Marx and Law

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There is no sense in which Marx can be described as just a legal theorist. He did not write any systematic works on legal science or jurisprudence; however, his observations on law are both immensely penetrating and contain an extremely subtle interweaving of philosophical, political, economic, and legal strands. Marx was also at the centre of many crucial intellectual and political debates of his time. In order to try to unpack some of these debates, elucidate his views on law, and retain some overall clarity, I divide my remarks into five sections, which will inevitably overlap. The sections covered are: the problems of discussing Marxist jurisprudence; the philosophical background to the analysis of law and the state; materialism, political economy, and law; base, superstructure, and the ideology of law; and finally, law, politics, and the state.

PROBLEMS OF MARXIST JURISPRUDENCE

There are a number of problems for any student of jurisprudence or politics trying to grasp Marx’s approach to law. First, there is the puzzling point that neither Marx nor Engels had a positive normative theory of law, crime or deviance. In fact, much of the time Marx appears predisposed simply to ignore the question of law as peripheral, or at least to treat crime as a symptom of the conflict within a class-based society. He certainly offers no clear encompassing definition of law. Marx’s jurisprudential thought is often premised upon a critique of law per se, and what he has to say tends to be overwhelmingly negative in character. This is fine if one’s purpose is ‘critique’ and nothing else, but it is a definite handicap if one wishes to say something more positive about the nature of law, law reform rather than its overthrow, or the future of law (especially if one believes that law has a future role in society).

A second problem relates to the sources for Marx’s observations on law. It has already been noted that Marx did not have a normative theory of law. It is also clear that what he does say about law, by way of negative critique, does not appear in any systematic format. There are works which begin to

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say something more systematic, like The German Ideology. However, Marx never allowed its publication in his lifetime and it is commonly dismissed (although not by all writers by any means) as either a work of immature juvenilia or a flawed piece of philosophical polemic which does not come up to the systematic and scientific standards of Capital. Marx, it is also commonly asserted, had intended to write a work on law and the state (possibly as an extension of Capital), but he never realized his ambition. Thus, in consequence, the writings and observations on law that we do have are incomplete and must be picked out from a diverse body of writings.

Marx's writings are in fact markedly eclectic and can be roughly divided into four often overlapping types: first, the early, more philosophically-inclined pieces, clearly more inspired by the German philosopher G.W.F. Hegel. Under this rubric would be included the Economic and Philosophical Manuscripts (1844), The Holy Family (1844), The German Ideology (1845/6), and The Poverty of Philosophy (1847). The second type of writing is the polemical pieces written for particular political objectives. The most famous of these is the Communist Manifesto (1847/8). The overt character of these polemical writings—despite their wide dissemination, immense influence, and popularity—is their simplification of issues and doctrines. This can be a problem in assessing what Marx actually believed, rather than what he needed to put forward for polemical thrust and cogency. The third group of writings relate to Marx's observations on particular historical events. Probably the most famous of these, and the most convoluted and ambiguous, is the 18th Brumaire of Louis Bonaparte (1852). The writings in this context employ Marx's immensely sophisticated method of close historical analysis, although the final upshot of such pieces has given rise to many hostages to fortune—especially over the theory of law and the state. The final group of writings settle upon his systematic economic theories. The most famous of these are the earlier Grundrisse (1857/8) and the later Capital (1867-85), which remained incomplete at Marx's death. In sum, Marx's observations on law must be, and usually are, picked out from these diverse writings. It is hardly surprising that there should be oddities, fierce contestation, and discrepancies over such fragments.

A related point to the diversity of the above writings is the fact that many commentators on Marx argue that there is a marked shift or break in his perspective. The break usually occurs between the 'younger' and 'older' Marx. The character of the shift, which was called the 'epistemological break' by the French Marxist, Louis Althusser, is between an earlier philosophically and morally-inclined Marx, clearly inspired by Hegel, and the mature Marx, focused on political economy and intent upon constructing an empirically-based social and economic science of history and society. This judgement on the distinction between the late and early Marx is often supposed to direct our attention to the late Marx and a consequent dismissal of the early philosophical Marx. In this reading, Marx's early interest in 'alienation' is superseded by a social scientific theory of economic 'exploitation'. The development of a clear vision of the early Marx was perhaps
partially hampered by the fact that the key early writings – the *Economic and Philosophical Manuscripts* – were not actually discovered and published till the 1920s. Marx certainly never contemplated their publication during his lifetime. Whether one takes the epistemological break seriously or not, there are undoubtedly changes in Marx’s perspective on many issues including law.6 These cannot be ignored by the student of Marx, although what one reads into these changes remains contestable.

Another problem concerns Marx’s intellectual relation with Friedrich Engels. There has been a strong tendency in Marxist writings to associate the two men closely with one pristine doctrine. It appears that in fact Marx’s definite turn to economics (political economy) was confirmed through his initial contact with Engels’ writings. As editor of the *Deutsch-Französische Jahrbücher* in Paris, in November 1843, Marx had received an article from Engels, entitled ‘Outline of a Critique of Political Economy’, which stimulated the economic turn in his own work. Their working relation began a year later in 1844.7 However, despite their collaboration on works like *The German Ideology* and *The Communist Manifesto*, it is far from clear that we should associate them, especially on questions of their philosophical beliefs or their subsequent ideas on law and the state. This point has been made by a number of scholars, although it is still far from resolved. It is clear, for example, that Marx did not formulate a lucid doctrine of materialism, whereas Engels clearly lays out such a doctrine, particularly in popularizing works like *Socialism: Utopian and Scientific* (1880), the *Anti-Dühring* (1885) and the *Dialectics of Nature*. Marx nowhere used terms like ‘dialectical materialism’ or ‘historical materialism’. Neither did he coin terms (which are relevant to the discussion of law) like the ‘withering away of the state’. This latter idea, again, was Engels’s terminology from the *Anti-Dühring*. Marx did not apply the notion of dialectics to nature itself. His belief remained firmly fixed in the social sphere of human emancipation. Engels was far more ambitious, some would say foolhardy, extending dialectics to the natural world.8 The ultimate consequence of Engels’s doctrine was a virtual re-enactment of an older form of mechanistic materialism resonant of the French Enlightenment, which Marx had attacked in his early unpublished work, the *Theses on Feuerbach*. Engels’s doctrines later became established in the writings of Lenin, particularly Lenin’s philosophical work *Materialism and Empirio-Criticism* and Plekhanov’s *Materialism Militant*, and subsequently it dominated much of the theoretical output of the Second International and the leading Marxist party of the time in Germany – the *Sozialdemokratische Partei Deutschlands* (SPD).9 However, Marx’s theory of knowledge, if it can be summarized, hung uneasily between a classical materialism and an idiosyncratic use of Hegelian idealism. One can overemphasize the differences between Engels and Marx; however, we ignore them at our cost. If we are trying to understand Marx, it is not wise to place too much reliance on Engels’s own personal output.

One final problem concerns Marx’s use of the concept of law itself. There are two terminological points to note here. The first concerns the German
word, Recht. It is virtually equivalent to the terms jus, droit or diritto, as distinct from lex, loi or legge. This distinction does not really work in English. Recht in German is not limited to law or jurisprudence but can encompass the issues of civil law, justice, right, and morality. In Hegel, the initial focus of Marx’s interest in law, Recht embodied the above themes, but also what he called the ‘ethical life’, the state and, ultimately, aspects of world history. In fact, the work on which Marx spent so much time in his early years, Hegel’s Grundlinien der Philosophie des Rechts, is sometimes translated as The Philosophy of Law, The Philosophy of the State and, more usually, The Philosophy of Right. It is important to bear in mind this ambiguity when considering Marx’s observations on law (as Recht); when Marx addresses law, it is not strictly parallel to English usage.

The above connects up with the second point, which is often confusing to audiences from the British or Anglo-Saxon legal traditions. Hegel’s work, referred to above, was, as much as anything else, a theory or philosophy of the state. This is encompassed, to some extent, in the broad use of the term Recht. Thus, the treatment of the state might be said, inclusively, to be also a treatment of law. This kind of approach resonates more with the Roman law and civil law traditions of continental Europe than with the common law tradition of Britain. However, it is worth taking note of this point since it throws a ray of light on some of Marx’s writings; namely, his critique of the state is to a large extent also a critique of law. One small biographical detail could be added here, which might add some substance to this point. When Marx was writing in a more reflective way on the state and law, he was in Germany and France. His early legal training had been in Germany (although he gave it up for philosophy) and he was reflecting and writing within the Hegelian genre. Much later in his life, in the late 1870s, when puzzling over whether to write more on law and the state, he had been living and working for a number of years in Britain, enough time to pick up on the peculiarities and idiosyncracies of the English legal tradition and its odd relation to the state. This might explain some of his later ambiguities, as opposed to his earlier certainties, on the state.

Finally, the interest in Marx on law, despite the work of the Soviet jurist Evgeny Pashunakis in the 1920s and 1930s, and Karl Renner in Austria, was not really a subject of wide-ranging debate until the 1970s. As Maureen Cain and Alan Hunt have commented:

the prevailing trend from the 1930s to the 1960s displayed an almost exclusive emphasis on the repressive or coercive character of law, conceived as the direct embodiment of the interests of the ruling class. In this conception law itself is unproblematic: the analysis of legal development or new legislation has the task merely of exposing the class interest contained in them.

What was discovered in the 1970s, presumably under the impact of the surge of interest in the Italian Marxist, Antonio Gramsci, was the conception of law as ideology and, in consequence, law as a crucial part of the intellectual hegemony of capitalist societies. In this sense, the more wide-ranging and
popular interest in Marx on law is a relatively recent development. It is thus very tempting, in dealing with this topic, to refer to the developments in Marxism itself to the present day. The major danger with this path is that the discussion can become wholly enmeshed in the recent material and Marx becomes a distant memory. I have tried to avoid this trap here. Although contemporary developments are not ignored, the principal focus is on Marx’s writings.

**THE PHILOSOPHICAL BACKGROUND TO THE ANALYSIS OF LAW AND THE STATE**

There are three points to note concerning Marx’s philosophical background which are relevant for his later project and his overall understanding of law. First, the premises for his critique of law are derived from his initial philosophical criticism of religion and the state. Secondly, his analysis of the conception of ideology and the ‘illusory’ character of bourgeois thought (including law) lies in early essays like ‘On the Jewish Question’. Finally, his first inkling of the economic roots to social and political thought can also be found in his early essays – particularly the *Economic and Philosophical Manuscripts* and his article on ‘Law on Thefts of Wood’ in the *Rheinische Zeitung* (1842). I take the first two issues as most significant. The last point, to a large degree, follows from the first two.

From the late 1830s, Marx had determined to get to know Hegel ‘from beginning to end’. Together with Bruno and Edgar Bauer, Arnold Ruge, Max Stirner, and Ludwig Feuerbach (the so-called young Hegelians), Marx studied Hegel’s works assiduously through the late 1830s and early 1840s. Feuerbach was the most influential figure in the group. Initially he had been a disciple of Hegel’s philosophy, and in some ways he never abandoned it. Feuerbach, however, did engage in a dialectical critique of Hegel – using Hegel’s own method to criticize him. Hegel’s definition of humanity through its thinking abilities, specifically through the notion of Spirit (*Geist*), is, for Feuerbach, one step short of reality – or, at least, it is inverted reality. Hegel explained humanity through consciousness (or mind); however, for Feuerbach, it is sensuous and materially-rooted humans who think, not some abstract consciousness or mind. The transcendental ego of Kant, the absolute ego of Fichte, or Hegel’s notion of Spirit (the great themes of German philosophy) were all seen by Feuerbach as sensuous human creations. Thus, the basis of Feuerbach’s critique of Hegel is that the latter was offering, unwittingly, an ‘esoteric theology’. Humans are not vehicles for Spirit (*Geist*); rather, humans create the notion of Spirit. In fact, for Feuerbach, humans create God in their own image. Thus, in Hegel, ‘What was a logic of Being becomes [in Feuerbach] a psychology of human concept formation’. Philosophy, in actuality, reflects human wants and needs.

This critique of Hegel’s ontology was directly related to Feuerbach’s equally important critique of religion in *The Essence of Christianity*. Hegel’s
philosophy is, in point, interpreted as the last speculative outpost of God. Speculative philosophy and religion needed to be led from the realm of mental abstractions into the realm of sensuous humanity. For Feuerbach, in essence, all ‘theology is anthropology’. The true object of religion is not God but idealized humanity. Religion is the alienated form of the individual’s recognition of his or her own nature. God is the creation of the human imagination, unknowingly idealizing itself. Thus, Feuerbach claimed that some radical demythologizing was needed. Love of God is really love of humanity in symbolic inverted form. Theology is kind of psychic pathology. The separation between God and humanity is really a separation within humanity itself. Religion is a form of alienation from our essential natures. The demythologizing was to be accomplished by the technique Feuerbach called ‘transformative criticism’, namely, the interchanging of the subject and predicate of propositions. For example, an understanding of God is not crucial for understanding humanity; conversely, an understanding of humanity is crucial for understanding the idea of God. The real subject is humanity, the predicate is God.

These arguments affected profoundly the thinking of the young Hegelians. Marx, particularly, was initially enthralled, but soon turned to his own critique of the young Hegelians, especially Feuerbach. In his Theses of Feuerbach, he argued that Feuerbach’s great achievement had been to bring holy ideas down to earth. However, he had retained an abstract materialism and theoretical humanism. What was needed was a practical humanism and a new understanding of materialism which took account of the social and economic reality. Philosophy must be moved away from mental abstractions and contemplation into the realm of social, political, and economic realities. Feuerbach was thus also subject to the demystification of transformative criticism. Practical and sensuous humanity, embroiled in economic and social realities, is the real subject, not theoretical humanity. This critique of Feuerbach also forms the basis for Marx’s critique of Hegel, religion and, finally, the state and law. It also led him to his crucial life project – the study of political economy.

Marx accepted, implicitly, one theme in both Hegel and Feuerbach. Philosophy is about emancipating human beings. History was imbued with teleological significance as to the growing possibility for and realization of freedom, although this theme become very shrouded in his later writings. Religion purported to be about emancipation; however, for Marx, again, the reality was inverted. As he stated: ‘The criticism of religion ends with the doctrine that man is the highest being for man’. Religion per se could not be overcome by simply drawing people’s attention to its inverted logic (with due respect to Feuerbach). For Marx, one had to grasp, critically, the social, political, and economic roots as to why people sought consolation in religion. A criticism of religion was, in essence, social and economic criticism. This exactly paralleled his criticisms of Hegel’s notion of the state.

For Hegel, humans were self-constituting and self-producing creatures. There was no sense in which we were simply the passive products of historical

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forces. For Marx, Hegel’s view was correct, but again the reality had been inverted. Hegel’s *Geist* (Spirit or Mind) was really labouring humanity. Hegel, for Marx, made the ‘exoteric esoteric’.¹⁹ Hegel had grasped the centrality of labour (self-production) but only in its mental form (in consciousness). Thus, Marx refers to Hegel’s philosophy as ‘concealed criticism that is still obscure to itself’.²⁰ For Marx, humans produce themselves by actual labour and through the ensuing social relations in the world. Thus, Marx moved from regarding Hegel’s philosophy as an esoteric psychology gradually to regard it as an esoteric economic thesis. Hegel’s philosophy of the state (and law) had a correct content but in an inverted and mystified form. Marx in fact treats Hegel’s *Rechtsphilosophie* as summing up German reality at that time (in its mystified form). As Marx put it:

The criticism of German philosophy of the state and of law which was given its most consistent, richest and final version by Hegel, is ... the critical analysis of the modern state and the reality that depends upon it."²¹

Hegel had argued that humanity and civil society were the product of the state. The state is seen to stand above the conflicts of society. However, for Marx, again the reverse is true. Individuals in civil society, embroiled in economic forces and classes, and hedged about by private property rights, produce the state which, of necessity, reflects differential and unequal property relations and powers. Abstract property rights are embodied in the state. The state exists to maintain this interest. The modern state gives people legal rights and freedoms, premised on the idea of humans possessing property. However, such property is of necessity premised upon the alienation and denial of such freedom to a large proportion of the population. As Marx observed, the critic must now grasp ‘the essential connection of private property, selfishness, the separation of labour, capital and landed property, of exchange and competition, of the value and degradation of man’.²² The logic of private property is the same as that logic of religion. As human beings alienate their essence into God, so workers alienate their essence into the production of goods. Workers, in receipt of wages, only secure a small proportion of what they produce. Thus, they alienate their essence into goods which others consume, use or embody in their private property – a property upheld by the state and legal system.

Moving now to the second point of this section, Marx’s early essay ‘On the Jewish Question’ deals, on the surface, with question of the repeal of legal disabilities for Jews in Germany. The essay is interesting on a number of counts; however, one point will suffice for the present discussion. Marx indicates that the illusions that were to be found in the religious consciousness could also be found in law. The basic point was that humans turned to religion in particular historical circumstances. Young Hegelians, like Bruno Bauer, had argued that the demands for *Jewish* emancipation precluded genuine emancipation, since the demand was formulated in religious terms – namely, *Jews*. The state, for Bauer, must abolish all religious categories. The secular state provided the real solution for Bauer. Marx responded to this by
arguing that religion *per se* was not the problem, but, rather, the state and legal system itself. Religion is an illusory (if crucially important) pathology, but it is a reflection of a broader ‘illusion’ pathology within the secular state. A secular state does not free human beings. Rather, the state embodies as many, if not more illusions than religion; illusions of secular states are structurally similar, and, in fact, related to religion. As Marx put it, in somewhat tortuous prose:

> We do not insist that they must abolish their religious limitations in order to abolish secular limitations. We insist that they abolish their religious limitations as soon as they abolish their secular limitations. We do not change secular questions into theological ones. We change theological questions into secular ones. History has for long enough been resolved into superstition: we now resolve superstition into history . . . We criticize the religious weakness of the political state by criticizing the secular construction of the political state without regard to its religious weaknesses.23

In short, for Marx, the political world of the secular modern state was as much a tissue of illusions as religion.24 Underpinning the modern state are the illusions about private property and commerce, and the legal structures which uphold them.

The final theme, with regard to his early writing, concerns his essay on the ‘Theft of Wood’ in the Rheinische Zeitung in late 1842. The ‘Wood Theft’ essay, as Marx later observed, was the first time that he saw clearly the socio-economic issues which underpinned law (viewed through the lenses of the transition from feudalism to capitalism). The common feudal and customary right of gathering wood was effectively being ‘privatized’ by commercial society. Rural poverty was itself the product of the redefinition of property as ‘private property’. In this sense, law was facilitating capitalism. Oddly, in this essay, Marx’s solution was a restoration of older customary rights (although a slightly odd use of them) against the new right of private property. As he put it: ‘We reclaim for poverty the right of custom which is not a local one but which is that of poverty in all lands’.25 It is worth noting, though, that many of Marx’s early writings do not envisage the abandonment of law or the state. He adopts, in fact, a quasi-natural law or customary law position (from a strictly secularist position), arguing, in essence, that certain newer laws are not really valid or real in the context of what real law ‘ought’ to be like – namely law ought to be, as Marx put it, ‘the positive existence of freedom’.26 It is also clear that he was not envisaging the abolition of the state; conversely, he anticipated a more radical democratic state upholding the fundamental rights and freedoms of the masses. In many ways these quasi-natural law themes and radicalization and democratization of the state do not disappear in his later writings; rather, they are submerged below the intellectual surface. The surface, in many later writings, becomes more positivist and economic in character; however, the underlying themes of human emancipation as a genuine need of human nature, the correct ways in which humans ‘ought’ to act towards each other, and the future structural character of society, still subsist, but certainly not in any easy or comfortable relation to the positivism.
MATERIALISM, POLITICAL ECONOMY, AND LAW

Marx was a materialist of sorts, although, as pointed out earlier, he never described himself as a historical or dialectical materialist. There are various senses which can be attached to the term materialism. Marx had no interest in materialism in the colloquial sense of a 'seeking after consumer goods' – which we might now call consumerism. Neither does he have much interest in mechanistic Enlightenment materialism, seeking to explain humanity via certain mechanical analogies – *l'homme de machine*. Neither strict physical materialism nor behaviourism were of any interest.\(^{27}\) Marx's concern with materialism must be set against his reaction to Hegel's idealism, as examined in the previous section. Put at its simplest, Marx wanted to insist that human beings must subsist (and labour to subsist) before they cognitively speculate or think a great deal about their condition. Our social and economic being is thus prior to our reflective consciousness. The material conditions of our lives form the true basis for both our cognitive life and our social and political structures. We can observe here the 'transformative criticism' at work again in the basic rudiments of Marx's thought. The 'subject' is not self-conscious thought, nor is material life the 'predicate': the converse is true. Subject and predicate must be transformed. It is important to bear this method in mind: namely, that Marx comes to his basic materialist conclusions from a philosophical direction. Marx does not suddenly 'see the empirical light' on some Damascus road or come to such conclusions from empirical observation. His route to such premises is philosophical.

One problem here is that even if we focus on Marx's particular type of materialism there are still distinct and competing versions of it. We might call these the stricter and looser versions. We will encounter parallels to this distinction in other areas of Marx's thought and there remains considerable debate as to where Marx's sympathies lay. The stricter materialism might be called 'unidirectional determinism'. Material conditions causally determine thought and political and social structures. This is the dimension that Engels, Lenin, Plekhanov, and Kautsky picked up on, and it reappears in structuralist Marxism, amongst other varieties in the later twentieth century. This materialism looks, and occasionally tries to act more like a natural science.\(^{28}\) In some more recent analyses of Marx it is connected to the idea of the 'epistemological break'; that is, the mature Marx is the 'scientist' and 'unidirectional determinist'.

The alternative looser materialism can be observed in the elusive Marxist doctrine of 'praxis' (where 'theory' and 'practice' have a symbiotic and reciprocal relation). The basic logic of a praxis argument denies the basic premise of the unidirectionality claim; that is, it asserts that reflective thought and consciousness (as embodied in philosophical, economic or legal thought) can actually affect our material conditions. We can accommodate our theory to our practice and vice versa. Put simply, human reflective thought has definite efficacy; it is not just an epiphenomenon of the material conditions of life. This form of looser materialism can be observed in some of Marx's
writings and in the subsequent Marxist tradition in writers like Antonio
Gramsci, Georg Lukács, and Karl Korsch. Such a looser materialism is also
more aware of the contestable nature of economic and social categories.

The particular form of Marx's materialism is premised on political
economy. The basic components of the doctrine can be stated as follows:
human beings must subsist in order to survive and in so doing they labour. In
labouring, humans use certain material technologies (crudely) or modes of
production. In working within a mode of production, whether in a medieval
rural context with a plough or within a nineteenth century factory with a
machine, humans come into relations of production, that is, relations with
other human beings within the productive process. Relations of production
crystallize into groups called classes whose relations are determined by the
particular form or mode of production. As forces of production change, so
do relations of production. In capitalism, for example, there are two
fundamental classes. Proletarian workers sell their labour for a wage.
Workers produce more than receive. The wage only provides subsistence.
The capitalist class sells the products of the workers to gain profit. Capital-
ism thus subsists by extracting labour value from its workforce. The interests
of the capitalist class necessarily conflict with those of the proletariat. Thus,
material conditions of economic life form the real basis to social existence.
Political and legal structures can only be understood via these material
conditions. Marx, in one of his more synoptic semi-autobiographical pieces
of writing, *Preface to the Critique of Political Economy*, called this whole
process the 'leading thread' of his studies.

It is worth remarking at this point that Marx's views on this 'leading
thread' have given rise to another debate which parallels the stricter and
looser senses of materialism. There are interactive and passive notions of
economic reductionism. On the passive view (which corresponds to stricter
materialism), law and the state emerge instrumentally from economic forces.
They have no independent efficacy or reality. The state and law are not
understood to arise from conscious human intention; rather, they reflect the
class struggle that takes place in the context of the economic base of society.

Many Marxists writers find themselves uniformly uneasy with this form of
passive reductionism. In this more sceptical reading, Marx's *Preface*
(mentioned above), as well as many works by Engels, are not regarded as
adequate representations of the totality of Marx's views. Antonio Gramsci,
for example, regularly dismissed this more passive view in the curt phrase
'ecologism'. For such critics, passive reductionism contains an impover-
ished and simplistic conception of the state and law. It does not grasp the
more interactive quality of the state and legal system, and it ignores the
conflicts between classes over authority within state. Neither does it explain
*how* the economic base actually 'determines' law. The actual causal mecha-
nism remains inchoate in Marx's writings. Marx's texts, it is argued, are rife
with potential for more interactive readings. However, the Marx of the
*Preface* could reply to this criticism by arguing that such a view is in
imminent danger of 'legal fetishism', where law is seen as both necessary for

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the existence of society and autonomous from economic or class factors. There is nothing unique about law in the passive reductionist reading. However, most exponents of interactionism would not want to argue that law has total autonomy; rather, that the law can, in certain circumstances, act upon economic life and can either facilitate or work against a particular mode of production.

The ambiguities over these various positions can be observed in Marx’s classic account of the transition from feudalism to capitalism. As commercial capitalism slowly develops at the economic base it, of necessity, erodes feudal relations. It is no use to capitalists that a workforce is tied by feudal bonds to a particular aristocratic landowner or piece of ancient property. In addition, communal land (or wood), which all can freely utilize as a common resource, is also deeply inconvenient for capitalism. Property, for capitalists (as in Marx’s observations in the wood theft article), must be privately owned and tradable. Labour must also be free of feudal ties in order to travel where the work is needed by capitalists. These processes were obviously facilitated by coercion and outright violence, as in many cases of enclosure; however, as Marx noted, law also expedited the whole process in developing sophisticated systems of property law, contract law, and tort. In creating a landless poor (‘free labour’) and a contractual private property-based law, the groundwork for capitalism was gradually laid. The problem is how to read these events. On the one hand, law could be seen (as in the interactive thesis) as semi-autonomous, providing intentionally the conditions for changes in the mode of production. In fact, it is arguable that law consciously constituted the integuments of a mode of production. This argument throws doubt on the unidirectional determinism and passivity thesis. On the other hand, law can be read as a coercive structure representing the actual dominance of the bourgeoisie of the means of production, but determined by the laws of the economic base. In this latter reading, law has no autonomy whatsoever. It simply and instrumentally reflects the economic base. Support for both lines of argument can found in Marx.

BASE, SUPERSTRUCTURE, AND LEGAL IDEOLOGY

The basic idea of base and superstructure follows neatly from the previous section. In fact, once again, we find similar disputes being echoed from previous sections. One theory sees a precise causal relationship. The other theory sees a looser tendency and more interactive quality in base and superstructure. This latter theory leads some critics to bewail even the use of terms like ‘base’ and ‘superstructure’. It is argued that it would be far better if we treated these terms as more or less useful metaphors, not referring to any empirical reality. As in many of Marx’s writings, half the problem here might simply be because Marx never really addressed the problem head on. The terms occur in certain writings, but Marx did not appear to have any inkling of how much significance was going to be placed on them by

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subsequent generations. The older instrumental causal account of base and superstructure sees a clear correspondence between laws and political institutions (superstructure) and the economic base. As Marx put it unequivocally in his *Preface to a Critique of Political Economy*:

With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic – in short, ideological forms in which men become conscious of this conflict... Just as our opinion of an individual is not based on what he thinks of himself, so we cannot judge such a period of transformation by its own consciousness; on the contrary, this consciousness must be explained rather from the contradictions of material life.56

For example, laws on land tenure in the feudal period (a superstructural phenomenon) changed markedly with the development of capitalism. The real foundation for these changes and the explanation of them would be sought in the actual change in the modes and relations of production – the material base.

There are a number of minor problems with the above view. First, it is not easy to see how the above thesis explains why certain types of law occur. For example, how, on the above model, would one explain factory legislation, which controlled the activities of capitalists? Alternatively, what of social welfare legislation or legislation which enacts progressive redistributive taxation? Admittedly, it could be replied here that such laws indirectly help capitalism by improving the condition of the working class and preventing revolution, while paying a minimum cost. Thus, despite appearances, such legislation aids capitalism: it is in essence still a business proposition. This counter argument might hold for some legislation, but what of other laws which prevent abuse to children, punish rape, or ensure the proper care of the mentally handicapped? What of laws which define the roles of an official in local or central government or, alternatively, traffic law? Surely it is not as easy to explain these as clearly causally related to the economic base of capitalism. Any attempt to do so would surely look very far-fetched. In other words, the instrumental thesis does not account for the totality of law.

Secondly, certain legal rules appear to be part of the relations of production, for example, contract law. The relations of production are held together by such contractual rules. They form a kind of social glue for such economic practices. The question arises, therefore, can we separate out contractual law and the relations of production? If the relations of production are constituted by legal vocabulary then there can be no clear determination of the superstructure by the base. Thus, for these, and many other reasons, a number of commentators have felt distinctly uneasy with the instrumental/causal base superstructure model.57 In fact, Marx did not use the model with any great frequency and late in life Engels also wrote a number of oft-quoted qualifying letters which appear to give a lot of ground to sceptics.58

As noted above, in the quotation from Marx's *Preface*, Marx often tended
to view ideology from a similar causal perspective. One way of viewing an important dimension of the superstructure is as the body of ideas of a society. Marx refers, in the above quotation, to the legal, political, religious, aesthetic, and philosophical ideas of a society. The quotation clearly takes a ‘reductionist’ and ‘instrumental’ view of ideology. Ideas are explained via their connection to the material base. Legal ideology is thus, once again, part of the consciousness of bourgeois society, and, as Marx clearly observed: ‘Just as our opinion of an individual is not based on what he thinks of himself, so we cannot judge of such a period of transformation by its own consciousness’. Thus, overt legal ideas and forms tells us virtually nothing substantive - they merely reflect deeper economic changes.\(^{39}\) It is understandable in this reductionist reading that Engels and others should thus have referred to ideology as the ‘false-consciousness’ of a class like the bourgeoisie. Lawyers might thus be regarded as professional ideologists or ‘waged hacks’ (in fact like most intellectuals, professional groups, and academics) for the bourgeoisie.

Subsequently Marx’s ideas came under certain pressures and a number of questions arose.\(^{40}\) In his early writings Marx appeared to be contrasting ‘ideology’ with ‘reality as practice’ – a form of philosophical materialist ontology. Liberal capitalism was in an equivalent position to religion as a distortion of the human essence. Later this contrast became ideology (as distortion) as against natural science (as truth or knowledge). The change in perspective here refers, once again, to the idea of an epistemological break in Marx’s writings. However, in both these views, it remained unclear as to what to include within the term ideology. In some writings it appeared to be widely inclusive – consciousness in general. In other writings he appeared to limit himself to economic and political ideas. The question arose at the time (which is still unresolved) as to whether natural science was part of ideology or was wholly distinct. Marx also did not explain, as mentioned earlier, the precise mechanisms of determinism. For example, it is not clear (taking A as the economic base and B as legal ideology), whether ‘determine’ means that A causes B, tends to affect B, or sets parameters to B, or alternatively, whether there is a symbiotic relation of A to B.\(^{41}\) In strictly practical terms, such corrosive ambiguities do link up to quite ordinary questions on legal activity. As Hugh Collins observes: ‘The question is whether a judge follows instrumental considerations with a class character or operates a discrete mode of reasoning.’\(^{42}\)

Marxists have gone on struggling with the concept of ideology. Some, like Gramsci, found inspiration in ideas of ‘relative autonomy’, which allows some leeway for ‘a discrete mode of legal reasoning’. In Gramsci’s thesis (which for some is present in Marx’s writings like the 18th Brumaire), domination under capitalism is not simply achieved by coercion, but, subtly, through the hegemony of ideas. The ideology of the ruling class becomes vulgarized into the common sense of the average citizen. Power is not just crude legal force, but, conversely, domination of language, morality, and culture. Laws, for example, become internalized within the consciousness of
each citizen. The masses are quelled and co-opted by this internalization of ideas. The hegemonic ideas become the actual experiences of the subordinate classes. Bourgeois hegemony moulds the personal convictions, norms, and aspirations of the proletariat. Gramsci thus called for a struggle at the level of ideology. Organic intellectuals situated within the proletariat should combat this by developing a counter-hegemony to traditional intellectuals upholding bourgeois hegemony – which might be considered as the basis of a credo for critical legal studies. In sum, this perspective does not consider law as just instrumental. Law does not necessarily uphold the interests of the ruling class and it is not simply determined by the economic base; in fact, it may have some counter-determining role on the base itself. These themes will be pursued more intently in the final section.

LAW, POLITICS, AND STATE

One view of the state and law, which predominates in Marx’s writings, is that they are a condensation of the economic interests of the dominant class. The state is thus viewed as the ‘executive committee to manage the affairs of the bourgeoisie’. The state acts as its oppressive agent in civil society, suppressing proletarian interests in favour of capital accumulation. The personnel of the state owe allegiance to one particular class – the bourgeoisie. Lawyers would be viewed as waged lackeys of the bourgeoisie. Law is part of this oppressive mechanism and embodies the ideological mystifications of bourgeois intellectualism. The bourgeois capitalist class dominates political power through its domination of economic power. This is the more traditional view of the state, epitomized in The Communist Manifesto. As Marx stated unequivocally in the latter work:

"Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class."43

The above argument is a form of class reductionism. The bourgeois state and legal system are class-based phenomena. Class, for Marx, refers to large social groups linked together in certain social relations within a mode of production. Each class receives differential rewards, power, and status. Relations between classes tend to be conflictual. Within the instrumental perspective, the state and legal system are seen to condense the interests of one class. The state is not a representation of any collective good or impartiality. It is, rather, integral to certain specific economic interests in society. Class interests are seen to manage the state apparatus in the interests of that class – the bourgeoisie in capitalist society. The history of states is therefore subsumable under class interest. Marx tended, in many writings, to interpret nineteenth-century legislation, particularly in Britain, in such class terms. For example, the passing of the Reform Bill and Ten-Hours Bill, and
the repeal of the Corn Laws, were seen as aspects of the economic conflict between the bourgeoisie and landed aristocracy.

The above view reflects dolefully on a number of issues. First, there does not appear to be any difference between a democratic rule-of-law constitutional state (Rechtsstaat) and an unconstitutional, undemocratic despotism. Both are simply exploitative class-based entities. The former state simply shields its basic exploitative character more successfully, particularly under guises like the 'rule of law'. Secondly, both the 'general' rule-of-law principle and 'particular' property, contract or criminal laws, are simply there to buttress the property owners of capitalism. The rule of law is a typical example of legal fetishism, namely, giving law a false autonomy from the economic and class base of society. In times of high productivity, the constitutional capitalist state will give the appearance of some concern, via state spending, but it will show its true colours during periods of economic crisis. The first cuts will always be to the welfare of working people. The rule of law is thus an elaborate confidence trick. Thirdly, Marx suggests that the so-called equal rights of liberal states have grossly unequal effects. The rights of human beings are in reality the rights of bourgeois men in civil society. They protect individual capitalists in their exploitative practices and they protect the unequal economic results of such practices. Rights are associated with individuals who 'own' them in order to protect private interests. Rights thus shield the basic inequalities and exploitative practices of bourgeois culture. Bourgeois culture ignores material inequalities and slavishly adheres to formal legal, moral or political equality of rights. Marx found this whole scenario profoundly objectionable.

Equally, from the same perspective, the justice that we observe in liberal societies is another aspect of the ideology of capitalism. It concentrates minimally on how goods might be distributed (if it gets as far as distributive justice) and ignores the massive inequalities implicit in the production process itself. In other words, it shuts the stable door after the capitalist horse has bolted. Justice is not a virtue for communists. Marx thus quite explicitly takes an anti-justice and anti-rights stance. With genuine communism, there would be no classes, no coercion, no conflict, and no private ownership; in consequence, there would be no need for justice or right claims. If there is abundance and communal ownership, then there is no reason for principles of allocation or any allocating or adjudication mechanisms. In sum, Marx objects, in this reading, to the whole notion of the juridical legal state as a complex sham. As law is integral to the idea of the state in Marx, so the anti-statist stance of communism implies the abolition of law.

The traditional account above is not without some internal ambiguity, particularly over notions like 'the dictatorship of the proletariat'. This latter doctrine envisages the state as not so much a negative, coercive, backward-looking institution, as rather an instrument of positive revolutionary change utilized for the benefit, ultimately, of humanity (even if it is still viewed as a transitional entity). Marx's own qualified fervour for the state can be observed, even in Capital, where he remarked enthusiastically on the work of
the Factory Inquiry Commission in Britain, specifically the work of Leonard Horner, as rendering ‘undying service to the English working class. He [Leonard Horner] carried on a life-long contest, not only with the embittered manufacturers, but also with the Cabinet’. Marx later commented, with evident relish, that British manufacturers compared the factory inspectorate with revolutionary commissioners of the French National Convention. However, this was hardly a negative coercive vision of a class-based state functioning only in the interests of the bourgeoisie.

The stricter class view of the state and law also suggests that if there were no class there would, in turn, be no law and no state. Class conflict is the prerequisite of the state. This view was later crystallized in Lenin’s work, The State and Revolution. This idea, in turn, gives rise to the idea (initiated by Engels and carried on by Lenin, although many would contend it was also present in Marx) that the state and legal order will ‘wither away’. In this sense a communist society would be stateless and lawless (in a strictly descriptive sense). Thus, from the standpoint of a strict materialism, the state is not a major player. The end result of this looks very much like communist anarchism, although Marx himself argued fiercely against such a conclusion and showed only vitriolic contempt for anarchists like Proudhon and Bakunin. However, Marx never resolved this issue of the relation between communism and mainstream anarchism.

However, the class reductionist and instrumental perspective does not represent the totality of Marx’s writings. Let us take the question of class first. Class, in certain works, is seen as more complex, fragmented, and containing fractions with no overt connection to political or legal domination. The state and its legal system, in this reading, clearly does not embody the interests of a ruling class. In addition there can be, as Marx demonstrated with great verve in the 18th Brumaire, intra-class conflict between fractions. Marx mentions four fractions within the bourgeoisie who often conflict: landed property, the financial aristocracy, the industrial bourgeoisie, and commercial bourgeoisie. In addition, the lumpenproletariat are kept separate from the proletariat, and the petty bourgeoisie from the peasantry. As one commentator has remarked, ‘the recourse to “fractions” of classes . . . indicates that . . . “class” is not a sufficiently precise concept to be of value in explaining particular events’. Law, in this fraction perspective, can actually become a ‘site of class struggle’. Laws are therefore not always oppressive in the interest of one class. In fact, many laws can benefit the working class, for example, factory legislation. Certain laws also result from pressures from multifarious groups outside social classes. In addition, the notion of class remains deeply ambiguous since Marx nowhere explains its precise relation to property ownership.

The doubts over the relation between class and state, outlined in the 18th Brumaire, led Marx to suggest that in the conditions that pertained in France in the period 1848–50, the state did not represent any bourgeois fractions, or even the bourgeoisie in general. In fact, Marx contends that the state and law may work against the interests of the bourgeoisie. This effectively under-
mined both the idea of the direct synonymy of ‘class’ to ‘law’ and ‘state’, and also the necessity of class for analysing the state (although both these views are strongly maintained by Marx in *The Communist Manifesto*, amongst other writings). It is these qualifying arguments of Marx which enabled the development of what is now called ‘state autonomy theory’, which has powerfully shaped late twentieth-century Marxist studies. The theory, in varying degrees, sees the state and law as a factor of cohesion, a site of struggle between fractions of classes, and an institution which may even regulate class conflict. The basic point is that legal reasoning takes on a relative autonomy from the economic base of society. It is not totally to be explained via modes or relations of production.

This relative autonomy thesis might make us consider anew the curt dismissals of notions like the rule of law. Certainly a number of recent commentators have picked up on this theme in Marx, suggesting that the theory of unidirectional determinism of base and superstructure does not really work for explaining the nature of law itself. Laws are actually integral to certain types of relations of production. E.P. Thompson, following this line of thought, has spoken of law in eighteenth-century England as ‘deeply imbricated within the very basis of productive relations, which would have been inoperative without law’. He continues that we cannot ‘simply separate off all law as ideology, and assimilate this also to the state apparatus of a ruling class’. Taking on board the Gramscian thesis of ideological hegemony being a sphere of struggle, Thompson contends that disputes are fought out in the sphere of law. Law certainly still expressed class power; however, part of the success of legal ideology itself was its appearance of impartiality. As Thompson notes, law ‘cannot seem to be so without its own logic and criteria of equity; indeed, on occasion, by actually being just . . . even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just’. The rhetoric was not therefore empty, even if it was still rhetoric. Semi-autonomous legal logic was thus often used against dominant groups – which was precisely a central aspect of Marx’s argument in the *18th Brumaire*. Thus, for Thompson, law does not equal raw class power. It was certainly involved in class power and it redefined property rights in undermining feudalism, but its focus was not *exclusively* on class interest. Its own logic and rhetoric gave it a partial autonomy which inhibited, in some cases, the dominant groups. It was also a site of struggle between fractions of these dominant groups. As Thompson concludes, such a notion of the rule of law is markedly different from arbitrary despotism. It is, in fact, he notes, a ‘cultural achievement’.55

The effort to redeem Marx from his anti-statist and anti-law stance, via some notion of relative autonomy, has also had other defenders. Some critics have found in Marx’s early writings a number of themes which add support this vision. For example, in one of his early writings, Marx speaks of law as ‘the positive, bright and general norms in which freedom has attained to an existence that is impersonal, theoretical and independent of the arbitrariness of individuals. A people’s statute book is its Bible of freedom’.56 He also
makes favourable noises, at points, about customary law established over
time, as against the new laws of the bourgeoisie. Others have noted, with
surprise, that Marx draws distinctions between 'real' and 'unreal' law. For
example, on the same page of the article referred to above, Marx speaks of
law becoming active:

as soon as it is transgressed for it is only true law when in it the unconscious natural law
of freedom becomes the conscious law of the state. Where law is true law, i.e. where it is
the existence of freedom, it is the true existence of the freedom of man. Thus laws cannot
prevent man's actions, for they are the inner laws of life.

Paul Phillips remarks on this point that: 'The significance of this distinction is
that it posits the existence of an order superior to that of mere man-made law
and, to that extent, it is a Natural Law Theory'.

Marx, even in his later writings, appeared to believe that there is a
condition of freedom and wholeness for human beings, where their real
natures will flourish. There is, as one critic has put it, a 'myth of trans-
parency' in Marx (as in Hegel) - this is 'the vision of a society in which
something "standing behind" the set of available social roles and relations . . .
will be revealed in a social order which will have become "obvious" to the
participants'. This notion of positive freedom, wholeness, and perfectibility
behind the veil, is both implicit in the discussion of alienation (in the earlier
writings), and restlessly present just under the surface of the later discussions
of exploitation and communism. This vision of freedom is subtly linked to
Marx's strong (if unstated) communitarianism, namely, his deeply-rooted
belief that humans are social creatures and can only develop freely within a
particular type of community. This is the community which is distorted and
lost in capitalism and will be recovered in communism. Humans are meant to
develop historically toward such a society. Marx did not like to be associated
with such a view, since it smacked of romantic utopianism. However, it is
undeniably there throughout the corpus of his writings.

Alienation is a prime example of such perfectibility lost and regained. The
notion developed initially in a theological context. Humans were alienated
from God through their sin. In Hegel, the alienation is philosophical: spirit
(or mind) externalizes itself in the world. It becomes alien to itself. The task
of thought is to overcome the self-alienation of spirit, to perceive itself at
home in the world. Overcoming alienation is realizing that the world is not
alien to our thought. For Feuerbach, however, the real alienation is that
human beings have placed their essence into either God or the Hegelian
Spirit. To overcome alienation is to transform the subject and object - to
realize that God is idealized humanity. For Marx, on the other hand,
alienation takes on a number of subtle forms. The basic idea is that human
alienation is more immediate and practical, and subsumes all the other
notions. In discussing the topic, Marx speaks initially of alienation through
labour. Labour creates capital and capital escapes the control of labour and
takes on a supposedly independent existence, which in turn dominates the
original producer. Workers thus find they are alienated from the product of
their labour. Labour, in this capitalist context, is no longer free and creative. It is necessary for subsistence and thus exercises alien compulsion over the worker. In consequence, workers are alienated from free creativity (which is the true nature of human beings) and they are thus also alienated from their fellow human beings. Overcoming human alienation implies ultimately overthrowing the economic and social forms which generate the loss of reality and the self. The solution to the riddle of history and human alienation is communism.\textsuperscript{62} There is strong sense here of a definite underlying human nature, with certain specifiable needs, which can flourish under a specific type of community, which recognizes certain ‘natural laws’, not necessarily as overt imperatives from some external authority, but more as natural non-coercive norms derived from reason.

Despite Marx’s appearance as an anti-law theorist, some writers have claimed that it is possible to identify a communist theory of law and justice, and also, possibly, of state (given Marx’s early interest in a radical democratic participatory state).\textsuperscript{63} In certain writings, particularly \textit{The Critique of the Gotha Programme}, Marx does indicate that there would be a principle of justice under communism – ‘from each according to his abilities, to each according to his needs’.\textsuperscript{64} Such a notion of justice would presumably prevent unequal access to the means of production and also prohibit alienation and exploitation. It would also respond \textit{distributively} to human needs – although Marx leaves the concept of ‘need’ fairly open. Needs for social relations, satisfying labour, and the like, move well beyond physical subsistence. It is difficult not to consider some of Marx’s needs as ‘wants’ or ‘interests’, which are surely markedly different notions.

Tom Campbell, amongst a number of recent theorists, believes that we can reconcile Marx’s historicism, and aspects of a looser materialism, with a belief in communist justice and the moral superiority of such a society. He distinguishes a formal from a material notion of justice. The former is understood as procedural adherence to rules, the latter concerns the justice of the rules themselves. Campbell suggests Marx moves between these two senses. If justice is simply about formal procedures, then it is internal to law and the state. Therefore the abolition of the state will mean the abolition of law and justice. However, if justice concerns the content of the rules, then it is concerned with social norms which validate rules and will not necessarily disappear with the abolition of the state. Justice, for Campbell, can therefore be said to be about the content of non-coercive social norms. This claim frees justice from coercive force – although it is not clear in this argument whether social norms are the same as laws. Neither is it at all clear what non-coercive rules would look like in practice or whether they could function at all. The upshot of this argument, for Campbell, is, therefore, that socialist legality is possible, ‘as long as there are socially recognised rules which are authoritative within a territory and which are applied by specialist bodies with responsibility for their interpretation and adjudication in relation to particular cases’.\textsuperscript{65} Campbell suggests that a similar argument can be made out for socialist rights. The binding quality of rights will be dependent on willing
acceptance rather than coercion. Thus, 'if part of formal justice involves treating individuals according to their rights, then we have a working tie-up between quasi-juridical conceptions of rights and justice which have potential application to socialist societies'. Interestingly, the notion of justice, law, and rights deployed by Campbell sounds remarkably like a version of secularized natural law (which we can clearly observe in Marx's early essays and, as I have maintained, was also behind his later writings).

CONCLUSION

Marx's conception of law is not easy to summarize for reasons that have been spelt out here. One major difficulty is, of course, the fragmentary nature of his writings and the fact that we do not have a systematic treatise on legal science or philosophy to focus on. In addition, there are often subtle changes in perspective which mark stages in his intellectual career. Some commentators on Marx make a great deal of these, trying to direct our attention exclusively to either the older or younger Marx. My own reading of this debate is that Marx worked his way towards his fundamental premises on political economy -- which subsequently became the 'guiding thread' of his life's work -- with philosophical and ethical tools. His decision to concentrate on the particular processes within the economy of capitalism was clearly derived from this philosophical critique. This philosophical element underpins all his later work.

I have also contended that there are powerful ethical themes which run consistently through his work which can be observed in his ideas on alienation and communism. His sporadic normative reflections on law appear to reflect these themes. As such, I have contended that there are aspects of a secular natural law position present in Marx. Partly because of the subtle changes in perspective, there are also a considerable number of unresolved tensions in his work. For example, Marx's attraction to a vigorous determinism and materialism, which was more fully utilized by Engels, does not rest easily with underlying themes of ethics, praxis, and positive freedom. This tension will remain unresolved since there are unequivocal examples of Marx's adherence to a much more committed determinism and materialism, as much as there are also clear examples of his ethical interests. This tension affects the whole manner in which we can approach Marx over the question of law. On the one count, there is the more determinist perspective which sees law as totally unproblematic -- an oppressive class mechanism of the bourgeois state which is determined by the economic base of society. However, there is also Marx's early admiration for a severely reformed and democratized form of Rechtsstaat. There is also the question of his natural law sentiment, mentioned already, and the point that a number of more recent theorists believe that a case can be made out for a theory of communist justice, rights, and legality in Marx.

However, even if it is agreed that Marx did have a normative theory of law,
there still remain a number of related difficulties. Many writers might now contend that his analysis of class exploitation misses the fact that many groups in society (women, racial minorities, the handicapped, the old, and the growing underclass) do not fit into any conventional class analysis. They are exploited and they have needs but they do not fit into the Marxian framework of the exploited (namely proletarian male workers). Many laws are also fostered by such pressure groups which do not fit into any orthodox accounts. In this sense, it might be contended that Marx's theories on society have a somewhat dated character. They relate closely to the cultural structures of late nineteenth and early twentieth century industrial societies. The notion of law deployed in Marx's theory is hampered to a large degree by some of the materialist aspirations of nineteenth century science and social theory, as well as the millennial yearnings of sections of the late nineteenth century industrial working class. None the less, Marx's theory is (as many theorists note) rife with potential, and the future may see an efflorescence of interest as theorists, in the new century, seek ways to deal with the legacy of rampant market-orientated liberal individualism which has dominated the final decades of the twentieth century.

NOTES AND REFERENCES

1 For biographical information on Marx, see I. Berlin, Karl Marx (1973) or David McLellan, Karl Marx, His Life and Thought (1973).
2 'Nowhere did either [Marx or Engels] . . . take law as a direct object of their study and writing', Maureen Cain and Alan Hunt, Marx and Engels on Law (1979) ix; see, also, Hugh Collins, Marxism and Law (1984) 9.
3 Another work which might be included here is his early critique of Hegel's political philosophy, Introduction to a Critique of Hegel's Philosophy of Right (1843/4), see Karl Marx, Hegel's Philosophy of Right and Marx's Commentary, ed. H. Kainz (1974). See, also, Karl Marx, Early Texts, translated and edited by David McLellan (1971) 115-29.
5 For Althusser, the epistemological break describes 'the leap from the pre-scientific world of ideas to the scientific', see glossary of terms in L. Althusser, For Marx (1969) 248.
6 Certainly in the early pieces of the 1840s period Marx accepts the value of law as a positive contribution to freedom within a radical democratic state. He describes law as the 'positive existence of freedom' within one of these essays, see K. Marx, 'Debates on the Freedom of the Press and the Publication of the Proceedings of the Sixth Rhenish Parliament' in McLellan, op. cit., n. 3, p. 36. By the time of the Communist Manifesto, law has simply become part of the ideology of capitalism. This might be called a purely instrumental account of law. In the 18th Brumaire of Louis Bonaparte, Marx expresses greater ambivalence: law is not exactly the positive existence of freedom, but neither is it just the efflux of capitalism. Law is a site over which fractions of classes struggle. It can also work against capitalism and in the interest of working people, as in the English factory legislation. In sum, I do not think that there is any precise break in Marx's writings; however there are subtle and unresolved alterations of perspective which do not necessarily represent progress or maturity in his thought.
7 On the outline and their subsequent relation, see Terrell Carver, 'Marx – and Engels's 'Outlines of a Critique of Political Economy'' in (1983) IV History of Political Thought 3;

As one scholar noted: 'Engels says in the Dialectics of Nature not only that matter historically preceded spirit, but also that it is the cause and the source of the evolution of consciousness. It became commonplace and fashionable to credit Marx with such a reductionist view which sees in spirit a mere biological by-product of matter. Engels tried to leave an escape clause by stating that the 'ideological spheres' can re-act on their own socio-economic causes; but this formulation does not basically change the systematic role of matter as the prime mover.' S. Avineri, The Social and Political Thought of Karl Marx (1968) 66.

id., p. 66-7. For an impatient Marxist response to Engels, see Lucio Colletti, Marxism and Hegel (1969) ch. 3. For a more philosophical treatment of the consequences of these ways of reading Marxism, see Charles Taylor, Hegel and Modern Society (1979) 140 ff. For a recent concise history of the German SPD and its doctrines, see S. Miller and H. Pottthoff, A History of German Social Democracy: From 1848 to the Present (1986).

G.W.F. Hegel, The Philosophy of Right, translated by T.M. Knox (1971). English enthusiasts (and detractors) of Hegel made clear what they considered Hegel's text to be about. In their various attempts to outline their support or criticism of Hegel, they adopted titles like Bernard Bosanquet's The Philosophical Theory of the State (1899) or L.T. Hobhouse, The Metaphysical Theory of the State (1918).


This partially explains Paul Phillips's point that 'one noteworthy aspect of many of the early works is that in them Marx uses the concept of 'the state' much more frequently than in his later works'. However I would not necessarily share Phillips's puzzlement that Marx leaves 'law' as a somewhat imprecise expression to cover almost any output of the legislature and perhaps also outputs of the administration'. Paul Phillips, Marx on Law and Laws (1980) 21. Marx's more frequent use of the term 'state' in his early writings is explained by the fact that his focus was on Hegel (as Phillips notes), and further that the notions of both the state and law are both broader and more integrated in European jurisprudential thought than in British legal traditions. There is more of an ambiguity about the notion of the state within the common law tradition. In the common law tradition law is not so much an emanation of the state as something which relates to established customs and precedents of a community which are practiced in the courts and recognized by executive authorities.

Cain and Hunt, op. cit., n. 2, p. xi.

Phillips, op. cit., n. 12, p. 6.

Marx Wartofsky comments: 'In an important sense, Feuerbach remained a Hegelian all his life. The unifying theme of his work was the progress of human consciousness, the unfolding self-awareness. And it is Feuerbach himself who recognises that Hegelian philosophy established the form of this development and suggests the mode of progress.' Marx Wartofsky, Feuerbach (1977) 141.

id., p. 193.

As Marx states in Thesis VI: 'Feuerbach resolves the religious essence into the human essence. But the human essence is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations.' K. Marx, Theses on Feuerbach in Karl Marx and Friedrich Engels, The German Ideology and other writings, ed. C.J. Arthur (1970) 122.

K. Marx, Towards a Critique of Hegel's Philosophy of Right: Introduction in McLellan, op. cit., n. 3, p. 123. In a longer quotation, earlier in this same text, Marx comments 'man makes religion, religion does not make man. Religion is indeed the self-consciousness and self-awareness of man who either has not yet attained himself or has already lost himself again. But man is no abstract being squatting outside the world. Man is the world of man, the state, society. This state, this society, produces religion's inverted attitude to the world, because they are an inverted world themselves. Religion... is the imaginary realization of
the human essence, because the human essence possesses no true reality. Thus, the struggle against religion is indirectly the struggle against the world whose spiritual aroma is religion' (pp. 115–16).

19 K. Marx in Kainz, op. cit., n. 3, p. 47.
20 K. Marx, Economic and Philosophical Manuscripts in McLellan, op. cit., n. 3, p. 163.
22 K. Marx, Economic and Philosophical Manuscripts id., p. 134.
23 K. Marx, On the Jewish Question id., p. 91.
24 The other fascinating theme in this 'Jewish Question' essay is worth mentioning since it reinforces Marx's point that religion embodies structurally important themes which parallel politics in the state. Marx asks what Jewishness symbolizes within Christian society. It implies, Marx suggests, the worship of money. As he states: 'What is the secular basis of Judaism? Practical greed and selfishness. What is the secular cult of the Jew? Haggling. What is his secular god? Money' (id., p. 110). Judaism is, in fact, he maintains, a veiled form of what Christian commercial society actually is: 'The imaginary nationality of the Jew is the nationality of the merchant, of the money man in general' (id., p. 113). Because Christian society cannot admit the true nature of commercial society to itself, it projects what it hates in itself onto Judaism. Judaism becomes the hated objectification of what Christian society actually hates in itself. As Marx put it: 'Christianity is the sublime thought of Judaism, Judaism is the vulgar practical application of Christianity' (id., p. 114). Money, as the essence of Judaism, and thus Christian society, commodifies everything. Money is thus 'the alienated essence of man's work and being, this alien essence dominates him and he adores it' (id., p. 112). We can see here again the transformative criticism at work. Apart from Marx's startlingly astute dissection of the 'unconscious' of commercial society, we can also see very clearly here Marx's assertion of the structural overlaps between religion, politics, and economics.

27 To some extent, Engels drifts into this category, in writings like The Dialectics of Nature. Whether he really always believed it or not, Engels certainly perpetrated some of this view, for example, in his 'Speech at Graveside of Karl Marx', when he stated that Marx's discoveries of laws of political economy and history could be compared with Darwin's discoveries of laws in evolutionary biology, see K. Marx and F. Engels, Selected Writings (1968) 435. See comments on this by Collins, op. cit., n. 2, p. 4 ff.
28 This same argument, insisting that Marx was offering a political theory rather than a science of society, is still being reaffirmed in certain texts, see, for example, Barry Hindess and Paul Hirst, Mode of Production and Social Formation (1977). They argue, for example, that law can be part of the conditions of existence of the development of the capitalist mode of production.
29 There are a number of problems with this whole argument, namely, that forces or modes of production determine relations of production. Technology, to some degree, is dependent upon the intellectual insights of inventors — thus, the separation that Marx appeared to want to make between material forces and intellectual life looks problematic. There are a number of other problems here which would take too long to discuss; see, for example, S. Lukes, 'Can the base be distinguished from the superstructure?' in The Nature of Political Theory, eds. David Miller and Larry Seidetrop (1983). By far the most sophisticated attempt to reformulate and answer many of the critics of Marx is G.A. Cohen, Marx's Theory of History: A Defence (1978).
30 The full quotation from Marx reads as follows: 'My investigation led to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material

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conditions of life, the sum total of which Hegel... combines under the name “civil society”; the anatomy of civil society is to be sought in political economy. The investigation of the latter, which I began in Paris, I continued in Brussels... The general result at which I arrived and which, once won, served as the leading thread in my studies, may be briefly formulated as follows: in the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structures of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of consciousness. The mode of production of material life conditions the social, political, and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being determines their consciousness’, K. Marx, Preface to the Critique of Political Economy in Marx and Engels, op. cit., n. 28, p. 182. For discussion of the significance of this quotation, see Terrell Carver, Marx’s Social Theory (1982).

32 There are strong echoes of the economic reductionist thesis in the work of the Russian Marxist Pashukanis - The General Theory of Law and Marxism, see P. Beirne and R. Sharlet (eds.), Pashukanis: Selected Writings on Marxism and Law (1980). Pashukanis saw the starting point for any understanding of law as the economic conditions in which social relations take on a legal character. Law in this context ‘is fundamentally a bourgeois form of social regulation. The fetishized form of legal rights and obligations becomes universal only with the development of the generalized commodity exchange that accompanies capitalist commodity production. Law is bourgeois because it reflects the form of this exchange... The subject of law is none other than the abstract commodity owner elevated to the heavens’. Introduction, Beirne and Quinney, op. cit., n. 4, p. 21; see, also, P. Beirne and R. Sharlet, ‘Pashukanis and Socialist Legality’ in the same volume. The above thesis led Pashukanis to suggest that there could not really be a proletarian or socialist law. If commodity exchange is abolished, it would appear that law also would be abolished (although he did draw a distinction between ‘technical rules’ and ‘legal rules’ and assumed that some technical rules would remain with socialism). However Pashukanis’s thesis did not go down well with Stalin and he was an inevitable victim of the purges of the 1930s.

33 ‘The source of the major problem in the history of Marxist theory has been and remains the tendency to elevate the simple reductionist thesis into the substance of Marxist social theory.’ Cain and Hunt, op. cit., n. 2, p. 63. They argue in their introduction that it is, in fact, a “travesty” and “naive” to argue that Marx has an economic theory of law in which law is said to embody and reflect economic interests’ (p. xiii). Collins also remarks that ‘the paucity of Marxist jurisprudence until modern times is probably largely a result of the materialist emphasis of Marxism.’ Collins, op. cit., n. 2, p. 10.

34 Cain and Hunt, id., p. 49.

35 ‘in the empirical treatments Marx clearly recognized the influence of law on the economy, he never articulated that insight into his theoretical treatment... Consequently, his theoretical view remained unidirectional and deterministic even though in certain passages a basis is laid which might have been developed.’ Phillips, op. cit., n. 12, p. 201.


37 ‘The elementary and spatial distinctions between base and superstructure break down under close scrutiny. The legal form of social institutions pops up in the relations of production at the same time as it regulates the state apparatus. No plausible distinctions can be drawn between the rules regulating the economy and the state with regard to either their appearance and formal qualities or their functions.’ Collins, op. cit., n. 2, p. 87.

38 For example, Engels’s famous letter to J. Bloch in 1890 where he argued, ‘according to the materialist conception of history, the ultimately determining factor in history is the production and reproduction of real life. Neither Marx nor I have ever asserted more than this. Hence if somebody twists this into saying that the economic factor is the only determining one, he transforms that proposition into a meaningless, abstract, absurd phrase. The economic situation is the basis, but the various elements of the superstructure...
also exercise their influence upon the course of historical struggles and in many cases determine their form in particular.' For this and other letters, see selections in Cain and Hunt, op. cit., n. 2, p. 55 ff; also Engels in Marx and Engels, op. cit., n. 28, p. 692 ff.

39 'Does it require deep intuition to comprehend that man's ideas, views and conceptions, in one word, man's consciousness, changes with every change in the condition of his material existence' K. Marx and F. Engels, The Communist Manifesto (1967) 102.

40 I am only touching upon a few of the pressures. However, one which is not mentioned in this text, which was very destructive, concerns the ideological status of Marxism itself. How could Marxism actually deal with this issue without engaging in virtual self-destruction, namely, Marxism must be determined by a particular economic base and since it is an ideology it is not the truth about that base; unless of course it either changed the meaning of the term ideology, or claimed to be the absolute objective truth about the world. Both the latter alternatives raise another series of insuperable problems.

41 The arguments became ever more confusing when Lenin, in his famous work What is to be Done? spoke of the value of 'socialist ideology' as a weapon in the class struggle against bourgeois ideology. For discussion of this, see Andrew Vincent, Modern Political Ideologies (1992) ch. 1.

42 Collins, op. cit., n. 2, p. 70.


44 In fact, for Lenin, there are advantages to living under or encouraging an unconstitutional undemocratic state since this will bring the proletariat to their senses quicker. The constitutional democratic state, especially one which utilizes a welfare state, tends to weaken the revolutionary potential of the proletariat by giving the impression that the bourgeoisie is actually concerned about their plight.

45 Such crude millenialist readings of the rule of law can be found still in works like Z. Bankowski and G. Mungham, Images of Law (1976) 97.

46 As Marx noted forcefully in one his early essays, 'the so-called rights of man, the rights of man as different from the rights of the citizen are nothing but the rights of the member of civil society, i.e. egotistic man, man separated from other men and the community.' 'On the Jewish Question' in McLellan, op. cit., n. 3, p. 102.

47 K. Marx, Capital (1909) vol. 1, 208, n. 1.

48 id., p. 271.

49 Phillips, op. cit., n. 12, p. 151.


51 This point would be even more pertinent today, for example, in terms of women's groups demanding equal opportunities, unmarried mothers, gay or lesbian rights groups, ethnic minority campaigners, animal liberation groups, those campaigning for the rights of old age, and so on. All of these try to foster laws, but none are classes in Marx's sense and it would be difficult to account for their emancipatory efforts in traditional Marxist class terms.

52 Marx remarks that Bonaparte as the executive authority of the state 'is somebody solely due to the fact that he has broken the political power of this middle class and daily breaks it anew. Consequently, he looks on himself as the adversary of the political and literary power of the middle class.' K. Marx, The 18th Brumaire of Louis Bonaparte in Marx and Engels, op. cit., n. 28, p. 177.


54 id., p. 133.

55 id., p. 135. However, see the essay by Sol Picciotti in the same text -- 'The Theory of the State, Class Struggle and the Rule of Law'. He criticizes Thompson and accuses him of 'neo-gramscian lapses' in reasoning on p. 170.


60 Tom Campbell, noting this, remarks that there is . . . an almost Aristotelian style of approach in Marx's naturalistic materialism which encourages us to look for answers to such major questions as the nature of the ideal society, not in the realm of value dispute, but by paying more careful attention to the facts about human nature and the conditions under which human beings flourish. T. Campbell, *Justice* (1988) 199.
61 Marx in fact uses three different German words which are often translated as alienation: *Entfremdung* (where two people might be alienated from one another); *Entäussерung* (making external to oneself); and *Vergegenständlichung* (literally, objectification). For discussion of this, see David McLellan, 'Introduction to Marx', McLellan, op. cit., n. 3, p. xl, fn. 3.
62 The term alienation does not really appear in his later writings. The concept of 'exploitation' tends to appear in its place, partly because exploitation corresponds to a more distanced, technical social-scientific language. However, I would contend that the same basic ideas lurk behind it.
63 The notion of a Marxist state is treated with much greater circumspection than Marxist justice or Marxist law — which is odd, given that Marx more or less treats 'state' and 'law' as synonymous. However, the reasons are fairly transparent. First, the actual record of Marxist-Leninist states, in practice, is so dismal that it puts off all but the most ardent investigator. Secondly, the Anglo-Saxon legal tradition finds it much easier to speak about law and justice separate from the state. In fact, the state is viewed with greater scepticism than in continental civil law traditions.
64 The fuller quote which precedes this is worth noting: 'In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all-round development of the individual, and all the springs of cooperative wealth flow more abundantly — only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!' K. Marx, *Critique of the Gotha Programme* in Marx and Engels, op. cit., n. 28, pp. 324–5. The actual word referred to, drafted by Marx in 1875, was a critique of the Lassallean programme of the German Workers' Party. It contains the only clear, if very brief, statements of Marx on justice. The notion of justice he employs is, in appearance, distributive and social (rather than legalistic and procedural), and is premised on the principle of 'need'. Marx, however, does not say a great deal more, in any systematic format, about the concept of need itself which opens up more problems than it solves. On the problems and ambiguities of utilizing the notion of need in politics, see Raymond Plant, *Modern Political Thought* (1991) ch. 5.
65 Campbell, op. cit., n. 60, p. 186.
67 Christine Sympnowich, in formulating her own account of socialist legality (*The Concept of Socialist Law* 1990), finds Campbell's argument wanting in so far as she suggests that he appears to concentrate on a non-conflictual notion of a socialist society. She notes that 'A view of socialism that understands the individual to have no interests that conflict with those of others . . . fails to understand the nature of individual commitments' (p. 164). Her own understanding of socialist law tries to construct, like Campbell, a reformist socialist account of law. Sympnowich seeks a rapprochement of liberal human rights theory (interpreted by the author as historical and communal practices corresponding to the nature of the human being), on the one hand, and a blending of aspects of legal positivism and secular natural law on the other. Law, she claims, can be an enriching feature of a socialist society; in fact, she suggests, it is an essential condition of such a society. Such a society needs a rule of law and basic rights to flourish. A healthy socialist society would
respect individual integrity and tolerate differences. Sympowich's theory is interesting, if eclectic; however, it totally fails to extend our understanding of Marx, except in so far as Marx also appears to adopt, if haltingly, aspects of a secular natural law perspective. Sympowich's own arguments drift far away from any interpretation of Marx in her subscription to an immensely intelligent, but otherwise fairly conventional social liberal position.

68 In consequence, some commentators have tried to explore the intricate Hegelian philosophical underpinning of even his later economic works, like the Grundrisse. See, for example, Hiroshi Uchida, Marx's Grundrisse and Hegel's Logic (1988).


70 It is thus that many socialist feminists accused Marx and Engels of being ‘sex blind’. For detail on this whole debate, see Vincent, op. cit., n. 41, p. 183 ff.