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An Uneven and Combined Development Theory of Law: Initiation

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Abstract That various legal orders preside in any one jurisdiction has long been seen as evidence of legal pluralism; however, this approach lacks a systematic understanding of history in general, and as such, tells us little about the inner machinations of law's relation to capitalist development in particular. What is needed instead is a dialectical materialist approach to legal development; for this reason, I tender an uneven and combined development (UCD) theory of law. Law flexes in concert with ever-changing social relations, or more plainly, law evolves in an uneven and combined manner. More than being mired in the contradictions that are the driving force of the UCD of capitalism, however, law also boasts its own set of contradictions that, if carefully accounted for, helps distinguish the historical evolution of capitalism as a social totality.

Keywords Capitalism · Dialectical materialism · Legal pluralism · Uneven and combined development

Introduction

After the 2007/2008 economic crisis new laws were drafted in the name of stability and recovery. On the stability front, the US government passed the *Dodd–Frank Wall Street Reform and Consumer Protection Act* (2010), which sought 'to prevent—or render less likely' future banking crises by curbing the risk-assuming and risk-creating behaviour of major financial firms (Acharya 2012, p. 2). On the

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recovery front, the Greek government passed such legislation as *Law 4146: Creation of a Friendly Development Environment for Strategic and Private Investments*, which foregrounds 'public–private partnerships' as a key to economic renewal ('Laws 3894/2010, 4072/2012, 4146/2013' in Government Gazette of the Hellenic Republic 2013). The impression one gets is that laws intended to stabilize are laws that seek the *status quo ante* (as in the US example), while laws intended to facilitate recovery are laws that promote instability (as in the Greek example). Based on this, it is unclear whether law mostly prevents or mostly promotes the contradictions and extremes that are inherent in capitalism. It warrants asking, therefore: what precisely is the nature of the relation between law and capitalism, and what can we reasonably expect from law given the history of this relation?

Capitalism, through its attendant social relations, penetrates all aspects of human life. To make sense of it as a social totality, however, we have to differentiate capitalism on two intersecting planes: internally in terms of its component parts, and externally in relation to other modes of production. To accomplish this ambitious analytical feat, we would be well-served by bringing the theory of uneven and combined development (UCD) together with a focus on law.

The advancement of capitalism in one area generally occurs at the expense of another area, a reality that is achieved by a complicated web of asymmetrical but inexorably linked social, political and economic relations. Extensive evidence attests to this uneven and combined nature of capitalist development, yet there is little clarity in terms of the internal dimensions of this evolutionary path. By examining the specific legal aspects that are central to the UCD of capitalism, I lay bare its more hidden facets and differentiate it from other modes of production. In doing so, I find that the UCD of capitalism has an important complement in the UCD of law, and further, that these developmental trajectories are mutually dependent. This formative hypothesis is the cornerstone of the essay at hand, which marks an initial step in the founding of a UCD theory of law. As we endure the cyclical crises of capitalism, this theory is necessary; its systematic approach to history better equips us to gauge what we can reasonably expect from law now and in the future.

In the balance of this piece, I make two opening moves that lay the groundwork for a UCD theory of law: first, I argue for a dialectical approach over legal pluralism; and second, I underscore the need to focus on law as a means of more effectively differentiating (internally and externally) the UCD of capitalism. As remnants of previous modes of production carry over and clash with new productive means, so too do laws of the past combine with new laws. The unresolvedness of that which pits opposing forces against each other in the UCD of capitalism is also, and necessarily, an unresolvedness of legal orders and attendant principles. Granted, that various legal orders can preside in a single jurisdiction has long been seen as evidence of legal pluralism; however, the theory of legal pluralism lacks a systematic—that is, dialectical—approach to history in general, and as such, tells us little about the inner machinations of law's relation to capitalist development in particular. The theory of UCD fares better in this regard because of its inherent dialectical materialist logic, but there is still room for improvement on this front. Anaemic appeals to 'social relations', 'class', and 'state' as a way of externally

differentiating the UCD of capitalism from the transhistorical conception of UCD only implicitly signal the importance of law in historical development. This tendency to take law for granted in discussions about UCD is a symptom of the need to focus more on the internal dimensions of capitalism, or risk creating an archetypal vision of UCD that has no utility because 'inter-societal relations double over as their own explanation, rendering description and causation identical and synonymous' (Teschke 2014, p. 32). Taken as is, UCD is a tautological abstraction that offers no explanatory value, but this can and must be corrected: with a dialectical understanding of legal development at the forefront of our analysis, we can historically differentiate the UCD of capitalism and better comprehend it as a totality.

As the foundation for a broader theory of law, I stake the main claim of this essay at the juncture between legal pluralism and UCD, and in critically sampling each I chart a new path forward. This begins with an assessment of the strengths and deficiencies among the dominant iterations of legal pluralism; though I take heed of the attentiveness with which legal pluralists conceptualize law, I challenge the theory's tautological tendency and underlying biases, and mostly leave the theory behind in favour of a dialectical approach to legal history. To substantiate this inclination, I review the main claims associated with UCD and explore how appeals to vague ideas about 'social relations', 'class', and 'state' hint at law; I further contend that making this relation more explicit not only rescues UCD from the confines of circular abstraction, but also differentiates capitalism in a manner that allows for an analysis of it as a totality. I conclude this essay with four steps that furnish the basis of a UCD theory of law—a theory that aims to enrich our understanding of capitalism and law as co-evolutionary processes, and enhances our capacity to address the gravest problems of our age.

Legal Pluralism

In this section I do not proffer still another history of legal pluralism; instead, I focus on the main currents that animate the contemporary debate while at the same time acknowledging that the 'basic tenets' remain open to challenge (Tamanaha 1993, p. 192).[1] With this in mind, perhaps the most common of claims is the best place to begin.

Legal pluralists concur that the historical development of law does not occur in neat stages dictated by a pre-determined trajectory, but rather that there is a 'meshing' of 'normative orders' and 'legal mechanisms' (Griffiths 1986, p. 14). John Griffiths, widely regarded as one of the leading theorists, provides among the strongest endorsements of this non-linear version of legal development, observing, 'legal reality is rather an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation' (Griffiths 1986, p. 4). This

[1] The debates regarding pluralism in general and legal pluralism in particular are voluminous. For brief assessments of the linkages between the pluralism debates from the early twentieth century and more recent discussions, I would direct readers to four of Fitzpatrick's works (2001, p. 50; 1984, p. 117; 1983a, p. 46; 1983b, p. 161).

understanding of law is so uncontroversial that Griffiths goes so far as to argue that legal pluralism is a 'universal feature of social organization', suggesting that the erraticism of legal development is intrinsic to the nature of our existence as social beings (1986, p. 38). This, in itself, is one of the promising elements in the legal pluralist approach—the nominal recognition of law as part of the social totality (1986, p. 38). Given such a foundation, our attention should shift instantly from the presupposed fact of legal pluralism to the need to analyze the social forces of change, as we are compelled to understand legal development as part of a more 'dynamic' social process (Merry 1988, p. 879).

Historical analysis is among the most effective ways of satisfying this analytical appetite, which is evident in the focus on colonial relations during the formative days of legal pluralism (Merry 1988, pp. 869, 891). Out of the more contemporary offerings, Laura Benton's assessments are especially worth noting; she fuses her training in history with a focus on law, arguing, '[h]istorical research represents our richest vein of information about the workings of legal pluralism' (Benton 2011, p. 57), adding that this approach underscores the 'fluidity' of legal development (2011, p. 59). As the co-editor of a recent volume of collected essays that explore the relation between legal pluralism and empires, she and Richard Ross set the tone of the work in the first essay by distinguishing between jurisdictional and normative legal pluralism. This distinction calls forth the dominant controversy in legal pluralism, namely the thorny matter of having to, for the purposes of meaningful historical analysis, define what one considers 'law'.

A willingness to work with a more porous notion of law is another characteristic of legal pluralism, and it stems from an abiding desire to resist notions of 'legal centralism' that tend to prioritize formal 'state law'—such as cases and statutes—over informal or 'non-state' conceptions of legality (Benda-Beckmann 2002; Tamanaha 1993, p. 193; Merry 1988, p. 874; Griffiths 1986, p. 28), which includes everything 'from the state's legal commands through customs, habits, religious precepts, and codes of etiquette' (Benton and Ross 2013, p. 4). To an important degree, the decisive stipulation that legal development is part of a complicated social process assumes the need for a more expansive notion of law that takes analysis beyond the confines of legal formalism; however, new challenges arise when striving to account for these normative orders. Benton and Ross identify three problems with this approach. First, it assumes too neat a distinction between 'state law' and 'non-state' legality, which may lead to two further consequences: a tendency to bleed law from all that makes it distinctive from other types of orders, or a tendency to read law into social relations where it need not be (Teubner 1991, pp. 1458–59; Santos 1987, p. 281). For Brian Tamanaha, this unsettled matter of 'what is law' is the 'folly' of legal pluralism because everybody knows it is far from solid terrain, yet many proceed to stake their claims regardless (Tamanaha 1993). Second, the presumption of a stark dichotomy between state/non-state has a distorting effect on historical analysis insofar as it can be deployed in support of a simplistic linearity that submits all legal development to the nativity story of the formal nation state. In this narrative, non-state rules or customs inhibit the fatalistic birth of the state and presuppose a sharp division between the public laws of state and 'private legal spheres' that did not necessarily exist in history (Benton and Ross

2013, pp. 4–5). These two problems logically lead to the third specifically methodological concern, that is, the sheer amount of material one would have to source in order to be able to make a convincing case regarding the distinction between state/non-state or public/private. The focus on normative legal pluralism requires seeking-out 'elusive subjective beliefs about the applicability and ordering of bodies of law' (2013, p. 5), which is not only laborious, but also could prompt the type of highly speculative assertions that accompany ambiguous findings.

Benton is cited as the architect of the 'jurisdictional' turn, which emerged as a response to these problems. Rather than follow a firm definition of law or insist on a pat distinction between state/non-state or public/private, this perspective recognizes an array of regulatory and administrative authorities, 'from a guild or merchant ship captain to a conquistador or trading company' (Benton and Ross 2013, p. 6). As a corollary to the worthwhile goal of excavating the 'intellectual ecology that supported and shaped legal pluralism' (2013, p. 12), this approach also acknowledges the ways in which various jurisdictional authorities evolved in connection with coeval religious and political debates as well as more localized traditions (2013, p. 5). By framing these varied sites of contestation as instances of jurisdictional conflict, Benton strives to keep intact an overarching sense of the disproportionality of power that undergirds empire-building and sovereign rule, but at the same time she does not presuppose the primacy of sovereign power. Interestingly, by leaving the matter open to further historical analysis, this approach allows geographically- and temporally-specific narratives about legal development to emerge, which, when divulged over the course of the edited collection, has the cumulative effect of confirming for the reader by showing, instead of telling, that jurisdictional legal pluralism does not accord with the notion that law develops uniformly from the top down.

Benton deftly navigates the perennial problem of legal definition and categorization; on the whole, such attentiveness to this particular quandary is the most compelling facet of legal pluralism because it illuminates the complex nature of legal development. However, just as we bring the contours of legal pluralism into sharper focus, we also begin to see clues as to the limits of this approach.

First, if we grant Griffith's version of 'legal reality' as 'an unsystematic collage', or abide by Benton's arguably piecemeal approach to jurisdictional contest, we risk miscasting the uneven and combined nature of legal development as an arbitrary phenomenon. This allowance can lead the legal historian down a sterile path by prematurely conceding the possibility of comprehending the development of law in a more systematic manner. Second, if we agree that legal pluralism is a universal rule of social development, we are caught in a tautology, namely that legal pluralism both explains the development of law and is that which requires explanation. Third, related to this tautological limitation, if legal pluralism is taken as a universal rule, we must remain wary of treating the abstract rule as a material fact; we do not want the 'fact' of legal pluralism to function as a procrustean device that selective historical cases merely serve to prove. Benton, for one, is cautious in the face of this eventuality, though I remain guarded about the explanatory prospects of jurisdictional legal pluralism beyond its effectiveness in delivering multifarious historical narratives.

While legal pluralism aspires to laudable analytical goals, its proponents sometimes cannot get past the descriptive.[2] We could trace this potential for analytical inertia back to the 'folly' of protracted disagreement about the definition of law, but I posit that these contests are the best feature of legal pluralism. The problem of limited analytical output cannot be resolved by reifying the very concepts that are integral to the debate; rather, what needs attention is the method by which the concepts themselves are debated. The absence of a coherent method of conceptual analysis is a symptom of the lack of a systematic approach to historical change, a concern that must be addressed or else there will be a lingering potential to slip into an apolitical, relativist, or even an instrumentalist analysis. Consequent to this, we are left with an assortment of historical studies that share only the thinnest commonalities, offering a minimal basis to advance our comprehension of the development of law. Well-researched as it is, the lack of a systematic standard is precisely what undermines even the most exemplary self-reflective contributions in the Benton and Ross edited collection.

The essays that comprise this text do well to reinforce the main claims long-associated with legal pluralism: development is non-linear (Dewar 2013, p. 52), authority is paradoxical (Stern 2013, p. 39), law is flexible (Barkey 2013, p. 104)—all qualities that undermine the prospect of a clear dichotomy between formal and informal law (McHugh 2013, p. 219). To stress this paradoxical flexibility, a recurrent storyline tells of those historical moments when legal freedoms were granted to disparate subjects, not out of reverence for universal justice but primarily in an effort to buttress the metropole's authority and control (Owensby 2013, p. 162; Rupert 2013, p. 218; McHugh 2013, p. 254). The point of this narrative is to dissuade readers from inferring that imperial authority is a one-dimensional exercise of sovereign power, and instead presents legal development during this expansive period as fraught with contradictions and complexity. For isolated studies of specific legal histories, therefore, this book is indeed commendable; however, most of the essays undermine a key tenet of pluralism, namely the repudiation of a linear approach to legal development. Jane Burbank and Frederick Cooper state as much in the final summary essay of the text, with the observation that '[l]urking in the background… is the old notion that somehow a more "modern", more centralized sovereignty emerged sometime after the "early modern" centuries' (2013, p. 287). The suggestion that the contradictions of the 'early modern' period evaporate in the 'modern' era promptly calls into question the text's objective to complicate our understanding of legal development and imperial rule. It is a worrisome bias especially given that the transitional period in question coincides with the advent of the capitalist mode of production, a mode of production wrought by contradiction (Harvey 2014). The impression left by the book is that of a soft endorsement of legal stagism, one that rejuvenates the fallacy that 'modern' capitalist laws and their twinned promise of predictability and stability are an inevitable corrective to the arbitrariness of imperial laws and coeval feudal systems.

[2] I borrow this distinction between the analytical and the descriptive from von Benda-Beckmann (1988, p. 898).

To cultivate a more fertile approach to understanding law systematically as part of the totality, added consideration needs to be given to the methodology of this type of analysis in order to find a way past relativism and tautology. Dialectical methodology functions as a necessary antidote to these trappings, and Peter Fitzpatrick's work is a most apt pivot in this regard. In a relatively under-appreciated essay from 1984, 'Law and Societies', he sheds light on the type of rich analysis that can result from blending dialectically-informed methodology with pluralism's attentiveness to the problem of legal definition and categorization. By explaining dialectical change as involving contradiction and synthesis, by emphasizing the need for an historical materialist approach to the quandary of defining law, and by resisting legal stagism, Fitzpatrick lays a solid foundation for the type of theorizing I advance in the latter portion of this essay.[3]

First, in explicating his notion of 'integral pluralism', he argues that law and 'social forms' are both mutually constitutive and essentially distinct (Fitzpatrick 1984, p. 123), relying all the while on 'a part of the Hegelian notion of dialectical contradiction' to articulate this tension (1984, p. 137). Liberated from the urge to define law according to the state/non-state dichotomy, it is now possible to see the internal contradictions of legal development insofar as 'law is constituted in relations of opposition and support with other social forms' (1984, p. 128). For Fitzpatrick, this dialectical facet of legal development is incontestable given that law itself is essential to the most foundational contradiction of 'modern society', namely the contradiction between the rights-bearing, formally equal individual, and the material social relations germane to capitalism that are 'founded on coercion and inequality' (1984, p. 132). Throughout the piece he uses various descriptors to evoke this conflictual essence, seeing it as '[t]he fusion of the innovative and the *stasis*' (1984, p. 133) wherein law and social relations undergo 'convergence and separation' (1984, p. 121), all of which echo the hallmarks of dialectical progression: contradiction, negation, and synthesis.

Second, less overt but no less important, is his insistence on an historical materialist approach to define law. What guides historical materialism is a revolutionary logic: theory does not drive practice, but practice drives theory (Marx and Engels 1975, p. 59). Traces of a similar inclination inform Benton's jurisdictional pluralism, but the impetus is best articulated by Fitzpatrick, specifically when he warns against assuming that the 'integrity of "law"' is transhistorical, highlighting the hazards of 'applying a certain idea of law to the world' (Fitzpatrick 1984, p. 135). The hypostatization of law infuses it with timeless integrity, sealing it off from the social realm and halting the possibility of understanding legal development in a dialectical manner. Instead of taking an abstract concept and reading it into social relations across history, a more attentive approach involves undertaking historical analysis and letting the material before you dictate what law is or is not in that given era and locale. In doing so, we can keep the dialectical understanding of historical development intact by bearing witness to the

[3] In an earlier essay, Fitzpatrick is tantalizing close to a UCD theory of law when he refers to 'the forms and relations that result from the interaction of articulation of modes of production' as 'combined' (1983b, p. 168).

evolutionary trajectory between abstract notions of law and concrete instances of legal practice.

Third, insofar as it is unwise to hold fast to an abstract notion of law and apply it to history, so too is it unwise to see the tenets of dialectical analysis as abstractions ripe for simplistic application. The dialectical understanding of legal development assumes an historical materialist outlook because the latter furnishes the evidentiary basis for the dialectic itself. In other words, we cannot comprehend the inner nature of the dialectical evolutionary trajectory without first observing it in reality; we begin therefore with material evidence of the contradictory dimensions of legal development, not with the idea of contradiction that we map onto legal history. Guided by this methodology, we recognize the need to keep abstractions in check by holding them in a productive tension with the concrete. Moreover, as it relates specifically to legal analysis, this method absolves us of the propensity to see law as evolving in historical stages precisely because we begin from an analytical position that is antithetical to stagism.

A stagist approach to legal development must be avoided because it is the by-product of the reification of law, as Fitzpatrick elucidates:

> modern law can be seen as a distinct stage of development only because of the conditions of its emergence. These entailed a specific dynamic of identity and a specific constitutive connection between 'law and society.' This specific connection and the resulting distinctness of law cannot be a general basis for a theory of stages or types of law. Yet it is implicitly so used when different stages or types of a reified 'law' are seen to result from different stages or types of 'society'. (1984, p. 135).

He goes on to note that the historical evidence undermines the assumed presence of stages, arguing that rather than the expected progression toward '"bureaucratic-administrative law" at the expense of bourgeois legality', there is little evidence attesting to the disappearance of the latter in this 'modern' context; in fact, the opposite may be true insofar as there may be 'an increased reliance on bourgeois legality' (1984, p. 135). This brings Fitzpatrick to the decisive finding associated with his notion of integral pluralism: 'there is a range of "legal" types in society', as opposed to distinct stages of legal development (1984, p. 135). In effect, when he links his perspective on legal development to capitalism as a social totality, he hints at a UCD theory of law.[4]

[4] With regard to Fitzpatrick's scholarly output since 'Law and Societies' (1984), it is almost an understatement to describe it as prolific. Yet over the last three decades—despite the coincident scarcity of the word 'dialectic' and his dismissal of Marxism on the basis of its supposed 'schema of stages' (Fitzpatrick 1983b, p. 161)—there seems to be an ongoing commitment to a dialectical (though variably materialist) methodology across his works. Of course this claim warrants a more extensive analysis that is beyond the scope of the essay at hand, but I shall offer a preliminary glimpse of this continuity as it relates to the concept of totality. In an earlier work, Fitzpatrick offers a materialist critique of totality as an idealist construct, and proceeds to present Foucault as a champion of a materialist particularity against the undialectical 'totalising explanation' (1983a, p. 50). After establishing totality as one of the elements that constitutes the '[m]odern myth' of law in *The Mythology of Modern Law* (1992, p. 43), the persistence of his dialectically-informed analytical framework is noteworthy as he dissects the linkages between mythic universality and the particularities of historical development. He makes sense of this relation by relying

Legal pluralism is attractive to anyone who appreciates that the development of law is part of the broader social process, and that historical analysis is necessary to understand the nature of this development. But it is not accidental that legal pluralism gains academic currency contemporaneously with the popularization of the liberal notion of pluralism as an intrinsically honourable aspiration—wherein notions of 'civil society' celebrate 'difference and diversity' against predominant conceptions of state (Meiksins Wood 1995, p. 243). The late Ellen Meiksins Wood refers to this emergent trend of the late twentieth century as 'new pluralism', and links its rise to the fall of the Soviet state (1995, p. 244). Though often contested, the conception of pluralism as an 'inherent good' continues to linger (Halliday 2013, p. 273), if not as an explicit normativity, then as an unwitting inheritance that biases its adherents in a certain direction. To this end, Meiksins Wood observes that 'at the very heart of the new pluralism is a failure to confront (and often an explicit denial of) the overarching totality of capitalism as a social system' (Meiksins Wood 1995, p. 260). Yet because legal pluralism 'is preoccupied less with its foundations in theory than with its origins in the messy pragmatisms of rule' (Ross and Stern 2013, p. 110), we should not be surprised that the essays in the Benton and Ross book forsake the abstract for the concrete in a most undialectical fashion (Halliday 2013, p. 267). Legal pluralism, while giving rise to invaluable insights, nevertheless bends toward relativism, and as such, associated historical findings can be seen as incomplete and in need of further assessment.

With Fitzpatrick's rejection of stagism (specifically the presumed shift to 'bourgeois legality' in 'modern' society), we can recognize that the value of dialectically-informed approaches to legal history dwells in the realization that contradictory relations are the engine of social transformation. Simply situating law in the social totality, nominally- or descriptively-speaking, enhances neither our comprehension of law's relation to that totality nor our understanding of that totality as such; however, an approach that lays bare the dialectical nature of development—that is, its systematic dimensions—allows us to establish an analytical vantage point that is more rich in analytical potential. This is the contention I advance in the pages that remain.

Footnote 4 continued
on quintessentially dialectical concepts: negation (1992, p. 65), integration (p. 125), reconciliation of 'contradictory positions' (p. 143), not to mention his account of progression as 'developing in the negation of its origins' and 'always moving towards greater differentiation' (p. 144). When Fitzpatrick revisits this theme of totality through a Freudian lens in *Modernism and the Grounds of Law* (2001), it is law that combines two irreconcilable positions: social totality and social particularity (2001, p. 52). Law 'occup[ies] this area of apposition in-between' totality and particularity (p. 54); later, he distills this relation to its dialectical essence: '[m]odernity, in sum, contains yet is exceeded by what it constituently negates' (p. 63). While I recognize that the theoretical influences that animate Fitzpatrick's writings of the last three decades have changed, it can be argued that the dialectical mode of thought present in his 1984 essay continued to hold some sway in his later works.

Uneven and Combined Development

As a static abstraction, UCD is entirely unremarkable: capitalism evolves in starts and stops, to greater and lesser degrees across different eras and geographies. When presented as such, UCD is a 'flat tautology' (Teschke 2014, p. 48), and cannot rise above the aimless assertion that capitalism evolves in an uneven and combined manner because it evolves in an uneven and combined manner. However, when its dialectical materialist logic is upheld, then the enigmatic dimensions of capitalism's evolution become comprehensible. By excavating the dialectical materialist facets of UCD, we can see why appeals to 'social relations', 'class', and 'state' emerge as means of differentiating the UCD of capitalism, and why a turn to law is necessary. Debates rage about capitalist development and the primary catalysts therein, but a focused commentary on law brings forth a new plane of understanding capable of lending meaningful analysis where previously there was relativism and arbitrariness.

We can draw a direct albeit slight line from UCD back to Marx and Engels, specifically their stipulation that there are 'intermediate hybrid types' of capitalism 'between the old modes of production, which may have renewed themselves on the basis of capital, and the classical, adequate modes of capitalist production' (Marx and Engels 1986, p. 436). This short quote offers an early iteration of combined development; meanwhile, over five decades later, Lenin's World War I-era writings on imperialism explain how the 'uneven development and wretched conditions of the masses are fundamental and inevitable conditions and premises of [the capitalist] mode of production' (Lenin 1939, p. 63). Although Lenin delivers only a partial theorization of UCD, the thrust of his indictment of imperialism nevertheless turns on the matter of the unevenness. For a still more complete articulation of UCD, however, it is necessary to turn to Trotsky.

From the opening pages of Trotsky's impressive work, *History of the Russian Revolution*, we see the applicability of UCD as an analytical lens. The events surrounding the revolution, which he details over three meticulous volumes, can hardly be comprehended without UCD, as the oft-cited passage relays:

> The laws of history have nothing in common with a pedantic schematism. Unevenness, the most general law of the historic process, reveals itself most sharply and complexly in the destiny of the backward countries. Under the whip of external necessity their backward culture is compelled to make leaps. From the universal law of unevenness thus derives another law which, for the lack of a better name, we may call the law of *combined development*—by which we mean a drawing together of the different stages of the journey, a combining of the separate steps, an amalgam of archaic with more contemporary forms. (Trotsky 2008, p. 5)

Germane to UCD is a tension between the inequalities of capitalism that produce unevenness and exacerbate disparities, and the interdependencies of capitalism that bring otherwise disparate spheres of economic activity into close relation, forcing adaptations. Trotsky illustrates this in his commentary on how Russia's neighbours

to the East and West exerted oppositional influences in the pre-revolutionary era, writing that 'Russia was unable to settle in the forms of the East because she was continually having to adapt herself to military and economic pressure from the West' (2008, p. 4). By applying an historical materialist approach, Trotsky reveals the immanent tensions that are intrinsic to UCD.

In this frame, we can appreciate UCD as an historical materialist expression of a dialectical materialist logic, the objective of which is not only to uncover the mechanics of historical transformation, but also to make sense of change—to answer the 'why', not just the 'how'. To explicate this further, it is useful to pause on a quote from Trotsky: '[d]ialectical thinking analyses all things and phenomena in their continuous change, while determining in the material conditions of those changes that critical limit beyond which 'A' ceases to be 'A', a workers' state ceases to be a workers' state' (Trotsky 1942, p. 51). The dialectical dimension is the element of 'continuous change' that is evident when we observe 'material conditions'; however, we move past 'how' into 'why' when we observe the 'continuous change' of 'material conditions' not in isolation, but as part of a totality. At which stage we can begin to make determinations about the 'critical limit'—the demarcation point of social transformation as such. Rule/unruliness, harmony/contradiction, domestic/international, and abstract/concrete; the complexity of historical development itself is mirrored by the interminable movements of the dialectic. In short, '[d]ialectics is the logic of development' (Trotsky 1986, p. 96).

Reminiscent of how Fitzpatrick's dialectical approach leads to the rejection of legal stagism, the dialectical materialism of Trotsky's UCD is likewise antithetical to the economic stagism that Stalin was championing at that time (Löwy 1981, pp. 46, 48). 'Backward' states need not proceed through all of the same stages as the advanced ones, evoking the mechanics of dialectical development as he remarks, '[t]he living historical process always makes leaps over isolated 'stages' that derive from theoretical breakdown into its component parts of the process of development in its entirety' (Trotsky 2010, pp. 269–270). Never intended as a tool for formulaic analysis, dialectical materialism accompanies the type of scrutiny of the social world that arises from an historical materialist approach (Rees 1998, p. 267), one that recognizes the importance of 'perpetual interrogation' in order to comprehend historical development as a whole (Fanon 1952, p. 23). Trotsky elucidates this claim, positing that '[d]ialectical thinking gives to concepts, by means of closer approximations, corrections, concretisation, a richness of content and flexibility' (Trotsky 1942, p. 51). From this quote we can ascertain that one of the main challenges with this method is the parsing of abstract concepts from the concrete and vice versa. This is necessary in order to lay bare the relation between historically-differentiated particularities and transhistorical concepts, all in pursuit of a better conception of 'the process of development in its entirety'.

From this perspective, it is not enough to discover and conform to a universal rule—for example, legal pluralism as a 'universal feature of social organization' (Griffiths 1986, p. 38) or 'the universal validity of the law of unequal and combined development' (Mandel 1975, p. 23). As I have already submitted, when held solely as universal abstractions, such claims lose their connection to historical development, becoming 'fetters' on dialectical thought (Trotsky 1986, p. 98) and gateways

to tautological assertions. The objective is to interrogate abstractions by concretizing them through historical analysis, and in the course of discovering processes of contradiction and synthesis, also appreciate that the synthetic nature of dialectical thought entails abstracting the concrete. More succinctly, '[f]rom living perception to abstract thought, and from this to practice—such is the dialectical path of the cognition of truth, of the cognition of objective reality' (Lenin 1976, p. 171). Historical study for the sake of merely reinforcing an abstract rule leads to unreliable, relativist findings and brings us no closer to comprehending the 'objective reality' of capitalism.

Despite this dialectical logic, however, Marxist theorist Michael Löwy accuses Trotsky of 'sociologism' insofar as the latter sometimes relies too much on general accounts of social relations in order to explain expressly political matters, for instance, the inner constitution of the Chinese Red Army (Löwy 1981, p. 94). More recent contributions that debate the utility of UCD likewise ponder the indistinctiveness of the theory, and call for more of a focus on the 'social'. Historian Marcel van der Linden gestures to a possible future direction that involves taking into account more of the 'social context' that configures these 'historical leaps'; his aim is to ameliorate the 'explanatory power of the mechanism of uneven and combined development' (van der Linden 2007, p. 162). This is also the case in another Marxists theorist's work, namely George Novack's vague assessment of the 'law' of combined development. He discusses the 'unique synthesis' that is the result of UCD, explaining how the engine of this transformation is the clash of opposing forces (Novack 1974, p. 106), but it remains unclear what *exactly* is standing in opposition, or how *exactly* it is undergoing synthesis. Meanwhile, critical geographer Neil Smith attempts to explain the forces behind the spatial changes that coincide with capitalist development, and in doing so he identifies a '*social* logic', which he sees as the deciding factor behind the movement of capital (Smith 2008, p. 141). Changes in space are determined by the social realm, as he attests that the 'spatial geography is socially produced, [and] no longer a received natural pattern' (2008, p. 142). While this is an interesting thesis, we are still left guessing in terms of what constitutes the productive capacity of the social context.

Undifferentiated or overdrawn, such references to the 'social' invite further vagueness, a problem that Trotsky himself attempts to curtail with more precise references to class, which eventually transitions into a discussion about state. Trotsky's analysis shows us that through concerted study we can identify the contradictions inherent in society that form the conditions of the inevitability of class struggle and appreciate the dialectic as a 'mechanism' of 'transformation' (Trotsky 1986, p. 99). To this end, John Rees explains how Trotsky 'built up a picture of the totality of class relations and formulated the law of combined and uneven development to trace the relationship between the different parts of that totality', eventually arriving at the notion of 'differentiated unity' (Rees 1998, p. 278). Since his focus on 'totality' necessitates a more expansive account of the nature of historical development (Löwy 1981, p. 52), his attention to class helps him unpack the 'social relations of production' (1981, p. 97). He sees 'capitalism and the class struggle as a world process' (1981, p. 48), and while he grants that 'national peculiarities' shape the developmental path (1981, p. 105), he does not conceive of

class struggle as occurring in a vacuum. Beyond the stagist view in which nation states are fated to undergo a logic of 'economic determinism' (1981, p. 49), Trotsky insists that states are constantly subject to external, international forces, which influence internal class struggles.

'We Marxists know the role and meaning of state power', he writes, arguing that '[t]he passing of power from the hands of Czarism and the bourgeoisie into the hands of the proletariat abolishes neither the processes nor the laws of world economy' (Trotsky 2010, p. 167). It is therefore imperative that we read Trotsky's contention regarding the 'planless, complex, combined character' of capitalist development as neither erratic nor arbitrary, but deliberate (as the corollary of directed class struggle) yet also vulnerable insofar as it is subjected to an array of external influences and internal pressures. This allows us to differentiate capitalism both internally and externally, as we begin to grasp the 'why' of historical development.

In the secondary literature we see similar attempts to differentiate the UCD of capitalism with reference to class, which implicates the state. To this end, Smith asserts that the state operates in service of the dominant class and does so through the administration of law, ideology, and the economy (Smith 2008, p. 61). This connection between class and state is also evident in Lenin's 1917 pamphlet, where he points to the domestic unevenness between the starving masses and capitalist excess (Lenin 1939, p. 62). Workers' movements in that era sought to advance their cause through the nation state (Desai 2013, pp. 52–53); class struggle therefore took on nationalist qualities that both emerged from and contributed to the uneven and combined nature of capitalist development. Moreover, as we clarify the class and state dimensions of UCD, we also begin to signal the import of law. Class divisions are maintained by specific legal parameters and governance structures; consider for example systems of primogeniture and landed nobility or the tax laws and welfare systems of today. So when we contemplate the transitions from one mode of production to another and the aims and efforts of a given class struggle, we must also take into consideration how much of the pre-existing legal order remains, either because of a strategic compromise with another class, or because it is not (yet?) in the power of the revolutionaries to discard certain foundational laws in their entirety.

In *Late Capitalism* by lauded Marxist theorist and UCD-proponent, Ernest Mandel, law finally appears alongside the state and is awarded substantial consideration; yet here we also confront the limits of a prescribed approach to both state and capitalism. For Mandel, law is confined to the superstructure (Mandel 1975, p. 475). This undialectical split leaves him ill positioned to reconcile how law (as administered, transgressed, and transformed by the state) comes to play the central role as the 'midwife of the capitalist mode of production' (1975, p. 477). This banishment of law to the superstructural realm is also indicative of his more formulaic approach to the history of capitalism. By formulaic, I mean the fact that he begins with identified 'laws of motion of capital', and then proceeds to test the conformity of reality to these laws in order to demonstrate their explanatory authority (Harman 1978). In response, economic historian Patrick Karl O'Brien revisits Mandel's claims in a 2007 issue of *Historical Materialism*. O'Brien

contends that Mandel's account of unevenness does not offer enough evidence *and* cannot account for salient extra-economic variables that might provide a more cogent picture of capitalist development. Interestingly, he argues for a more expansive lens that encapsulates, *inter alia*, 'legal rules' (O'Brien 2007, p. 104) to better ascertain the relative penetration of the capitalist mode of production. Unfortunately, however, he does not proceed any further. Similar flickers appear in a UCD-themed special issue of the *Cambridge Review of International Affairs*. Sam Ashman contests the bifurcation of politics and economics by acknowledging the administrative role of state in relation to the expansion of capitalism, mentioning the state's function 'in the appropriation and dispersal of surplus value through taxation and expenditure, the regulation of accumulation, the restructuring of capital, the regulation of exchange rates, and influencing relations of distribution through tax and income policy' (Ashman 2009, p. 39). Elsewhere in the same issue, Neil Davidson mentions law once in passing reference to the general evolution of state power (Davidson 2009, p. 21), as he argues the need to acknowledge the state as the principal agent in the global economy (2009, p. 19).

For critical geographers, the presence of law in capitalist development is more forthright. Their focus on spatiality and territoriality immediately raises questions about jurisdictional delineation. Read from one angle—especially David Harvey's notions of 'accumulation by dispossession' (Harvey 2005, p. 72) and monopoly capitalism (2005, p. 76) – these phenomena are inconceivable apart from law. In his work on primitive accumulation in Part VIII of *Capital* Vol. 1, Marx himself observes that by the eighteenth century, law 'becomes now the instrument of the theft of the people's land' (Marx and Engels 1996, p. 716). In an earlier discussion dealing with roughly the same era, he sees the 'legal monopoly for the exploitation of certain branches of industry and commerce' as 'the forerunners of our modern joint-stock companies' (1996, p. 315). The spatial changes that animate Harvey's theory of uneven geographical development are, in deference to Marx, inseparable from law. Smith identifies this even more clearly in his writings, acknowledging that '[i]t was not simply the material world transformed and created by human action, but rather the manifestation of free will through a system of right as the economic and political institutions of modern society' (Smith 2008, p. 78). The division of labour and the parcelling of land into private property all turn on the legislative authority of the state, whether such power is exercised in the form of legislated wages or England's famed *Enclosure Acts.*

As evidenced in the preceding accounts, discussions of 'social relations', 'class', and 'state' begin to historically distinguish the UCD of capitalism from the idea of UCD as a transhistorical abstraction, but the dialectical rigors of UCD demands still more of the theory's proponents. While Trotsky's vision of 'differentiated unity' opens up the field of analysis for more exacting explanations of the social relations behind the historical development of capitalism, it is important not to stop there. Chronic generalization awaits those who seek to concretize UCD with reference to the undifferentiated notion of 'social relations', such generalizations that undermine the analytical promise of the dialectical materialist logic that is at the core of UCD.

The import of law in historical development informs how we might historically differentiate the UCD of capitalism. Law moderates and aggravates the uneven and

combined dimensions of capitalist development: we can gauge this on the international level by examining the scope of new trade legislation and the laws surrounding foreign investment; on the domestic front, we see this unevenness when studying the demographics of prison populations, the breadth of austerity laws, and minimum wage legislation. Once we are attuned to law in our study of UCD, we gain new insights into the inner nature of historical development that allows us to better understand what differentiates capitalism from other modes of production. While claims about the significance of law are implicit, a more concerted extrapolation is necessary in order for them to cohere into a UCD theory of law. As I build on these implicit remarks, law reveals itself as the nexus between the economic and the socio-political realms. Law should therefore be appreciated as the fulcrum not only for a more precise articulation of UCD, but also for a more complete study of capitalism as a social totality.

Four Steps Closer to a UCD Theory of Law

Tautological confusion abounds when it comes to our understanding of both legal pluralism and UCD, but we can inoculate ourselves against this outcome with a dialectical turn to law. I submit four successive steps that advance this endeavour: (a) distinguish between law and state; (b) explicate the dialectical facets of legal development; (c) show that law is intrinsic, not tangential to capitalist development; and (d) demonstrate how law's flexibility helps capitalism negotiate its barriers. Across the four steps, I detail how a more thorough integration of law into studies of UCD can both illuminate the nature of law's co-evolution with capitalism and recover this theoretical work from its tautological predicament, bringing us closer to a UCD theory of law.

(a) Distinguish between law and state

From reading selected sources on UCD, state and/or law appears whenever attempts are made to bridge the economic and the socio-political realms. This is a crucial point: in order to differentiate the UCD of capitalism both internally and externally, it is useful to look more closely at law as the nexus between the economic and the socio-political—an important first step in this direction is to distinguish law and state. Across these accounts of UCD, the state is variably the 'midwife' of capitalist production, the administrator of class conflict, the instrument of the bourgeoisie, or the resurgent element in International Relations theory. A commonality among these assessments is the penchant to depict class antagonism as in some way constitutive of the broadly conceived administrative power of the state, but it is important that we do not attribute to the state a fully formed 'will', which tells us little about how, let alone why, states 'act'. For convincing testimonials regarding the need to distinguish law from the state, we are well-advised to re-visit legal pluralism, where the unremitting scepticism of legal centralism provides a clear-eyed account of the value of this distinction.

First, recall the importance of rejecting the fiction that is the nation state's nativity tale. By treating law and state as synonyms, we subsume all other types of legality to the birth-of-the-nation-state narrative and exalt formal law as *the voice* of the state—an expression of its 'will'. Only a most distorted and undialectical understanding of historical development can result from this blinkered approach. Second, the problem of treating law and state as synonyms is evident when we encounter societies that are not in themselves states, but still have order; in other words, 'this linkage of law to the state is problematic. It implies that those societies without a state have no law' (Tamanaha 1993, p. 197). Absurdly enough, when historical realities prevent us from pitching law as an expression of a state's 'will', we are left without a social explanation of law; with only mystification to rely on, we become stunted in our capacity to comprehend the particularities of social transformation. Finally, blending the two previous points, the split that occurs between 'law' and 'society' in twentieth century scholarship reflects the monopoly centralized law claims on order, wherein law is alienated from the social as a means of securing its authoritative voice as the 'will' of the state (Marx and Engels 1990, pp. 270–71; Brophy 2013, p. 45). On this point, Fitzpatrick observes that a 'state-centred conception' of law results in a field of study in which law is severed from society in a manner that alters our understanding of legal development (Fitzpatrick 1984, p. 134). Legal effectiveness then becomes a gauge by which scholars measure the force of state authority; as Fitzpatrick further contends, the sociological concern with 'the effectiveness of law… is an expression of class interests' (1984, p. 134). The ongoing treatment of law and state as synonyms therefore underscores the implicit separation between law and society, leading to a scenario in which the quest to bridge this supposed gap can be interpreted as a pronounced class interest in the improved effectiveness of law, and by extension, the buttressing of the 'will' of the state.

The takeaway in all of this is the need to better distinguish between law and state so that we can engage in a meaningful analysis of social transformation. Trotsky's own analysis of the Russian Revolution reminds us of this: think of what we lose by saying that 'the state' abolished private property laws, or even that the October Revolution was fought against 'the state'. Put this way we are left with no sense of which specific parties were implicated or of class-based dynamics that inform certain exercises of state power. This rendering of the wilful state also obscures the complicated legal dimensions that inform the prevailing tensions. Legal campaigns can compel states to 'act' in various, often conflicting ways. Where workers are organized, for instance, states can legitimate their collective bargaining power and adjust labour laws accordingly. Concomitantly, states can 'act' in response to external legal pressures—as is the case with the Structural Adjustment Policies of the International Monetary Fund—and pass austerity legislation that undermines established labour laws, as the contemporary Greek case illustrates all too well.

Furthermore, by equating law and state we risk losing sight of the extent to which the legitimacy of the state depends not only on the effectiveness of its enforcement and administrative capacities, but also on its own subjugation to law. As a consequence, we underestimate the ideological force of the rule of law that engenders a particular conception of legal autonomy. A quote from renowned legal

historian Christopher L. Tomlins underscores this point, specifically his observation that law is 'first and foremost a modality of rule, whose particular practices at any one time will have determinable consequences for human action, not least those actions which constitute the practice of rule itself' (Tomlins 1993, pp. 29–30). Lastly, taking cue from a core tenet of legal pluralism, the collapse of state and law assumes the state's monopoly of 'legitimate coercion' (1993, p. 190), which blinds us to how various legal entities—such as corporations, unions or municipalities—also exercise authority on the ground.

Simply put, to treat law and state as one is to flatten their relation, compromising our ability to understand law's co-evolution with capitalism. Once we differentiate the two concepts, we can rid ourselves of the idea of the wilful state and appreciate it as one of many legal constructs that are indispensable to the development of capitalism. Having done so, the next task is to examine the internal dimensions of law as a means of further distinguishing the UCD of capitalism.

(b) Explicate law's own dialectical facets

When authors discuss social relations in an effort to differentiate the UCD of capitalism, I see the spectre of law lurking in the background. Law is a 'social process' (Banaji 2011, p. 59), which explains both the historical variability and the historical continuity of law's content, force, and effect. This is not to say that law simply fulfils the whims of capital by overtly servicing its needs; such an outlook lends a tripartite superstructuralist, determinist, and functionalist gloss to legal development (Gordon 1984, pp. 77, 80).

By first retrieving law from the base/superstructure dichotomy, we begin to divulge law's dialectical constitution, and are then in a solid position to avoid a determinist or functionalist understanding of legal development. To begin with, the heuristic distinction between base and superstructure is vague and should be understood metaphorically. In offering this claim, Maureen Cain and Alan Hunt contend that a deterministic reading, such as one which holds that '[l]aw … is to be explained and understood as a product of, or as a reflection of, changes in the economic base' is too simplistic (Cain and Hunt 1979, p. 49). Hugh Collins's introductory text clarifies this view, thus: 'Marxism has approached law tangentially, treating it as one aspect of a variety of political and social arrangements concerned with the manipulation of power and the consolidation of modes of production of wealth' (Collins 1984, p. 13). E.P. Thompson echoes this take, writing,

> I found that law did not keep politely to a 'level' but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice); … it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; … it was the arm of politics and politics was one of its arms. (Thompson 1995, p. 130)

Far from an easy narrative, legal development, like the development of capitalism itself, is full of contradictions. By interrogating law and legal relations

in unforgiving detail, we are better equipped to differentiate the UCD of capitalism and, by extension, appreciate law as an important nexus between the economic and the socio-political realms.

As it pertains to UCD, the case has already been made in favour of keeping intact the dialectic between the abstract and the concrete that is at the core of dialectical materialist analysis. I contend that this dialectical imperative applies in equal measure to the study of legal development. By distinguishing the abstract from the concrete, we guard against ahistoric functionalism and economic determinism; can more effectively chart the co-evolution of law and capitalism; and grasp the extent to which law is essential to the differentiation of capitalism.

Law is a transhistorical or 'simple' abstraction insofar as it appears 'common to several epochs of production' (Banaji 2011, p. 54). This general, undifferentiated constant embodies authority, suggests order, and upholds the precepts of sovereign continuity. As a simple abstraction, we learn little about the specific forms of law and its relation to historically specific forms of production and must satisfy ourselves with sweeping generalizations. To move closer to a concrete category or 'true abstraction' we must concretize the indeterminate concepts associated with law as they appear at particular moments in the development of capitalism (2011, p. 59). This requires the examination of a second notion, namely the historically specific law with an eye on the particularities of said law in practice. By examining the dialectic between specific, concrete or positive law, and general, transhistorical or natural law, we can gauge the variability of law's content, force and effect. It is in this manner that we apprehend the dialectical facets of law in its own right, which involves placing the specific historical developments of law against abstract conceptions.

Take for example the concept of land ownership. Although we associate the ownership of land with the emergence of private property that is so integral to the capitalist mode of production, land ownership as such is not unique to a single era or jurisdiction. In what we might contentiously label 'pre-capitalism', varied conceptions of access and ownership inform this relation, many of which were shaped by custom, such as the widow's common right to access woodlands in twelfth and thirteenth century England (Linebaugh 2009, pp. 41–43), or squatters' rights that could eventually lead to the ownership of private land in Ancient Rome (Gargola 1995, p. 130). Patently, land ownership is not a phenomenon exclusive to capitalism, but there is something unique about the legal parameters of ownership internal to capitalism that historically differentiates it as a mode of production. The alienation of land, as a primary step in its commodification, is one such distinguishing occurrence (Mészáros 2005, p. 34), which in concert with a host of other legal developments—especially rights and protections that enable the emergent capitalist to profit from alienation—signals the onset of capitalist relations. Neither total rupture nor pre-determined continuity inform the relation between the transhistorical or abstract notion of land ownership and the type of land ownership that is more closely aligned with capitalist relations; instead, there is a dialectical relation characterized by constant variability: contradiction, negation, and synthesis.

By historically differentiating land ownership in this manner, we can approximate a more concrete category that clarifies the constitutive relation between land ownership in capitalism from land ownership as an undifferentiated construct. This is necessary so that we do not infer capitalism anytime we see land ownership in history, but instead have a firm historical basis upon which we can differentiate capitalist laws as they specifically pertain to property. Further, this sheds light not only on how law evolves, but also on the central distinguishing aspects of the UCD of capitalism.

(c) Show law is intrinsic, not tangential to capitalism

The dialectical method, which expounds on law's historical dimensions, particularly its development in tandem with capitalism, is integral to understanding law as a social process. The work of political economist and historian Jairus Banaji, in particular offers a useful jumping-off point to analyze this relation because he begins to bring law into focus as it pertains to political economic history. Marx, in Banaji's view, did not simply see law as a superstructural reflection borne of the economic base, but rather as a mystifying process inherent in and necessary for capitalist development (Banaji 2011, p. 138). For Banaji, the matter turns on the unhelpful classification of labour as either 'free' or 'unfree'. He argues that to suggest that the wage labour of capitalism is 'free' is to adhere to law's mystifying power, which neglects the 'real basis' of law and denies the fact that it is law that secures those conditions of subjugation that make 'free' labour possible (2011, p. 140).

When we see that law develops in tandem with the UCD of capitalism, we see the value of a dialectical approach to law. Capitalism does not evolve in either a linear or uniform manner, so relations of production may have feudal as well as capitalist dimensions unique to a certain time and place; such relations that are influenced all the while by external forces and events. That law would develop in pure and distinct stages is likewise dubious; rather, it is the case that customary rights and capitalist laws not only exist side by side, but that the former can be revised toward capitalist ends as a testament to the combined nature of law's development. An awareness of new, quashed, over- or under-enforced laws or rules—the expressed UCD of law—not only tells us a great deal about what overt steps have been taken in order to uphold or challenge certain norms, but also who the main participants are in the process and what the nature of the struggle is. More than mere fodder for the legal pluralist camp, such an exacting account of law is proof of the fact that the evolution of law is bound to the UCD of capitalism itself. Indeed, law is intrinsic to capitalism. Instead of law emerging tangentially, law itself is 'capital-positing, capital-creating' (2011, p. 54), as Banaji states, 'the forcible creation and regulation of labour-markets are an intrinsic feature of capitalism' (2011, p. 15).

The degree to which law is intrinsic to capitalism is evident in the fact that legal doctrines of proprietorship render land, labour and capital possessable and exchangeable commodities in the first instance. In addition to title, contracts and labour laws, the money system itself requires law to standardize currencies and facilitate circulation (Marx and Engels 1996, pp. 138–39), meanwhile the

individuals involved in exchange are themselves armed with juridical rights (Pashukanis 2007, p. 114). Beyond post hoc fixes and enhancements, law is therefore foundational to capitalist relations themselves. The conclusive insight that results from this analysis is that testimonials in support of the theory of UCD that provide little more than passing commentaries on 'social relations', 'class' or 'state' remain limited: not only are they prone to the explanatory overreach, but they also miss the core objective of UCD—to comprehend capitalism as a totality. To study law in relation to capitalism is to study the precise moments where social, political and economic forces converge in such a manner that warrants either the breaking or the making of law. Importantly, it is worth re-iterating, this is not to say that law necessitates capitalism (or vice versa) in a pre-determined, functionalist way (Gordon 1984, p. 77). In the co-evolution of law and capitalism, there is no straightforward march out of arbitrariness into order.

Just because there is an intrinsic relation between law and capitalism, there is no determinant or prescriptive 'law' that dictates this relation. Robert Gordon's seminal essay 'Critical Legal Histories' reminds us that 'the social needs of industrialization in its earlier phases' do not in every instance lead to the 'negligence principle', which is the primary means of assessing wrongdoing and damages in civil law. He observes that 'lots of societies industrialized without the negligence principle or after the principle had been around so long that it could hardly be a "response" to industrialization' (Gordon 1984, p. 76). The value of focusing on law in order to differentiate is precisely this level of awareness with regard to the complexity of developmental trajectories, which resists the notion that certain phases of capitalist development necessitate a pre-given armoury of legal measures. The resultant perspective stands to yield significant explanatory potential as it pertains to the history of law and capitalism. More explicitly, the UCD of capitalism is afforded more depth and historical complexity when we account for the historical development of law, especially when this is undertaken in accordance with the dialectical method upon which Trotsky insisted.

(d) Demonstrate how law's flexibility helps capitalism negotiate its barriers

A specific example, namely the realities of 'free' labour in *postbellum* United States, best demonstrates the aim of this fourth step. During the industrialization of the mid-nineteenth century, 'free' labour existed in the US alongside slave labour. Slavery itself was not antithetical to a type of capitalist growth (Banaji 2011, p. 10), but nor was it entirely complementary. Yet when slavery was declared illegal after the American Civil War, novel legal measures protecting the predominantly white wage-labour workforce proliferated, re-inscribing the racist terms of labour that continue today (Alexander 2012; Roediger 2006, 2010). For instance, the *Fair Labor Standards Act* of 1938, which sought 'to establish minimum wages and maximum work hours' in the effort to curb the downward spiral of wages in the latter years of the Great Depression. Significantly, this Act did not apply to 'two-thirds of the black workforce' (Hamilton 1994, p. 499), namely agricultural and domestic workers, who 'were excluded on the basis of their not being involved in the production of goods that involved interstate commerce' (1994, p. 498). On the

abstract plane, this law bolstered the notion of 'free' labour that is characteristic of the capitalist mode of production; however, on the concrete plane, 'free' labour was racially differentiated in such a way that the material social relations more closely aligned with the type of legal order that had long ago been formally declared as illegal.

The concrete reality that is the legacy of slavery in practice contradicts the abstracted notion of the 'free and equal' individual, but far from undermining the development of capitalism, this tension helps negotiate the barriers of its realization. Lisa Lowe provides an interesting take on why this may have been the case, writing that 'in the history of the United States, capital has maximized its profits not through rendering labor "abstract" but precisely through the social productions of "difference," of restrictive particularity and illegitimacy marked by race, nation, geographical origins, and gender' (Lowe 1996, pp. 27–28). New legal measures contributing to the differentiation of 'free' labour on the one plane underscores the ideology of the free legal subject on the other plane, all of which is cut across by the historical reality of legalized slavery and its legacy. The abstract and concrete facets of law work in tandem to undergird the UCD development of capitalism, enriching our understanding of not only how law and capitalism co-evolve beyond a simplistic notion of the 'will' of the state, but also why we end up with such a complicated network of laws over the course of history.

When we observe the historical development of law, we can remark on the extent to which law flexes in response to the specificities of changing social relations. In concurrence with legal pluralism, this flexibility is a distinctive feature of legal development in general; in disagreement with legal pluralism, I support Fitzpatrick's implicit assertion that this flexibility is born of law's internal contradictions (Brophy 2013, p. 40). The 'why' of legal development is not answered by pointing to law's flexibility as such, but in understanding the social circumstances that inform that flexibility in a broader totality. As Lenin attests: '[f]lexibility, applied objectively, i.e., reflecting the all-sidedness of the material process and its unity, is dialectics' (Lenin 1976, p. 110); rather than a symptom of the arbitrariness of legal development, therefore, this flexibility reflects the dialectical progression of history as such.

Rees offers an excellent summative statement explaining that, to appreciate capitalism as a totality, 'the dialectic has to be able to show how the central contradiction of capitalist society is expressed' (Rees 1998, p. 100). In this regard, law is not only mired in the contradictions that are the driving force of the UCD of capitalism, but when understood as a component of a totality, we can appreciate that it boasts its own set of contradictions that intersect with and historically differentiate capitalist relations. Law's intrinsic relation to capitalism can be encapsulated by an understanding of its flexibility. On a transhistorical level, law is intimately related to justice, rationality, freedom and stability; however, in practice law is pliable, contingent, and often evasive as well as repressive. Imbued with an enduring quality, law flexes in response to the contextual specificities of evolving social relations; law by social necessity therefore evolves in an uneven and combined manner. Moreover, law's flexibility is precisely that which helps capital negotiate its barriers, a negotiation that occurs on two mutually reinforcing planes. The first

plane is abstract-ideological: in capitalism legal subjects act with a 'juridically constituted' will and engage in exchange with other 'free and equal' individuals (Pashukanis 2007, p. 114). In this instance, the driving ideological force of law is the 'juridical illusion [that] reduces law to the mere will' (Marx and Engels 1975, p. 92), creating an abstracted notion of the free legal subject as both a worker and a consumer. This becomes an integral legal construct insofar as capitalism 'requires the production of new consumption' in order to overcome a barrier of realization (Marx and Engels 1986, p. 336). The second plane is concrete-historical: older legal relations can restrict the growth of capital, and on such occasions new laws may be introduced that do not absolutely abolish extant legal forms, but instead combine with them to establish new grounds of application and exploitation. This perspective in particular denies the predominance of legal formalism and reflects the three preceding conditions.

Legal pluralism, hampered by the lack of a systematic outlook on historical development in general, only has a limited capacity to explain these types of developments. Yet when we bring the dialectical materialist method to bear on legal development, we can better answer the how and why of legal history. Guided by the aim to better differentiate capitalism both internally and externally, we finally move past ambiguities and concentrate on the multifaceted relation between capitalism and law. At last we arrive at the underlying reality: the UCD of capitalism is simultaneously the UCD of law. Capitalist development in some countries can force its pace in others, while several otherwise distinct modalities may be compressed together with capitalist and pre- or proto-capitalist institutions co-existing for considerable periods. Law, as a vital distinguishing element in capitalist development, can hardly escape this logic. Just as there is no stagist economism, there is no stagist legalism. There is no pre-ordained, direct move from the arbitrariness of feudal law into the orderliness of capitalist law (Kennedy 1978, p. 235), but instead an uneven and combined process of social transformation that is subject to an array of geographical and historical specificities. By bringing law's own internal dialectic to bear on capitalism, we historicise the latter, approximate a more complex understanding of capitalism as a totality, and avoid tautological confusion.

Conclusion

In the quest to differentiate capitalism both internally and externally, law cannot be ignored. The historically distinctive facets of capitalism are inexorably legal in nature, and by excavating the dialectics of law in relation to the evolution of capitalism, I lay the groundwork for a more extensive assessment of capitalism as a totality. From this newly established analytical perch, we see the primary advantage of a UCD theory of law, which promises a lucid view of what we can reasonably expect from law now and in the future.

Law's dialectical constitution and its intrinsic relation to capitalism explain why and how law can be looked upon to both promote and prevent capitalism's calamities. Based on dialectical analysis, we can understand why, in the contemporary neoliberal condition, austerity legislation can be presented on an

abstract-ideological plane as a legitimate response to the crises of capitalism, and from a concrete-historical perspective, we also see that it is law's manifest flexibility that allows capital to overcome new barriers in its unceasing need to grow. From this UCD theory of law, we comprehend that law—in offence, defence or even absence—can both embody and advance a range of reactionary, reformatory or revolutionary principles, and it is from this more systematic understanding that we can begin to think about the future of law and capitalism.

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