it seems that the initial necessity would be to start with (1) the differentiation of the common culture of hunter-gatherer bands with overlapping territories into societies with more differentiated productive practices and sharper-edged borders and conflicts among themselves, (2) private property as inherently producing the differentiation of the necessary common and public productive/reproductive activities, and (3) the differentiation within the public domain between religion and the state.

My concern in the remainder of this article is, however, with the negative aspect of the problem. *Because* law and the state are actually holes in the coherence of historical materialism, the result is an apparent choice between, on the one hand, digging the holes deeper within the Hegelian frame, and, on the other, filling the holes from one or another variant of standard academic theory.

### *Digging the Hole Deeper*

I explicated earlier two fundamental objections to the sub-Hegelian approach. The first is that the concepts of *dominium* and *Recht* are ideological constructs of Hegelianism rather than real abstractions on the basis of the social practices of law and property. The second is that the laws of motion of capital underdetermine the state form. In particular, if the inner logic of capital drives towards anything in the state form, it is towards a world state as the guarantor of world credit money: a dynamic imperfectly reflected in the role of single world hegemony (Britain, USA) in world capitalist orders. The *nation* form of the state, with its concrete dynamics, is capitalist in *real existent Kapitalismus*, but it is shaped by capitalism's inheritance of the national form of the state from (European) feudalism.<sup>57</sup>

The *Rechtsstaat* form of the state is also, in a slightly different way, an inheritance from feudalism. The judicial review of state action is the operational core of which the 'rule of law' more broadly is an ideology. Roman concepts of *dominium* on the private law side and of *imperium* (the right of command) and *iuris dictio* (jurisdiction) on the public law side allow no space for the state to be conceived as an ordinary litigant, and therefore for judicial review of state action. The state is thus inherently above the law: *princeps legibus solutus*, the emperor is not bound by the laws: at most he can be urged to govern 'by law' or praised for doing so.<sup>58</sup>

In the transition to feudalism, there are consequences for legal thought. The feudal relation of lord and tenant is, in the terms of the Justinianic institutional classification of law, both private and public, and both proprietary and (bilateral) contractual. *Dominium* merged with *possessio* (possession), and this *possessio* can include rights which the classical Roman lawyers considered as contracts *in personam* (binding persons, not things) or as partial rights over things not amounting to ownership.<sup>59</sup>

<sup>57</sup> Cf. in particular Patrick Geary's *The Myth of Nations* (Princeton, NJ: Princeton University Press, 2002). The point is that it is in the early Middle Ages that the state becomes a *nation* state (Kingdom of the Franks, for example) as opposed to being a *city*-state or a divine empire whose outside is 'barbarians'. The same transition can be seen in the emergence of Japanese feudalism.

<sup>58</sup> The same is true of ancient Chinese and Hindu law; sharia deals with the problem by not recognising the state as having any legitimacy at all (P. Crone, *Medieval Islamic Political Thought* [Edinburgh: Edinburgh University Press, 2004]).

<sup>59</sup> E. Levy, *West Roman Vulgar Law: The Law of Property* (Philadelphia, PA: American Philosophical Society, 1951), pp. 19–72, details the transition in post-classical Roman law. The principal monument of this law, the *Breviary of Alaric* or *Lex Romana Visigothorum* (ed. Haenel, Leipzig, 1849) was widely circulated in the early medieval period: Ian Wood, in Jill Harries and Ian Wood (eds) *The Theodosian Code* (Ithaca, NY: Cornell UP, 1993), pp. 162–166. The continuing general conflation of rights, possessions and jurisdictions in the central Middle Ages can be seen *passim* in R.C. van Caenegem (ed.), *English Lawsuits from William I to Richard I* (London: Selden Society Publications vols 106–107, 1990–91).

Under this regime, it is possible to conceive of the King (and therefore his servants, the state) as having proprietary rights in taxes and jurisdictions, capable of being granted away to the subjects and of being the subject of ordinary litigation.<sup>60</sup> This, in turn, allows the *possibility* of thinking that the King/state is under the law.<sup>61</sup> It is this legal framework which, eventually, forms the legal-ideological basis for the emergence of the *Rechtsstaat* for the first time in the form of the English revolution of 1688.<sup>62</sup> It seems likely that this development is possible because England after 1066 was the *most* systematically feudal country, so that the fundamental contradiction of the lord–tenant relationship played out faster than elsewhere; hence England developed capitalist law out of the self-negation of feudal law, rather than—as happened elsewhere—feudal law being overlaid in the late feudal period by an artificial ‘Reception’ of Roman law complete with the state-absolutist characteristics of Roman public law.<sup>63</sup>

As a result, to create their own *Rechtsstaaten* the legal framework of the continental countries has to be significantly Anglicised, that is, move away from the Romanistic foundations of Hegel’s *abstraktes Recht*, before the idea of the ‘rule of law’ can have real political purchase. This Anglicisation takes place partially at several stages—the French revolution is an early one—but the current political purchase of the *Rechtsstaat* idea in Europe depends on constitutions redesigned in the wake of 1945.

The nearest approach to a successful attempt to derive law, and therefore the *Rechtsstaat*, from the commodity form was the Russian Stalinist E.B. Pashukanis’ *General Theory of Law and Marxism*, which is, in fact, theoretically superior to its

<sup>60</sup> Hence grants to the subjects of rights and liberties, such as those made in the Magna Carta, on which, and its relation to earlier struggles for urban charters and to analogous grants elsewhere in Europe at the same period cf. G. Hindley, *The Book of Magna Carta* (London: Guild, 1990).

<sup>61</sup> For example, the 13th-century English treatise called *Bracton*, G. Woodbine and S.E. Thorne (eds) and S.E. Thorne (trans.) (Cambridge, MA: Harvard University Press, 1977), fo. 5b, ii p. 33, fo. 34a, id. 110, and fo. 107b, id. 305–306.

<sup>62</sup> Various literature, but M. Landon, *The Triumph of the Lawyers* (University, AL: Alabama University Press, 1970), and L. Schworer, *The Declaration of Rights* (Baltimore, MD: Johns Hopkins University Press, 1981), are particularly helpful on the *Rechtsstaat* aspect of 1688/9, which Tory (and hence most modern English academic) historians tend to downplay.

<sup>63</sup> Self-negation of feudal law: S.F.C. Milsom, *Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976) and J.M.W. Bean, *The Decline of English Feudalism 1215–1540* (Manchester: Manchester University Press, 1968) are both helpful; the subsequent literature sparked by both books, while perhaps pointing to overstatement in aspects of their arguments, by no means precludes my very summary statement about ‘self-negation of feudal law’. The wholesale rejection of the use of (military) feudalism as an interpretive category by Susan Reynolds, *Fiefs and Vassals* (Oxford: Oxford University Press, 1994) is more clearly greatly overstated. Marxist attempts to collapse feudalism into the ‘tributary mode of production’ as in John Haldon, *The State and the Tributary Mode of Production* (London: Verso, 1993) involve issues too complex for discussion here, but in my opinion lose the real explanatory value of ‘feudalism’ which can be seen in the *differences between* medieval western European and Byzantine, or between Japanese and Chinese, societies.

subsequent reinterpretations.<sup>64</sup> Pashukanis started with Engels and with Lenin's reading of Engels in *State and Revolution*. He also had significantly more extensive knowledge of pre-modern law than was available to Marx and Engels. Following Engels, he identified the emergence of both state and law with the emergence of private property and class society. However, he was trapped by linking law to the *commodity exchange* form, rather than to the *private property* form: the fundamental idea of *Recht*/ justice is to be expressed in terms of equality in exchange, and is thus an aspect of commodity fetishism. Like Engels, Pashukanis resolves the problem this poses, at least in part, by seeing commodity exchange being an important feature of pre-capitalist societies: *commodity exchange* does not have to be *generalised commodity production*.<sup>65</sup>

But making commodity exchange central had certain disabling effects in relation to explaining the actual historical evolution of law: contract law was given a historical priority which is not justified by the sources, and within contract law equality in exchange—at most a secondary aspect of most contract laws, pre-modern and modern—is given undue prominence.<sup>66</sup>

It followed from this priority that Pashukanis tended to understate the 'legality' of medieval law, and to see law as becoming most truly law when it became capitalist law.<sup>67</sup> This, of course, supported his central conclusion (drawn from Marx's *Critique of the Gotha Programme*), that the law of the Soviet state would continue to be capitalist law until the state and law themselves withered away.

However, the idea that law becomes most truly law when it became capitalist law 'returns into' the Hegelian (and later Weberian) idea that the Anglo-American common law is 'not truly law', somehow irrational as opposed to Code law, or not truly capitalist law.<sup>68</sup> This misconception has been disproved by the experience of 200

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<sup>64</sup> E.B. Pashukanis, *Law and Marxism: A General Theory*, C. Arthur (ed.), B. Einhorn (trans.) (London: Ink Links, 1978) (cited hereafter as *LM*). For the identification of Pashukanis as a Stalinist see Trotsky, 'The Bonapartist Philosophy of the State', *The New Internationalist*, 5 (1939), pp. 166–169, <<http://www.marxists.org/archive/trotsky/works/1939/1939-bonapartism.htm>>, accessed 21 August 2006. For Trotsky to say in 1939 that Pashukanis was an 'orthodox Stalinist' had quite a strong and narrow meaning: that is, that in the 1920s he was a supporter of the Stalin faction in the CPSU as against both the 'Lefts', and the 'Rights'. If Pashukanis had had any association with the 'Left' Oppositions Trotsky would have identified him as a 'capitulator'; if he had been associated with the 'Rights' Trotsky would have identified him as such. Since Trotsky was a participant in the debates of the 1920s, and had no interest in 1939 in characterizing Pashukanis as a Stalinist, Trotsky's statement is strong evidence that Pashukanis was indeed a Stalinist in politics. In other words, Pashukanis was not (as some commentators have presented him) a defective critic of the Soviet regime: he was not a critic of it at all, but a supporter who was merely sacrificed to its ideological needs.

<sup>65</sup> See also G.E.M. de Ste Croix, *The Class Struggle in the Ancient Greek World* (Ithaca, NY: Cornell University Press, 1991), pp. 52–55, on modes of exploitation other than wage-labour being 'dominant' in the sense of supporting a class elite, but nonetheless embedded in a mass of petty production which may be undertaken with a view to commodity exchange (as was plainly the case in classical antiquity).

<sup>66</sup> Pashukanis in fact admits that he is inverting the historical development: *LM*, pp. 167–173. In doing so, he sacrifices an important advantage of his argument over both Hegel and the legal positivists (on the latter see *LM*, ch. 3).

<sup>67</sup> *LM*, ch. 5.

<sup>68</sup> *PR* §§ 211–212 & *RR*; Weber, in M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Cambridge, MA: Harvard University Press), chs 8–11; *LM*, pp. 44–45, 58–59.

years since the French *Code Civil* and 100 since the German *Bürgerliche Gesetzbuch*, which has produced a 'common-law like' accretion of commentary and precedent on the interpretation of the Codes.<sup>69</sup>

Socialist Workers' Party member China Miéville has produced a theory of international law on the basis of a modified version of Pashukanis. *Between Equal Rights* offers in principle a Marxist theory of *international* law.<sup>70</sup> Miéville's reconstruction of Pashukanis is framed by an extensive review of the critical literature on the theory of international law at the outset, in which Miéville substantially accepts some post-modernist arguments, and by a historical account which attempts to cash the theory, which occupies the second half of the book.

Miéville's core theoretical move is to accuse Pashukanis of having an insufficiently dialectical understanding of the commodity form: the internal contradictions of the commodity form are *expressed in* the peculiar character of labour power as a commodity, so that the tyrannical regime of the workplace, far from being *external to* the sphere of *Recht*, as Pashukanis, following Marx, had argued, is, in fact, integral to it.<sup>71</sup> The title of Miéville's book is taken from Marx: 'Between equal rights, force decides' ('Zwischen gleichen Rechten entscheidet die Gewalt'), a quotation from a passage in *Capital* in which Marx is discussing the struggle over the length of the working day.<sup>72</sup> Miéville takes this idea and infers from it that law is at its core systematised coercion: the decision of force is internal to the moment of Right, rather than being external to it.

On the basis of this reconstruction Miéville is able to argue (1) that international law is more genuinely 'law' than has commonly been held to be the case; and (2) in the historical part, that the emergence of international law as a distinct body of laws is dialectically linked to and dependent on the emergence of European colonial activities. 'No peace beyond the line' (that is, outside Europe) is the dialectical opposite which enables the existence of law between European powers.<sup>73</sup>

At the level of theory, Miéville at first sight seems to have reinvented Dühring's 'force theory' as opposed to the historical materialism of Marx and Engels.<sup>74</sup> The plausibility of the attribution of this theory to Marx is given at its core by the 'between equal rights, force decides' passage. This is, in fact, puzzling. Between equal rights it is clear that *law* cannot decide, but outside—and even sometimes in—the labour relation, the contract agreed is as commonly the result of habits or of unforced cooperative agreement, as of one-sided direct coercion. In part there is a translation problem. The German 'die Gewalt' translates accurately to 'force' in 19th-century

<sup>69</sup> See, for example, the exceptionally clear discussion by R. Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford: Clarendon, 2001).

<sup>70</sup> C. Miéville, *Between Equal Rights* (Leiden: Brill, 2005) (cited hereafter as *BER*).

<sup>71</sup> *BER*, ch. 4.

<sup>72</sup> *Capital*, i, ch. 10, § 1, after n. 6, <<http://www.marxists.org/archive/marx/works/1867-c1/ch10.htm>>, accessed 21 August 2006; the German from *MEW* vol. 23, p. 249, <[http://www.mlwerke.de/me/me23/me23\\_245.htm#Kap\\_8\\_1](http://www.mlwerke.de/me/me23/me23_245.htm#Kap_8_1)>, accessed 21 August 2006.

<sup>73</sup> *BER*, ch. 5.

<sup>74</sup> See *Anti-Dühring*, Part II, chs 2–4, and *German Ideology* I.D. § 'Conquest', pp. 89–90.

English, but in current English would be more accurately translated as ‘power’ (or even ‘dynamics’). But this still does not resolve the problem that ‘die Gewalt’ is not the unique determinant of the terms of the employment contract. The problem here is, in fact, that the partial Hegelianism of *Capital I* is misleading: Marx is thinking in shorthand across to law = *abstraktes Recht*, and identifying what Hegel himself sees as an unresolved contradiction in *abstraktes Recht*. Hegel sees the contradiction as resolved in *Sittlichkeit*, where the free actor more fully recognises the social unity which is the context of his particular will. But the persistence of the single inversion of Hegel in the method of *Capital I* creates here, as elsewhere, the risk of fragmentary Hegelianisms which are not coherent with the historical materialism of *The German Ideology*.

When we come to Miéville’s claims about the historical development of international law my judgment must be, for want of detailed knowledge of the sources and the literature used, more tentative. It seems to me, however, that the dialectical move in which imperialism and ‘no peace beyond the line’ enables the idea of law between European states, makes the tail wag the dog. Law between states certainly existed in the later middle ages, within the frame of the academic *ius commune*, of canon and civil law.<sup>75</sup> Miéville insists, to evade the relevance of this law to modern international law, that this is law between *princes* as persons. But this corresponds merely to the ideological claims of early modern European monarchists, and disregards the role both of the later medieval Italian city republics and of ‘the King’s two bodies’ in the emergence of a legal concept of the state as an entity.<sup>76</sup> The emergence of international law as such thus seems more likely to be the product of the early bourgeois revolutions than of the emergence of imperialism.

If we turn to the political implications of Miéville’s theory, the striking feature is that class relations, from being forms of the social division of labour, are reduced—via the coercion at the core of the legal relation—to relations of coercion. The logical result is that all relations of coercion would become ‘class’ relations. The historical materialist critique of the unfolding of the division of labour through other forms of class society into capitalism, which leads to the distinctive role in Marxist theory of the self-emancipation of the proletariat as a class, disappears.

The theoretical presuppositions of Miéville’s account of law therefore support an ethical socialism of ‘siding with the oppressed’ without regard to economic or class dynamics. Miéville’s theory thus corresponds rather precisely to the Socialist Workers’ Party’s current *Respect* project. But this sort of reasoning is, in fact, self-defeating. Why should we identify Muslim small traders as ‘the oppressed’ as opposed to their wives and daughters, or *a fortiori* the Islamic Republic of Iran as opposed to the Iranian workers?

<sup>75</sup> See, for example, (*inter multis aliis*) some of the topics discussed in Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press, 1987); Kenneth Pennington, *The Prince and the Law 1200–1600* (Berkeley, CA: University of California Press, 1993).

<sup>76</sup> The tag is from the title of E.H. Kantorowicz, *The King’s Two Bodies* (1957; Princeton: Princeton University Press, 1997).

*Borrowing from the Academic Bankers*

The usual alternative is simply to borrow from existing academic legal theory. Thus the Austro-Marxist Renner and the Stalinist Vyzhynsky (and his Soviet successors) offer variants on the simple ‘command theory’ legal positivism of French and German legal theory in the post-Codification periods.<sup>77</sup> Nicos Poulantzas’ treatment of law is closer to the theory of law as a psychological internalisation or rationalisation of state violence developed by Karl Olivecrona.<sup>78</sup> Tom Campbell’s *The Left and Rights* corrects Marx by importing H.L.A. Hart, while Christine Sypnowich’s *The Concept of Socialist Law* prefers to deploy the more recent liberal positivist Joseph Raz.<sup>79</sup> Bob Fine has even produced in *Democracy and the Rule of Law* a pseudo-Hegelian-Marxist version of legal positivism, constructed by creating a ‘classical jurisprudence’ to parallel ‘classical political economy’.<sup>80</sup> This in turn involves identifying the absolutist Hobbes as a representative of the revolutionary bourgeoisie and the active bourgeois revolutionary Locke as a representative of the feudal past.<sup>81</sup> If this was not enough falsification, it is necessary to artificially interpret Hegel as a legal positivist (by silently reading *Recht* without the aspect of its meaning as *Law*, so that only *Gesetz* is treated as law). Olufemi Taiwo’s relatively recent *Legal Naturalism* mixes a Hegelian Marx with the ideas of the Catholic neo-Thomist school of natural law.<sup>82</sup> Too many authors to list have taken the appearance of law as ideology in *The German Ideology*, and various casual comments by Marx and Engels, as a cue to adopt mixtures of Karl Llewellyn and others’ ‘American Realism’ with a large dose of Althusser; these authors have generally more recently collapsed into post-modernism.

Loans have to be repaid. By borrowing from variously liberal and conservative academics, authors who take this approach end by yielding the principal with

<sup>77</sup> Karl Renner, *The Institutions of Private Law and their Social Functions*, O. Kahn-Freund (ed.), A. Schwartzchild (trans.) (London: Routledge, 1949); Andrei Vyzhynsky, *The Law of the Soviet State*, H. Babb (trans.) (New York: Macmillan, 1948), pp. 5–62, esp. definition at p. 60; successors, for example, L. S. Jawitsch, *The General Theory of Law*, H. Campbell-Creighton (trans.) (Moscow: Progress, 1981), pp. 88–104. In 19th-century France, the ‘exegetical school’, on which an outline is provided by R.C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), pp. 149–151; for Germany after the BGB, see F. Wieacker, *History of Private Law in Europe* (Cambridge: Cambridge University Press, 1995), p. 363ff. The English equivalent is the command-positivist school descended from Jeremy Bentham and John Austin, which—particularly in the form of John Austin’s *The Province of Jurisprudence Determined*, W.E. Rumble (ed.) (1833; Cambridge: Cambridge University Press, 1995)—was dominant in English law schools until the 1960s.

<sup>78</sup> N. Poulantzas, *State, Power, Socialism*, P. Camiller (trans.) (London: NLB, 1978); K. Olivecrona, *Law as Fact* (London: Oxford University Press, 1939).

<sup>79</sup> T. Campbell, *The Left and Rights* (London: Routledge, 1983); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961); C. Sypnowich, *The Concept of Socialist Law* (Oxford: Oxford University Press, 1990), relying in particular on J. Raz, *The Authority of Law* (Oxford: Clarendon, 1979).

<sup>80</sup> B. Fine, *Democracy and the Rule of Law* (London: Pluto, 1984).

<sup>81</sup> Locke: R. Ashcraft, *Revolutionary Politics and Locke’s Two Treatise of Government* (Princeton, NJ: Princeton University Press, 1986). Hobbes: J. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context* (Basingstoke: Macmillan, 1992). On both authors there is very substantial other literature, but these treatments address particularly the political issues which would have to inform a judgment of the sort that Fine claims to make.

<sup>82</sup> O. Taiwo, *Legal Naturalism* (Ithaca, NY: Cornell University Press, 1996).

interest: the justification of the *Rechtstaat*/rule of law. This is explicit enough in the positivists and naturalists, but is still present, even they would deny it, in the 'American Realist', Althusserian and post-modernist theorists of law as ideology. The reason is that the theory of law as ideology or 'realism' collapses law into the social practice of dispute settlement. The law-form has thus been emptied of content and can in theory be turned to radical ends, those of the pursuit of politics through courts. The relatively few high-profile successes for leftist lawyers of this policy seem to blind them to the overall effect, which is that political democracy is ever more tightly confined within a cage of judicial review.

Didier Hanne's 2004 article 'Droit et transformation sociale' in *Cahiers de Critique Communiste*, the theoretical journal of the French Ligue Communiste Revolutionnaire, is explicitly a defence of *Rechtsstaat* (*état de droit*) theory and a claim that socialists must abandon the idea of withering away of law in favour of arguing for a socialist rule of law. It is almost not worth a critique, since it is merely a low-grade pragmatic form of arguments that have been made in a much more theoretically rigorous way by Campbell, Collins and Sypnowich among others.<sup>83</sup> Hanne, for example, draws on Habermas without really grasping how Habermas' *theory of law* informs his concrete conclusions.<sup>84</sup> The argument is presented, not as a systematic logical approach, but by piling on a series of more or less brief allusions and rhetorical points.

The pivotal elements of Hanne's argument can be stated very briefly as follows:

(1) Stalinism, and the sub-Stalinist nationalist regime of the later 20th century, require leftists to give clear guarantees that we won't do it again. (a) This requires commitment to a 'contre-pouvoir', to translate crudely 'counter-power', which can hold back the state. The Bolsheviks committed themselves to eliminating counter-powers when they dissolved the Constituent Assembly, set up the Cheka, and so on. The result was Stalinism. (b) It is insufficient to rely on the mobilisation of the masses, since they will inevitably be demobilised after the first enthusiasm of the revolution. (c) Hence what is required is 'mecanismes de freinage', 'braking mechanisms', which imply control though constitutionalism and legality.

(2) Marx and Engels' suggestion that law would wither away rests on an illusion of human unity and dispute-less-ness which is inconsistent with the anthropological evidence. This evidence, on the contrary, shows that disputes and law are found in the simplest societies without class division. Habermas shows that the legal positivists are

<sup>83</sup> Campbell, op. cit. and Sypnowich, op. cit.; Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1985). Hanne does not, of course, cite these authors: it would be beneath a writer in *Critique Communiste* to cite Anglophone literature.

<sup>84</sup> See J. Habermas, *Between Facts and Norms* (Cambridge: Polity, 1997) and the critical literature on this book, in particular James L. Marsh, *Unjust Legality* (Lanham, MD: Rowman & Littlefield, 2001).

wrong and law is not merely ‘l’État mis en normes’. It grows out of civil society in the Habermasian rather than the Hegelian-Marxist sense. The Codes contain symbolic translations of the ideas of civility, solidarity, reciprocity, etc.<sup>85</sup> The same point—law does not equal state law—is confirmed from the anthropologists from Malinowsky and Mauss onwards.

(3) Hence, law is not merely concerned with the immediate functions of the state, but ‘constitutes at the same time a response to relatively permanent problems posed by ‘la vie en commun’ (‘communal life’). Marx is therefore wrong to assert that ‘*Recht* can never be higher than the economic structure of society and its cultural development conditioned thereby.’<sup>86</sup>

(4) Law, in fact (here Hanne borrows from the post-modernists), reflects the underlying complexity of society cut across by multiple identifications, etc. Once these multiple identifications are taken into account, society is, in the end, a society of individuals who are not reducible to ‘workers’ (or other groups) and the refusal to recognise the positive role of individuality is one of the keys to Stalinism. This, then, brings us back to Hanne’s starting point.

The specifically *legal-theoretical* content of Hanne’s argument is a ‘normative legal positivism,’ taken immediately from Habermas and the anthropologists of law, of a kind which has been standard fare for law students in the UK since the publication in 1961 of H.L.A. Hart’s *The Concept of Law*, and has been subjected to major internal critiques within the Anglo-American legal academy.

Hanne’s reliance on the legal anthropologists’ construal of all normative rules—and, indeed, mere social habits—as *law*, is, indeed, more primitive than Hart’s account, which sets out to elucidate how customary social norms are *different from* legal rules. It ignores the devastating objection made by J.W. Harris in 1980 that customary social norms are also found in law-using societies. In such societies it is necessary to be able to distinguish a custom, like buying your round, from a legal rule.<sup>87</sup> Hanne ignores, equally, the significant body of historical work now in existence on the *transition from* pre-legal custom to law. This transition, as Engels’

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<sup>85</sup> In a more or less throwaway remark at this stage, Hanne accuses Pashukanis of unduly privileging study of those branches of law which can be given an explanation in terms of exchange relations (text at n. 21). It is hard in the light of this remark to believe that Hanne has actually read *Law & Marxism*.

<sup>86</sup> *Critique of the Gotha Programme*, in § 3.

<sup>87</sup> J.W. Harris, *Legal Philosophies*, Second edition (London: Butterworth, 1997), p. 245.

letter to Schmidt foreshadows, can now be seen clearly to involve the unfolding of the division of labour to create a distinct professional group of *lawyers*.<sup>88</sup>

And it is not *laws* (*Gesetze*) which was absent in the old USSR: there were masses of them. It was not even *rights*: the 1936 Soviet Constitution guaranteed many of them. What was missing was the ‘rule of law’ *as a practice*. Hanne is ready to quote Trotsky when it serves his turn, but he has clearly not read Trotsky’s comments on the 1936 Constitution.<sup>89</sup> This constitution gave all the formal legal rights and guarantees of the most advanced bourgeois liberal constitutions: but every one of these rights and guarantees was absolutely worthless, because the lawyers and the judges were part of the *nomenklatura* and wholly dependent on it.

It is not the existence of laws which enables the *Rechtstaat*, but rather the material social bases both of the autonomy of the lawyers from the state, and of the ability of the lawyers through their legal doctrine to think the state as a private party under the law. The first is given by the lawyers’ source of independent income from the exploiting class (whether this class is slave owners, feudal lords or capitalists). The second is given by the concept of the sanctity of private property. This forms the core of *Recht* and enables states to be imagined as private parties subject to the law—and conversely the ideas of civil or ‘human’ rights as a kind of quasi-property. If we are to stand for the ‘rule of law’ to be made real, we must therefore stand for the existence of a ruling class of private property owners, whose existence supports the autonomy of the legal profession as a group, and the sanctity of private property as the core ‘human right’.

Even the capitalist *Rechtsstaat*, however, has its limits as a control on state action. Though written in 2004, Hanne’s article is peculiarly dated. One might imagine that we had not seen, in the wake of 9/11, Guantanamo, torture camps and ‘extraordinary rendition’, the US Patriot Act and UK Terrorism Acts, and all in the name of protecting the ‘human right to life’. The English House of Lords has said in the name of human rights that the government may not imprison *aliens* without open trial, but that it would be acceptable to imprison *both British subjects and*

<sup>88</sup> A few among many possible examples: ancient: Anne Fitzpatrick-McKinley, *The Transformation of Torah* (Sheffield: Sheffield Academy Press, 1999); Bruce Frier, *The Rise of the Roman Jurists* (Princeton, NJ: Princeton University Press, 1985); it is also possible to compare and contrast the (customary) character of Athenian forensic oratory, on which see, for example, D. Cohen, *Law, Violence & Community in Classical Athens* (Cambridge: Cambridge University Press, 1995), with its (legal) Roman equivalent, on which D. Crook, *Legal Advocacy in the Roman World* (Ithaca, NY: Cornell University Press, 1995). Medieval: Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992); and Chris Wickham, *Courts and Conflict in Twelfth-Century Tuscany* (Oxford: Oxford University Press, 2003); it is again possible to contrast early medieval (customary) dispute settlement with the 12th to 13th-century emergence of legal reasoning along with a legal profession, England providing a very striking example: the transition between spending nothing on lawyers and having to employ them discussed by Brand, *op. cit.*, ch. 1, is also a transition between the customary dispute settlement of most of the 11th- and 12th-century period of van Caenegem’s *Lawsuits*, *op. cit.* and the intensely legal reasoning of the later 13th century seen in P. Brand’s (ed.), *The Earliest English Law Reports* (London: Selden Society Publications vols 111–112, 1996–97).

<sup>89</sup> For example, in *The Revolution Betrayed*, ch. 10, <<http://www.marxists.org/archive/trotsky/works/1936-rev/ch10.htm>>, accessed 21 August 2006.

*aliens* on the same grounds (Belmarsh No. 1). And it has said that the government may not use ‘evidence’ obtained by torture to justify this imprisonment—but is under no obligation to point out to the secret tribunal handling the case that the ‘evidence’ may have been obtained by torture in Uzbekistan, and so on (Belmarsh No. 2).<sup>90</sup>

With the argument for law as an effective control on the state (absent commitment to private property and class society) broken, the rest of Hanne’s arguments fall to the ground. The core sentiment that remains is that the lawyers are to substitute for the demobilisation of the masses. But the true meaning both of Stalinism, and of the erosion of liberty in the wake of 9/11, is that this is a complete illusion. The proposition that ‘eternal vigilance is the price of liberty’ became a commonplace among the American revolutionaries around 1800 and is now mainly used by the Libertarian right. It is nonetheless true. Socialists can make institutional choices which foster that eternal vigilance, like trial by jury, universal military service, and so on. We will not do so, however, by promoting the *Rechtsstaat* as a substitute for the mobilisation of the masses.

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<sup>90</sup> *A & O’rs v. Home Secretary* (No. 1) [2004] UKHL 56, (No. 2) [2005] UKHL 71.