THE PLACE OF LAW IN THE MARXIAN STRUCTURE-SUPERSTRUCTURE ARCHETYPE

ALAN STONE*

Law occupies a critical place in a Marxist theory of society. Yet Marx and Engels did not provide a coherent and detailed discussion of law. Subsequent writers in the Marxist tradition have either developed simplistic versions of the unsustainable thesis that the capitalist class dominates the legal apparatus in a capitalist society, or they have virtually abandoned Marxism as a framework for analysis of the law. This paper examines leading texts of Marx and Engels and employs them to provide the outlines of a plausible Marxist theory of law that can embrace the rich complexity of legal activity in a modern capitalist society.

I. INTRODUCTION

Law was clearly a subject of interest for Marx and Engels, as an excellent collection of their writings on the subject attests (Cain and Hunt, 1979). Yet while they devoted considerable attention to particular laws that were the focus of intense political debates (such as the English 1834 Poor Law Amendment and the Corn Laws) and mentioned law in discussions of the structure (or base) superstructure dichotomy, they provide no comprehensive discussion of law within the context of historical materialism. The legal system is only addressed as part of more general analyses of the movement of history and the economy’s interface with society (Marx, 1911; Marx and Engels, 1976). Their statements are often only a few sentences long and raise more questions than they answer.

Nevertheless, many writers within the Marxian tradition have sought to construct a coherent theory of law’s place within the capitalist system. Renner (1949) made the first major attempt in 1904, but the theorist whose work is widely held to be the most brilliant and imaginative was Pashukanis (1978),

* I want to thank Richard Lempert, the Law & Society Review’s anonymous reviewers, my colleagues Bob Carp and Tom Dunn, Josh Cohen (M.I.T.) and, especially, Joel Rogers (Rutgers) for their invaluable criticisms and suggestions.

LAW & SOCIETY REVIEW, Volume 19, Number 1 (1985)
once the Soviet Union's leading legal theoretician. Pashukanis' principal work on law was published in 1924, but it fell out of fashion in the Soviet Union (Pashukanis himself was killed in the Stalinist purges of 1937) and was not rediscovered until the 1970s, this time by Western Marxists and others outside the Marxist tradition. Even before Pashukanis' rediscovery, however, Western Marxists had begun to focus on the possibility of developing a Marxist theory of law. This interest is manifest in an outpouring of recent scholarship. Like any corpus of work, the more recent efforts range from the shoddy to the first-rate. In the latter category one would clearly include the efforts of Collins (1982), Fraser (1976; 1978), and Tushnet (1978; 1983).

As different as the cited examples are, they share a disdain for the simple (if not simple-minded) view that law is nothing more than a capitalist confidence game designed solely to cover up the exploitation of the masses. That simplistic perspective characterizes the worst work, which develops the image of an instrumentalist criminal law used by an elite to subjugate the masses. We may readily dispose of this perspective. First, the criminal justice system is in large measure mobilized by and serves the needs of ordinary people who suffer from crime. Second, the criminal law is far less important to the maintenance and functioning of the capitalist social order than parts of the civil law. As Sparks succinctly observed, criminal law is important "at the margins of social life; . . . in day-to-day affairs it is not at all that important to the maintenance of late industrial capitalism's social order. . . . the most generally useful laws are likely to be the ones that define ownership and control" (Sparks, 1980: 159). In what follows, I critically review some of the more important Marxist expositions of law and then set forth my own additional contribution. But initially it is important to note what can and cannot be expected of a Marxist theory of law.

II. MARXIST THEORY

A Marxist theory of law cannot be expected to yield specific predictions about such mundane things as the content of specific legal rules or whether, where, or when specific laws will be enacted. The propositions underlying Marxism are too

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1 For example, consider *Swift v. Tyson*, one of the most important American cases on commercial law. The Supreme Court upheld a rule allowing a good faith holder of a bill of exchange to recover from a defendant who had been defrauded into giving the bill of exchange. While the Court
general to yield unequivocal predictions at an operational level. Thus, no crucial tests are available that can falsify Marxist theory, and in this limited, "Popperian" sense Marxist theory is unscientific (Popper, 1959: 40-43; Tushnet, 1983: 283).

Marxism, however, has a good deal to offer those who seek to understand the legal system. Marxism is methodological in that it provides a way of ordering concepts that relate diverse facts. Marxism is also heuristic in that its central formulations (such as the connection between structure and superstructure) provide a coherent picture of the connections among apparently discrete realms, such as technology, the economy, law, and class structure. Law, politics, economics, sociology are, under Marxism, ways of approaching a larger whole rather than disciplines focusing on natural divisions in social life that are capable of being understood as self-contained systems. In this Marxism is consistent with the general approach of law and social science (Lempert, 1983). At the same time Marxism illuminates our views of particular areas of study because we can perceive their connections to other areas. None of this, of course, requires us to throw away the findings of specialized studies or to renounce statistical or other techniques of empirical inquiry. Far from being a substitute for such inquiry, Marxism can build on it. In short, even if Marxism cannot deterministically explain or predict specific events or outcomes, it can provide a shape or structure to revealed relationships that is sensitive to "notions of individual action, natural causes and 'accidental' circumstances" (McLenan, 1981: 234). Understood in this way and stripped of: (1) the temptation to engage in specific prediction, (2) frequent diatribes (of which Marx was often guilty), and (3) the conflation of ideals of distributive justice with reasoned analysis, Marxism can be a powerful tool in understanding the social world and the place of law in it (Moore, 1980).

couched its decision in the need to facilitate the use of negotiable instruments, and thereby promote capitalist development, some states did not follow the federal rule. Also, as Gordon has observed: "The Swift rule may have made it more secure for people like the plaintiff to take commercial paper in payment of or as security for debts, but it made it less secure for people like the defendant to use such paper as a medium of exchange, because they were liable on their paper to subsequent holders even if they got nothing for it" (Gordon, 1980: 224). Thus, although negotiable instruments are essential in a capitalist scheme of production, a choice for either of the rules available to the Court in Swift and the state legislatures could be interpreted as consistent with Marxist theory. If this is the case in an area as central to the capitalist system as negotiable instruments, consider the even greater difficulty of developing a Marxist theory that would yield a falsifiable explanation of the different "pre-no fault" rules governing divorce in the various American jurisdictions.
III. THE ECONOMIC-LEGAL CONNECTION: RENNERS AND PASHUKANIS

Two major figures—Renner and Pashukanis—are important in recent Marxist discussions about the law, although in Renner's case references are often critical. The reasons for this are not hard to find. Renner was a member of the Austro-Marxist group which, from the beginning of this century to the 1930s, sought to update Marxism to take account of the dramatic economic and social changes that had occurred since Marx's time, such as the growth of large-scale corporate enterprises, the rise of the welfare-service state, and changes in the class structure, including, especially, the emergence of a broad-based middle class (Bottomore, 1978: 1-44). This effort was in part a defensive response to the intellectual attack on Marxism that arose from Marx's failure to anticipate trends that would begin just a few years after his death. The Austro-Marxists adopted the crucial theoretical view that the economic structure and the superstructure interact with each other; they thereby virtually abandoned any notion of economic primacy, a crucial concept in Marx's Preface to the Critique of Political Economy (Adler, 1978: 259-61).

Renner's work on law follows the same path. Avoiding any serious attempt to probe Marx's structure-superstructure language, Renner found only a weak connection between economic development and law (1949: 252-60). Law cannot cause economic development or change, according to Renner, but can be gradually modified to meet changed economic conditions. For example, the contract, a device employed in connection with real and personal property, was adapted to the employer-employee relationship. Laws change "steadily, continuously, imperceptibly, like the growth of grass, according to the law of all organic development" (1949: 252-53). Thus, Renner concluded, fundamental social changes can occur "without accompanying alterations of the legal system" (1949: 252).

While Renner had acute perceptions about the durability and adaptability of such legal concepts as contract, he failed to grasp an important part of what he had shown. On the one hand, laws change, but, on the other hand, what I shall call essential legal relations, such as contract or property, are at once durable and adaptable. Renner's failure to grasp the distinction between law in general and the fundamentals of the legal order is what compelled him to the view that there is only a weak relationship between the economic system and its
changes, on the one hand, and the legal system and its changes, on the other. With this view of the empirical situation, it is natural to slight the problem of what compels laws to be consistent with the requirements of the economic system. So long as crude notions of capitalist domination of law prevail, either directly through force or indirectly through a consciously constructed ideological system, the problem is not interesting for the answer is obvious, and Renner's inattention to this problem does not count heavily against his theory. But for the more sophisticated group of contemporary Marxist scholars, Renner's failure to deal adequately with this problem and his virtual abandonment of Marx's hypothesized connection between economic structure and superstructure are fatal flaws that make his work of little more than historical interest (see, e.g., Bierne and Quinney, 1982).

Pashukanis' work, on the other hand, is an intellectual starting point for many Marxists currently interested in the law. His views must be understood in the context of the major problem he sought to address. Writing in 1924, well before Stalin's consolidation and its accompanying terror, Pashukanis sought to determine the place of law in a future communist society. His conclusion—that law, like the state, was associated with a class society and would accordingly wither away with the development of classless society—was, even when it was written, familiar Marxist dogma and is the least interesting aspect of his work. What was ingenious was the general Marxist "theory" of law that Pashukanis devised as a route to this conclusion. The principal connection that Pashukanis saw between the capitalist economic structure and its legal superstructure is that the latter reflects and corresponds to the former. That is, the conceptions that Marx employs to elucidate the inner workings of the capitalist economic system have conceptual parallels in the capitalist legal system.

In developing his argument, Pashukanis distinguishes between technical rules (such as train timetables which regulate rail traffic) and legal rules (such as the liability of railroads toward consignors of freight). In the former case he sees a unity of purpose since technical rules can benefit everyone in similar ways, but in the latter case "differentiation and opposition of interests begin" (1978: 81) since legal rules systematically advantage particular parties in particular transactions. A capitalist system, Pashukanis tells us, involves the production and distribution of commodities (goods intended for sale in the market rather than for personal consumption).
This characteristic, in turn, implies an atomistic economy in which private economic units (including collaborative units such as corporations and trade unions) compete and bargain with one another in product, service, and labor markets (1978: 85).

The dynamics of competition and bargaining, which drives the economic system in capitalist society, is for Pashukanis rooted in the conflicting interests of parties involved in social relationships. With conflict the key motivating force, individuals (including corporate "persons"), who are the key actors in the system, are inevitably drawn into disputes with others. This gives rise to legal action. The legal system is thus another arena for pursuing economic conflict, but it is not the same as the economic system. Its central actor is not the economic man/woman of the marketplace, but the judicial one.

Capitalist law (exemplified by contract law) reinforces an ideology that embraces individualism, private autonomy, and material self-interest but which, at the same time, affirms mutual obligation and obedience to external authority (1978: 97). Just as the commodity acquires an exchange value independently of the will of the producer, so also "man acquires the capacity to be a legal subject and a bearer of rights. . . . He is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations. . . ." (1978: 112, 113). Social relations between persons assume a doubly mysterious form. "They appear as relations between things (commodities) and . . . as relations between the wills of autonomous entities equal to each other—legal subjects" (1978: 117). The state, through the judicial machinery, appears to be the impartial guarantor of obligations and arbiter of disputes between rival claimants and forces (1978: 147), but behind this it is "the organized power of one class over the other" (1978: 150). Thus, the rules of law, imposed by the state to clarify and stabilize social relations, are rooted in and mirror the relations of production.

This portion of Pashukanis' analysis deals primarily with contract and property. With the exception of criminal law, he does not probe other legal areas. But his treatment of criminal law may be analogized to many other areas of law. In essence, Pashukanis argues that capitalist social relationships and the legal relationships that parallel them in the paradigm case of contract law are transplanted into other areas. For example, in a criminal prosecution, the state appears both as plaintiff (public prosecutor) and judge. The prosecutor asserts a claim,
demanding satisfaction from the defendant in the form of a high price (a severe sentence). The offender pleads for leniency—a discount. The court determines the guilt and intention of the individual. The question of whether the act was caused intentionally, negligently, or accidentally reinforces the concept of the autonomous subject (1978: 177, 178). Finally, the whole of the criminal proceeding is affected by the principle of “equivalent recompense”—making the value of the punishment, be it “time” or “money,” equal to the value of the costs imposed by the criminal (1978: 186). Clearly, most of the same points could have been made with respect to tortious conduct as well.

As the foregoing shows, Pashukanis' “theory” of the connection between the capitalist economic structure and legal superstructure is an elaborate one. It is primarily concerned with the forms of law rather than with the particulars of substance; indeed, it is virtually silent on substance or the ways in which rules change over time. Thus, it yields no operational predictions and so is not scientific in the Popperian sense, but as with Marxism generally, this is not a fatal flaw.

The great merits of Pashukanis' analysis are, first, its attempt to draw important connections and parallels between the economic structure and the legal superstructure. One need not accept his commodity theory of law to accept its insights into the legal subject, individual responsibility, and the structure of the legal system generally. Second, the analysis allows for the domination of the legal system by the dominant classes but avoids a crude instrumentalism in which members of the dominant classes always prevail. Third, in drawing the distinction between legal and technical rules, Pashukanis' analysis helps to differentiate in a rudimentary way between the rules that sustain and define social relationships and those that aid a society's functioning. All societies want their trains to run on time.

There are, however, serious problems with Pashukanis' approach. As Collins (1982) has shown, Pashukanis' attempt to explain all legal rules as reflections of commodity exchange is crudely reductionistic. While his views on criminal law are insightful, Pashukanis, as Collins argues with respect to the law of assaults, “seems to ignore its [the criminal law’s] role as vindicator of the dominant values and standards of a community” (Collins, 1982: 109). Thus, Pashukanis' approach does not explain why the state, and not the victim or his or her relatives, is the plaintiff in criminal cases.
More fundamentally, Pashukanis’ discussion of public law is confused and fails to consider important components of capitalist legality. Despite an extended discussion of the forms of capitalist legality, Pashukanis does not show how judges, formally independent of class pressures, act to promote capitalist interests. “How then does the coincidence between law and ruling class interests come about?,” Tushnet asks (1983: 281). The problem is especially acute when one looks at administrative regulation and the many laws that operate to restrain capitalist interests (e.g., environmental laws). Indeed, the administrative structure of the modern regulatory state, in which a governmental unit is frequently the moving party and the goal is more often rule-making than the assignment of culpability or the assessment of damages, eludes Pashukanis’ analysis.

Law has many functions in contemporary capitalist society. While one can divide these functions in many ways, I will employ Habermas’ typology (Habermas, 1973: 53, 54). Habermas divides laws into: (1) those that constitute the mode of production (e.g., property, contract) and promote the economy; (2) those that complement the market by adapting the legal system to new business arrangements (e.g., much commercial law); (3) those that replace market activities (e.g., public utility law and occupational licensure); and (4) those that respond to politically effective reactions to economic dysfunction (e.g., minimum wage or environmental laws). Pashukanis’ theory, with its narrow focus on the legal forms, cannot explain the range of law in the modern state.

I believe that the structure-superstructure formulation of Marx and Engels suggests an attractive alternative to Pashukanis’ approach. It allows us to develop a theory that can embrace the variety of law in the modern capitalist state without discarding what is most attractive about Pashukanis: his insight that law can reinforce capitalist domination although judges and administrators are neither capitalist conspirators nor automatons in service to a capitalist elite. Indeed, the theory I shall propose allows considerable room for official independence and the ability of judges and administrators to engage in honest, critical reflection and to draw differing conclusions from similar factual episodes. The first step toward this theory is to examine closely Marx and Engels’ structure-superstructure formulations.
IV. STRUCTURE AND SUPERSTRUCTURE

The starting point for any Marxist conception that seeks to relate law to the economic structure of society is Marx’s famous 1859 Preface to *The Critique of Political Economy*, in which he stated:

In the social production which men carry on they enter into definite relations that are indispensable and independent of their will. These relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness (Marx, 1911: 11, 12).

Some preliminary observations are in order. First, as the above quotation indicates, the term “superstructure” includes a wide range of human activities—indeed, virtually every facet of life not specifically located in economic production; that is, every facet of life except “the totality of the operations aimed at procuring for a society its material means of existence” (Godelier, 1976: 60). Thus, superstructure includes the beliefs of persons operating within a given society, cultural artifacts such as works of art, and the institutional rules such as laws that guide conduct within a society. It is fair to ask whether Marx’s claim here is that the mode of production can be shown to determine religious preferences, styles of music, and the particular laws governing domestic relations in some direct, mechanistic manner. If so, the wide variety of cultural, religious, intellectual, and other differences among contemporary capitalist societies would require us to reject Marx’s hypothesis out of hand, “for such a position implies that the economic base is ultimately (if not immediately) self-sufficient and that its spontaneous development is the sole determinant of social evolution” (Jessop, 1982: 11).

This simplistic view (known as economism) was common among many prominent Marxists in the period following the death of Engels in 1895 and for this reason has been attributed by some to Marx and Engels. But, as we will see, a very different construction of the language is possible.
Second, the quoted language in the above text appears to be inconsistent with other Marx-Engels texts insofar as it applies to law, and it is even inconsistent with other language in the 1859 Preface. Later in the same paragraph Marx asserts: "At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production or—what is but a legal expression for the same thing—with the property relations within which they had been at work before" (1911: 12; emphasis added). Some scholars, comparing the two quoted portions of the 1859 Preface, have suggested a confusing and, perhaps, inconsistent dualism (Tushnet, 1983: 281; Plamenatz, 1955: 30, 31). Is property law part of the superstructure and consequently an effect of the economic structure, or is it simply a "legal expression" of the economic structure? While one must admit that the text is ambiguous, a closer examination of this and other Marx-Engels texts, together with the introduction of certain additional concepts, can clarify the apparent ambiguity and, more importantly, provide a framework that reveals connections between the law and economy that make for an underlying unity in the law of capitalist states.

How can one reconcile language that suggests a "legal expression" is synonymous with a part of the "economic structure" with language that suggests that all elements of the superstructure are separate from and somehow caused or shaped by the "economic structure"? Some Marxists have thrown away the dichotomy as it applies to law, claiming it is untenable (Thompson, 1975: 261). To do so implies that Marx and Engels were intellectually confused not only in the Preface to the Critique of Political Economy but in many other places as well. Indeed, the structure-superstructure dichotomy is one of the cornerstones of both the Marxist view of society in stasis and the Marxist conception of historical change. As O'Hagan has observed, the dichotomy is critical to Marxism for several reasons. The superstructure helps to "maintain a stable system in which power over production and enjoyment of products is thus unequally allocated. . . . [Superstructures] . . . impose a level of unity, cohesion and integration 'over and above' the disunited and indeed antagonistic interests of the classes composing the society" (O'Hagan, 1981: 86). They both present particular interests as the general interests of society and provide sets of enforceable rules.

It is possible to reconcile the apparently inconsistent formulations on law when we turn from the rather compressed
Preface to other texts which suggest that the notion of legal superstructure contains two quite distinct, but related, concepts. In his 1888 essay, "Ludwig Feuerbach and the End of Classical German Philosophy," Engels distinguishes "essential legal relations" from the law (or judicial practice). The former phrase embraces those essential legal conceptions that are central to a capitalist economic order, such as property, contract, and credit. Essential legal relations must be distinguished from the particular laws that are based upon them (Engels, 1959: 235, 236). Thus, the underlying notion of credit must be distinguished from the particular provisions of the Uniform Commercial Code, and the underlying concept of property must be distinguished from local landlord-tenant laws.

Although they employ different terminology, other Marx and Engels texts supply further support for this interpretation. The German Ideology of 1845-46 provides several such examples:

Private property is a form of intercourse necessary for certain stages of development of the productive forces; a form of intercourse that . . . cannot be dispensed with in the production of actual [capitalist] material life. . . . Because property . . . as in all epochs is bound up with definite conditions, first of all economic, which depend on the degree of development of the productive forces and intercourse—conditions which inevitably acquire a legal and political expression (Marx and Engels, 1976: 355, 356).

While not very artfully framed, the ideas are akin to those of Engels quoted above. The forms of intercourse (or essential legal relations) are integrally connected with the economic system; these in turn give rise to particular legal and political rules and institutions. Elsewhere in The German Ideology Marx and Engels refer to the "productive forces and . . . the intercourse corresponding to these" as conditioning particular conceptions, laws, etc. (1976: 36). Again, "All [production] relations can be expressed in language only in the form of concepts. . . . These general ideas and concepts are looked upon as mysterious forces . . . [and] are further elaborated and given a special significance by politicians and lawyers" (1976: 363).

In exploring the distinction between production relations and the concepts that refer to them, I will use the method employed by Marx in developing his structure of capitalism—the method of abstraction (Marx, 1973: 100-108). Marx began by provisionally assuming away all social relations except those
that he viewed as fundamental (capital and labor), developing abstract categories that were intended to elucidate the fundamentals of that relationship, and then gradually reintroducing other relationships and facts (Sweezy, 1942: 11-20). My approach is the same.

I begin with "essential legal relations," by which I mean the legal relations that mirror and legally define the fundamental economic relationships in a society. In a capitalist society these would include property and contract. Thus, one must employ these essential legal relations to comprehend the commercial, industrial, and employment relationships of a capitalist society—any capitalist society. As we will see, the concept of essential legal relations facilitates the understanding of linkages between the economy, on the one hand, and such lower order legal concepts as lease or easement as well as particular legal rules and decisions, on the other. And while one must be alert to the danger of reifying such essential legal relations as contract or property, one must be equally alert to the danger of disregarding the subjective content of action which is ordinarily expressed in conceptual terms. These concepts are parts of actors' meanings as they undertake action; they are not simply categories imposed by an observer (Weber, 1977: 109-15).

The concept of essential legal relations also addresses one of the criticisms raised by Kamenka in his review of Marxist discussions of the law. He criticizes the incapacity of many Marxists to distinguish laws that are central to a legal system from laws that could be changed tomorrow without affecting the character of the legal system (or economic system, one may add) (Kamenka, 1981: 476). In other words, not all laws and legal concepts—even in such areas as contract or property—are of equal importance. The question is which are most fundamental. We will see that, starting from the concept of essential legal relations, it is possible to structure legal concepts and rules in order of importance despite the mass of particulars. First, however, we must examine the concept of essential legal relations, beginning with a discussion of the economic base—in this case capitalism.

V. CAPITALISM AND ESSENTIAL LEGAL RELATIONS: PROPERTY AND CONTRACT

The term "capitalism" is traceable to nineteenth-century socialist theoreticians, of whom Marx was the most important. Although Marx did not attempt to fully define the term, his
writings form the basis for a broad consensus on the essential characteristics of capitalism. The most important of these characteristics, according to Marx, is that "the owner of the means of production . . . finds the free worker available, on the market, as the seller of his own labour" (Marx, 1977: 274). These relations give rise to one class that owns the means of production, including factories, mines, mills, raw materials, and machines, and another class that sells its labor power to the former in a free market. This relationship between classes is to be distinguished from one in which one class legally controls the persons of others for laboring purposes (slavery), or in which certain obligations (or mechanisms for remission) are owed from one to another as a result of tradition or status (feudalism), as well as from many other sorts of arrangements.

Capitalism, as Marx conceived it, is inescapably tied to certain ideas and arrangements that are realized in and guaranteed by law. The first of these is contract. The essence of a contract consists of a promise by one party to do something in return for a specific act or promise on the part of another party. It is a voluntary arrangement, "freely" entered into by both parties, and so stands in sharp contrast to obligations owed as a result of either one's status or enslaved condition. The relationships between the capitalist and the laborer, seller and buyer, and creditor and borrower are contractual at their core. A prerequisite for capitalism in the realm of the labor bargain as well as in other areas of commercial life is the recognition and enforceability of contracts by the state.

The second distinguishing feature of capitalism that cannot thrive without law is the private ownership of the means of production. Prior to the sixteenth century in Britain and elsewhere, the notion of property was quite different from the one developed in conjunction with capitalism. The feudal concept of "property" embodied both common and private property, a sense of social obligation requiring the performance of duties, and a sense of stewardship in the use of personality and land. But with the coming of capitalism, the idea of a communal interest in property withered away, as did the senses of stewardship and social obligation (Larkin, 1969: Chs. 1 and 2). Under capitalism "property is equated with private property—the right of a natural or artificial person to exclude others from some use or benefit of something. . . . Whereas in pre-capitalist society a man's property had generally been seen as a right to a revenue, with capitalism property comes to be seen as a right in or to material things" (MacPherson, 1975:
The conceptual change is reflected in the fact that property became more freely alienable and open to more uses, with the principal restrictions on the use of property being those assumed by contractual agreement and those imposed by the obligation not to interfere with other property owners in the enjoyment of their rights (Holdsworth, 1946: 105).

The essential legal relations of contract and property came to cover more and more of the social relationships in evolving capitalist society. As Marx observed, "Whenever, through the development of industry and commerce, new forms of intercourse have been evolved (e.g., insurance companies, etc.) the law has always been compelled to admit them among the modes of acquiring property" (Marx and Engels, 1976: 92). To which we might add that they are also subject to the contract relationship. Thus, stock certificates, commodities futures, options, and an array of other devices employed in commerce and industry have come to be embraced within the essential legal relations of contract and property. These are, in Habermas' terminology, "necessary to constitute the mode of production and maintain it" (Habermas, 1973: 53). Their usefulness in ordering the many kinds of activities and transactions that help establish the economic foundations of capitalism renders them essential to the system.

VI. CAPITALISM AND ESSENTIAL LEGAL RELATIONS: CREDIT AND COMBINATION

But capitalism requires still more. Specifically, capitalism requires credit and the capacity to enlarge capital by combining with other sources of wealth. Credit and combination, both contractual relationships, are essential legal relations that enable capitalism to expand.

Most production in a capitalist society is not for the personal use of the producers but is instead for sale at a profit. The capitalist engages in the processes of manufacture, distribution, and sale to turn a profit. In Marx's direct language, the production of goods simply for their utility "must therefore never be treated as the immediate aim of the capitalist; nor must the profit on any single transaction. His aim is rather the unceasing movement of profit-making" (Marx, 1977: 254). There are two important aspects to this description. First, the capitalist is interested in the continual repetition of the profit cycle and not simply in a single instance of profit-making. General Motors does not seek to sell its 1985 automobiles so that it can distribute the proceeds to its
employees and shareholders and then exit from business. Rather, it arranges its activities so that it can produce and sell its products in continuous cycles of profitability, symbolized by Marx's "M-C-M'." The capitalist uses money (M) to purchase commodities such as labor power, raw materials, machines, and the like (C), intending the cycle to result in more money than the amount originally expended (M'). And the cycle repeats.

Credit, as Veblen noted, may be divided into two subcategories: "(a) that of deferred payments in the purchase and sale of goods . . . and (b) loans or debts . . ." (Veblen, 1932: 49). The need for credit follows from the M-C-M' cycle, with its goal of ever-increasing profits. Unless credit is employed in the M-C part of the cycle, barter and available cash constitute the only means of payments, sharply limiting profit-making opportunities. Credit also aids those with profit-making potential who do not have immediate access to the resources needed to realize this potential. Most directly, credit can increase the size of M, allowing more commodities (C) to be purchased in any particular cycle, with the concomitant potential of an M' of greater magnitude. Credit also aids the unceasing quest for profit-making since it can speed up each cycle by providing money for additional investments before earlier investments have been fully paid off.

In short, the unceasing pursuit of profit-making requires the establishment and development of a credit system for a variety of reasons. Credit, then, constitutes a third essential legal relation, and with the rise of capitalism became a regular institution of economic life rather than the exceptional phenomenon it had been (Mandel, 1968: 217).

For many of the same reasons, combining with others is central to capitalism. The institution of contract allows one to reach an agreement not only with an adversary (e.g., buyer-seller or capitalist-employee) but also with those who share an interest in collaboration. Both types of combination are important, but the former is defined almost entirely by contractual agreement, while the latter, although rooted in contract, extends beyond it. Indeed, Coase (1937) has shown that the organizing authority and integrative activity of a business firm reduce the costs of negotiating and entering into many individual contracts, while Williamson (1975) suggests that the complete absorption of one business organization by another, the ultimate in combination, is a way to avoid the uncertainties of contractual relationships.
Because of the enhancement of capital, skill, and market power that combinations allow, it is natural in capitalism to seek allies in the pursuit of greater wealth. One special form of combination, the investment stock company, dramatically expands the ability of people to participate in the ownership of the means of production and provides the capitalist a means of greatly enhancing the available resources. Of course, combinations such as guilds, religious orders, monasteries, and towns existed in the pre-capitalist era (Davis, 1961: Chs. III and IV; Carr, 1909: 161, 162). Indeed, these earlier forms of combination supplied many of the key ideas essential to combinations that arose under capitalism, including perpetual succession and management by elected representatives (Kramer, 1928). Nevertheless, these early forms of combination had characteristics antithetical to those that make the later forms part of the essential legal relations of combination under capitalism. Early corporate forms were rife with: (1) restrictions on which activities could be pursued, (2) membership qualifications, (3) training requirements, and (4) restrictions on the ability of members to deal with non-members (Scott, 1951: 1-6).

Thus, the idea of essential legal relations, which, I argue, is the starting point in understanding Marx and Engels' theory of the relationship between economic structure and superstructures, refers to the legal expressions or images of the central components of the capitalist economic structure. The essential legal relations pervade subsidiary concepts (i.e., sale or mortgage) as well as other aspects of the legal order. For example, many crimes (burglary, robbery, fraud, etc.) and torts (trespass, strict liability) are premised upon the essential legal relations in that concepts like contract and property are essential to an understanding of what is wrongful about these acts. Similarly, other legal rules may modify or erode essential legal relations (such as environmental regulations or minimum wage laws). Notwithstanding these tensions, which constitute much of the politics of modern capitalist societies (and which I discuss later), the fundamentals of essential legal relations remain. For otherwise capitalism as a system could not survive. This is true almost as a matter of definition. The economic and legal concepts are that close.

VII. THE STRUCTURE OF HIERARCHY

In seeking to understand the Marxian conception of structure-superstructure and the law's place within it, it is
important to note first that there are many segments of the superstructure (philosophy, religion, culture, law, politics). While it is appropriate for some purposes to distinguish between structure and superstructure as two separate and distinctive spheres, such a sharp bifurcation obscures linkages. Although essential legal relations are in one sense superstructure, in another sense they are the reflection of structure ("a legal expression" for "relations of production"). As such they can be linked not only to the structure but also to other elements of the superstructure, such as the arts and politics, and to less essential aspects of the legal culture, such as decisions in particular cases. In all cases the linkages are hierarchical, for superstructural elements and their included aspects may be conceived of as relatively further from the structure or nearer to it. We determine the "distance" from the structure by the number of intermediate links and the centrality of the particular superstructural segment or included aspect to the functioning of the base.

To take a simple example, high culture is far less critical to the functioning of the economic base than are essential legal relations. Capitalism can function effectively under a wide variety of cultural arrangements without significantly impeding its daily operations, but a breakdown of such essential legal relations as property or contract will destroy the basis for fundamental capitalist operations. Similarly, capitalism can accommodate its operations to a variety of specific laws on a particular subject, but the range of acceptable variations in essential legal relations is far more limited. Certainly, Marx in giving preeminence to the structure meant no more than that the productive state and social relations of society influence or color the activities in distant areas of superstructures, such as the artistic aspects of culture (Marx, 1973: 110, 111). A particular violinist, for example, may accept, reject, or be indifferent to the mode of production with virtually no effect on the health of the capitalist system. It is perhaps true that the mode of production may ultimately frame his or her discourse, experience, and understanding but if so, it allows for a wide range of thought and behavior that can be exhibited within the system's constraints. This room for human discretion applies to other superstructural segments (including law) as well.²

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² The capitalist structure, because of its individualistic competitive base, may allow substantially more room for discretion than other economic structures. For example, to hold people to a feudal economic system may
Let us return now to the Preface, which apparently stated that the legal superstructure is determined by the structure but also told us that property relations are but the legal expression of the relations of production. The key to clearing up the apparent inconsistency is understanding that Marx was referring to different things. In the first instance he was speaking about the legal superstructure, while in the second instance the reference was to the essential legal relations to which the legal superstructure is linked. The apparent confusion, as G.A. Cohen acutely observes, stems from the fact that there was simply “no attractive alternative” to describing production relations except in legal terms (Cohen, 1978: 224, 230). Cohen goes on to note that the economic system requires a specified, orderly set of essential legal relations in order to function and maintain itself on a continuing basis. The economic structure and essential legal relations are connected without intermediation. In that way essential legal relations are but an expression of the economic structure, even though they are at the same time part of one of the superstructural segments. A person undertaking an act, such as entering into a business contract, may simultaneously experience the process as an economic, legal, ideological, and perhaps even religious activity, but while structure and superstructure are thus simultaneously cojoined, they are also separate since the objective institutions, associative relationships, and legitimation structures of each segment are different (Godelier, 1976: 62, 64; Weber, 1968: Pt. 1, Chs. I and II).³

require far greater constraints in other superstructural segments to maintain the legitimacy of the order than those required by capitalism.

³ Contrast the construction that Collins offers in his admirable book. Addressing the constitutive problem (law as a reflection of structure, yet superstructure), Collins argues that legal rules “subsume existing customs leaving them redundant as guides to correct behavior” (Collins, 1982: 88). The customs, in turn, originate in the practices necessary to the mode of production and the mechanisms needed to control deviance. The content of the law, Collins goes on, is thus superstructural because it is determined by the “dominant ideology as it is represented in customary standards of behavior,” but it is also part of the structure “to the extent of being the sole institution giving [relations of production] concrete form and detailed articulations. Thus law is superstructural in origin but because of its metanormative quality it then may function in the material base” (1982: 88, 89).

Collins’ argument, although solving the constitutive problem on a theoretical plane, leaves too much unresolved. The idea of a “dominant ideology” does not help us to specify doctrines and laws for examination, whereas the concept of essential legal relations does. Moreover, although Collins’ view concedes a hierarchy and elaboration of law, the concept of “dominant ideology” provides no guidance about how to organize such a structure. The concept of essential legal relations, as I shall show shortly, does. Furthermore, merely giving the concept of dominant ideology a central
VIII. MEDIATION AND DERIVATIVE SUBRELATIONS

Our next task is to move from essential legal relations to the particulars of legal decision-making. This will be done in two steps. The first is to show how particular decisions and doctrines are derived from essential legal relations. The second is to show how public law and judicial rulings that conflict with the accumulation interests of the capitalist class fit in.

Engels has written:

Still higher ideologies, that is, such as are still further removed from the material economic basis, take the form of philosophy and religion. Here the interconnection between conceptions and their material conditions of existence becomes more and more complicated, more and more obscured by intermediate links. But the interconnection exists (Engels, 1959: 237).

Implicit in this statement is the idea that if we are to understand the “higher ideologies,” we must attend to the intermediate links. An important set of links may, consistent with Marx's scheme, be called “derivative subrelations.” In the legal sphere the derivative subrelations are legal conceptions that fall between essential legal relations and particular rules. Thus, property is an essential legal relation. Under it are such derivative subrelations as easement, lease, and the like. Derivative subrelations of credit include security, bankruptcy, lien, etc. From these derivative subrelations flow particular legal rules and further subrelations. In both cases distance from the economic structure is a function of the number and quality of mediating subrelations. For example, assignment is a derivative subrelation under contract, but delegation of performance is a derivative subrelation under assignment in descending order from the structure. Particular legal rules (i.e., where personal performance is required under a contract, a substitute's performance does not discharge the contractor's duty), in turn, flow from the lower derivative subrelations.

role does not help elucidate the linkages between the economic structure and daily judicial and administrative decisions. Nor does it help us to understand how ideas in conflict with the dominant ideology, like environmentalism, arise, and how these ideas are translated into legal rules. As we will see in the discussion of public law below, the concept of essential legal relations helps us to place such laws in the context of a capitalist legal order.

I do not wish to be understood as saying that distance is necessarily inversely related to importance to the structure. It is entirely consistent with my formulation that a change in something distant from the economic structure can have a major impact on the structure. For this reason I use the word “quality” in the above sentence.
One merit of this view is that it accords with the manner in which the Anglo-American judicial system works. Essential legal relations, the expression of economic structure, give rise to derivative subrelations. Courts, confronted with particular matters, accept the essential legal relation, consider the functions and purposes of the derivative subrelation, and then seek to render a best decision consistent with the derivative subrelation's principal function. Since there is room for differences in judgment in this process, different courts can adopt different particular rules, as the example of *Swift v. Tyson* discussed in footnote 1 shows. Moreover, this dynamic accords with the differences that exist in human behavior. Judges are not omniscient. They can be stupid or wrong, just as they can be farsighted and brilliant. They are not constrained by a "dominant ideology" or by more direct influences of economic interest to reach those specific decisions that will best constitute and maintain the mode of production. And the system for its part can tolerate suboptimal and even occasionally antagonistic decisions at the case level.

This system of transmission from economic structure to the decisions of individual judges shows a structure of causation that is, at once, complex and flexible yet constraining. The fundamentals—essential legal relations—are set and nearly universally accepted, part of the "taken for granted" social order.\(^5\) If they should become widely questioned, this would indicate that the economic structure itself is being widely questioned. From these essential legal relations, judicial and legislative officials seek to derive consistent subrelations to meet particular problems or resolve particular cases. So long as the essential legal relations are taken as the starting point, those actors who create the derivative subrelations and the

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\(^5\) The processes by which the fundamentals are taken for granted are complex and would require a separate paper to explore fully. Here I shall simply mention some of the important considerations. First, the essential legal relations are encountered as part of our early socialization in much the same way that table manners, habits of dress, and so on are inculcated. An adult settling a dispute between two children battling over a toy will reward it to one of them, announcing that it "belongs to X." The word "property" is not used, but the concept and attributes are (Levi-Strauss, 1967: 19). Such instruction continues onward from childhood through adulthood, and in most cases the essential legal relations become ingrained. Second, a capitalist society invests considerable effort in developing a coherent ideology regarding the importance and fairness of the essential legal relations. Courts, law schools, and the elites in these and other institutions exert pressures and guide others to work with (i.e., accept) the essential legal relations. Finally, we should not underestimate the high costs of replacing the essential legal relations with others. Most people are unwilling to incur the effort required to supplant existing essential legal relations.
particular legal rules under them will develop a jurisprudence compatible with the structurally defined system although they act neither conspiratorially nor consciously on behalf of a class or ruling group.

Not only can the system allow creative and flexible decision-making within the framework set by the essential legal relations, but it can also tolerate the mistakes, the inefficiencies, and the conscious or unconscious attempts at subversion that are inevitable when decisions are entrusted to a multitude of variously motivated human agents. For example, the developing law of business corporations in nineteenth-century America displayed many twists and turns before ultimately abandoning size limitations, restrictions on indebtedness and the consideration for which stock may be given, and other provisions that limited corporate growth and capital accumulation. Despite these restraints and inefficiencies, the system was nevertheless capitalist, and eventually the principles of liberal general incorporation were reached (Dodd, 1936: 38). Similarly, as Engels observed, the different ways in which legal rules from older societies are adapted to capitalist ones can result in more or less efficient coordination between the structure and legal superstructure (Engels, 1959: 235, 236; Hall, 1977: 57, 58).

To summarize thus far, paying attention to the Marxian idea of structure and superstructure allows us to understand how the economic structure and the activities of judicial decision-makers are linked to the making of specific decisions that constitute and maintain the mode of production. Linkages move along the following path:

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structure
  ↓
essential legal relations
  ↓
derivative subrelations
  ↓
particular rules
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This does not mean that particular rules may not alter or modify derivative subrelations, for they may. But most legal activity occurs in a routinized pattern in which the category hierarchically above is not questioned. A judge rendering a decision on a question of negotiable instruments does not ordinarily challenge the derivative subrelation of negotiability and will certainly not question the essential legal relation of contract. Thus, without resorting to crude instrumentalism, this construction shows how legal agents act to support
capitalist social relations, and at the same time it accords with the manner in which legal decisions are made. Moreover, it allows us to detect signals indicating that the mode of production is being seriously challenged. When an economy's essential legal relations are openly challenged, we know that this is the case.

Such a challenge occurs when the "justice" of the allocative biases inherent in essential legal relations is subject to question. The conception of contract, for example, includes the notions that people are "free" to enter into them and that, with only certain exceptions, the terms arranged by the parties must not be upset by courts. An alternative ethic which is inimical to the capitalist system would have the state determine the "correct" terms for every bargain in the context of some theory of distributive justice. Similarly, as G.A. Cohen argues, the implicit claim of the property system that it is just and proper may be challenged. "Now every actual piece of private property . . . either is or is made of something which was once the private property of no one. . . . We must ask, apart from how he in particular got it, how the thing came to be (anyone's) private property in the first place, and examine the justice of that transformation" (Cohen, 1981: 15).

But, while philosophers may sometimes ponder such questions, this is generally not done in the real world. Ordinarily, legal actors accept the underlying notions contained within essential legal relations in much the same way that table manners are accepted and employed, without rationally considering them or demanding moral justifications. In this way, through biases built into the very concepts with which the law works, essential legal relations help to establish and maintain social conformity as well as what Antonio Gramsci termed "social hegemony"—ruling group homogeneity in the face of a diversity of particular societal interests (Gramsci, 1971: 12, 13, 146, 195, 247, 261; Sumner, 1979: 256, 257).

IX. PUBLIC LAW AND SOCIAL CONFLICT

Now that I have shown how particular decisions and doctrines are derived from essential legal relations, it is time to turn to public law and rules in apparent conflict with the accumulation interests of the capitalist class. The sequence of discussion is intended to follow Marx's method of abstraction, starting from the most fundamental aspects of capitalist law and incorporating other aspects of the capitalist legal system in steps. For this reason I started with activities in the realm of
private law that help maintain the economic system. The next step is to incorporate public law into the analysis.

I begin with the observation that capitalist societies have proved remarkably flexible and adaptive. Innumerable rules and changes over time have occurred in every capitalist society. The law of America or England that prevails in the 1980s is obviously different from prevailing law in those nations 50 or 100 years before. Nevertheless, the essential legal relations and most derivative subrelations have persisted. The problem, then, is to show how the ideas developed thus far can embrace such change and the constant core. This task requires us to examine public law and politics in capitalist society. In doing so, we must confront the fact that many rules in the modern state conflict with the direct interests of the capitalist class. Nor can we take comfort in the thesis suggested by some that every rule in apparent conflict with capitalist interests is nothing more than a concession by the capitalist class designed to assure the quiescence of their enemies. Like the crude instrumentalism that preceded it, this perspective is contradicted by a fair look at the contents and operations of modern capitalist legal systems.

Let us start with a modified reiteration of Pashukanis' view that much of the law in a capitalist society is a reflection of generalized commodity exchange, which presupposes an atomized economy of individual units engaged in trading transactions with other units (Pashukanis, 1978: 85, 93-97). An economy of this sort is characterized by legal relations between individuals involving, for example, A entering into a contract with B and then perhaps suing B for a breach of that contract. A and B may be two businessmen, buyer and seller, employer and employee, or virtually any other pair of contracting parties. The abstractness of the essential legal relationship of contract can embrace any relationship with adverse interests, as Pashukanis observes. But just as the law both facilitates and is shaped by the pursuit of individual gain, which is inherent in a capitalist society, so too it can facilitate and be shaped by collaborative efforts directed toward the same goal. A and B might, for example, enter into a partnership and together contract with C to purchase goods for less than either could have purchased them alone or, without contracting, they might agree not to compete in the same market. The two-person case, whether it involves a contract or not, can, of course, be extended to almost any number of similarly situated individuals who perceive that their well-being will be enhanced
by extended collaborative efforts; for example, a trade association or a cooperative research venture.

Such collaboration produces interest groups, which are based upon the divisions in a capitalist society. Bukharin has outlined a number of dimensions along which divisions exist that commonly give rise to such groups. These include: (1) size (big business and small business), (2) policy interest (importers and exporters), (3) vocation (financiers and industrialists), (4) industry (insurance and commercial banking), (5) firm (A.T.&T. and I.B.M.). Intermediate classes (such as managers, bureaucrats, and professionals), transitional classes (remnants of old orders), and declassé groups outside the structure of production, distribution, and exchange may develop joint interests at variance with the interests of other groups (Bukharin, 1965: 276-92). Some of these divisions are more likely to be within classes than between them. Nor is the working class exempt from interest group fragmentation. For example, Marx expected the savings bank, designed to promote working-class saving and thrift, to “lead to a split between that portion of the working class which takes part in the savings banks and the portion which does not” (Marx, 1976: 427). But ties to the economic system, through savings bank deposits or other links, are not the only bases on which working-class divisions may arise. The Marxian framework can extend to the range of intra-class divisions that occur in real life, whether based on race, sex, religion, neighborhood, or some other dividing dimension. Nor is it surprising, given a Marxian framework, to find that group life mirrors the self-seeking life of the individual, for whom essential legal relations generate the central rules for the allocation of resources.

Groups, like individuals, may use the devices of private law to attain their ends. The collective bargaining agreement is a contract, just as is an individually negotiated wage agreement, and groups have the same control over their property as individuals have over theirs. In addition, groups, unlike individuals, are often able to induce the state to reallocate resources to them through legislation and/or administrative action. Indeed, groups often form for just this purpose. Thus, both public and private law are potential ways of advancing wealth in a capitalist society.6

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6 To treat private law as if it were completely eclipsed by public law in the day-to-day workings of a capitalist society, as some scholars have done (Tushnet, 1978: 99; Fraser, 1978: 167), is to seriously distort the larger picture. Indeed, most of a capitalist society’s daily transactions, such as sales, are covered by the mundane common law rules of the private law. To suggest, as
Public law, then, under capitalism is usually not a reflection of class divisions, although some public laws such as labor legislation or those governing the distribution of the tax burden may be. More typically, interest groups representing segments of classes employ available processes before courts, legislatures, and administrative decision-makers to gain advantages over other interest groups. For example, the history of federal and state banking legislation in this country is a history of conflict, victory, failure, and compromise among local, regional, and national commercial banks, credit unions, investment banks, etc. There can be many outcomes of such battles, and it is impossible in a few sentences to present a full-scale theory that explains the variety of outcomes in the numerous public policy areas in which such conflicts arise.

Several observations, however, are in order. First, in the name of the "public interest," laws can be enacted to fulfill any of the functions described by Habermas. For example, laws affecting monetary policy can be enacted to promote the economy. Such laws can originate from either interest group activity or the public-spiritedness of public officials. Second, groups from the economically dominant class in competition with other segments of the dominant class can ally themselves with groups from other classes, to whom concessions will have to be made. For example, domestic automobile companies and the automobile workers' union may align themselves against automobile importers. Finally, it is entirely possible in a democracy for groups representing segments of inferior classes to prevail frequently in their battles with segments of the dominant classes. Divisions within the dominant class, its relative lack of concern about a subject, the threat of cost-imposing lower-class actions (such as strikes) are among the factors that can lead to this result. Yet even such defeats are consistent with capitalist domination so long as the fundamental legal relations are not challenged.

Consider utility regulation as an example. Public utilities enter into large numbers of contracts with their subscribers, who are "free" to reject the service and provide alternatives (such as a solar home heating system). Sometimes a utility can offer various grades of service from which users can select. In these respects, the contract device remains intact and the essential legal relations remain unquestioned; contracts are

Fraser (1978) does, that corporatism, consisting of a grand alliance of government agencies, trade unions, and corporate organizations, has destroyed private autonomy is seriously misleading.
honored and the utility's ownership of its property is not challenged. However, a utility is often an area's sole supplier of an essential service and so is in a position to extract monopoly profits. To forestall this, consumers, including other powerful capitalist interests, demand legal protection. The usual solution is a law establishing a public utility commission. Such commissions are usually given the power to affect the terms of the contract or the uses of the utility's property, but they cannot destroy or transform the essential legal relations themselves. In other words, the regulations limit the discretion of individuals or groups to make certain choices in employing essential legal relations, derivative subrelations, and particular rules. These restrictions may be relatively tight, such as the requirement that a particular rate should be charged, or they may be relatively loose, such as the Federal Trade Commission's prohibition against false advertising, which precludes certain kinds of misleading messages without specifying what must be said. Whatever the restrictions, however, the essential legal relations are at their core respected, and those aspects of the legal superstructure that are isomorphic with elements of the economic base remain to foster the accumulation of wealth under capitalism even if the segment of the capitalist class that controls public utilities cannot take full advantage of the subrelations ordinarily derived from them.

Indeed, freedom to contract or deal with property has never been absolute. There have been illegal or unenforceable contracts and limitations on the use of property for as long as these legal concepts have existed. But the fact that there are rules, exceptions to the rules, limitations, and exceptions to the exceptions does not negate the conclusion that a capitalist society's fundamental operations are based upon a chain that leads from structure through essential legal relations to particular rules. This is the glue that holds a capitalist society together. Various interest groups are able to change aspects of their positions through the legal institutions the state provides. Sometimes these efforts focus on public law and at other times private law is used to establish particular rules or decisions. The outcomes of such efforts may make the mode of production more efficient, or they may make it less efficient. They may represent the effective actions of one group or another (Habermas, 1973: 53, 54). Each effort requires separate investigation, but they all operate within a framework of essential legal relations.
We have already seen that these essential legal relations, although part of the legal superstructure, express core economic relations. It is also important to note that they are incorporated into the political superstructure as well. While an analysis of the capitalist state is beyond the scope of this article, it follows from our discussion of essential legal relations that if they are embedded in the political superstructure, the state in a capitalist society is a state of the capitalist class, even when the class loses important political and legal battles to others. The essential legal relations under capitalism, inconsistently but on balance, serve to protect and further an unequal allocation of resources in society. A challenge to the essential legal relations means that the economic order is being fundamentally attacked.

X. CONCLUSION

This article is not intended to explicate what Marx "really meant" in the Preface or at any other place in his analysis. Instead, I have sought to employ Marxism heuristically and methodologically to draw connections between the capitalist economic system—in all of its variants—and law. Under this view, law does not stand or exist outside society, but this does not mean that legal history is nothing more than a reflection of economic or social developments. One may, consistent with Marx, acknowledge the relative autonomy of the numerous judges, administrators, and other policy-makers in our legal system and thus avoid the notion that law under capitalism is nothing more than the conspiratorial product of a ruling class. The perspective offered here recognizes and puts into context the numerous judicial and legislative decisions that are adverse to the interests of political rulers or business firms. From this perspective the many sharp divisions among legal decision-makers are the natural result of human agency. They pose no necessary problems for capitalism, for they do not preclude and, indeed, usually reflect agreement on the essentials. These essentials are part and parcel of the basic economic structure, and so long as the economic structure is well-established, accord on the essential legal relations will characterize legal action, and derived subrelations will reflect the essential relations in most instances. Thus, we have a framework for understanding the extent to which the economic system determines the actions of legal officials and the limits of their discretion.
The view developed here is obviously far removed from the reductionist economic determinism of which Marxism is not infrequently accused. It conceives, rather, a complex framework involving different levels of legal action (as measured by the distance from the structural base) and various mediating laws and concepts. It also recognizes that to understand the specifics of a legal situation, one must specifically investigate the problem under consideration, but it rejects an eclecticism that sees no ultimate organizing principles applicable to the diversity of legal events. Such principles, I have argued, may be found by attention to structure, as Marx used the term, and by careful analysis of the links to and within the superstructure.

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