From Substance to Form: the Legal Theories of Pashukanis and Edelman

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The history of the 20th century is replete with a welter of state and legal forms to which theory cannot remain indifferent. Over the last eighty years, capitalism has existed with fascism, laissez-faire and interventionist-welfare states with formally representative or autocratic governments, with or without working class parties. It has become, by now, a convention to claim that, Gramsci excepted, classic Marxism does not offer a general theory of law and the state applicable to capitalist or communist societies. As with many verities the value of this convention should not go unchecked. And to observe that the state will “wither away” with the demise of capitalism is simply not sufficient (Bahro, 1978). Thus it is encouraging to find the emergence of a lively debate over the nature of the capitalist state and its laws. In America and England for example, instrumentalist theories flourish, albeit not without widespread criticism.

The critique of instrumentalism has been a major theme in recent Marxist literature on law and the state. The instrumentalist position characterizes the state as directly controlled by a ruling class who uses it as a weapon to advance bourgeois interests, especially in relation to other classes. Critics have held that this perspective exaggerates the unity of the ruling class and neglects the partial independence of the state from ruling class control in capitalist societies. However, instrumentalism fails to distinguish legal from extralegal coercion and thus does not identify what is unique about law. Nor does it explain why the ruling class resorts to law when it rules.

French structural Marxism, particularly Althusser and Poulantzas, has given the study of the state a new direction. Here the focus is on the relationship between state action and objective class structure. This relation need not (and generally does not) involve the capture of the state by a single class. From this perspective, what make a capitalist state capitalist is not direct control by capitalists but its existence in a capitalist totality, and its functioning to reproduce necessary capitalist social relations, economic and non-economic.

In light of these theoretical developments, alternatives to instrumentalist perspectives on law — one important product of state action — are of particular interest. In this article we will present a comparison and critical assessment of two attempts — those of Evgeny Pashukanis and Bernard Edelman — to develop formalist Marxist analyses of law. Pashukanis, a prominent Soviet legal scholar, developed his commodity exchange theory of law in the 1920s, partly in opposition to Second International instrumentalism. And while the commodity exchange theory differs in its political implications from contemporary structuralism, Pashukanis’ work has recently been revived by — among others — Edelman, a French Althusserian jurist and philosopher. Both formalist Marxian legal theorists seek to establish alternatives to the deeply flawed instrumentalist tradition.
Pashukanis published the outlines of the commodity exchange theory of law in 1924 in *Law and Marxism: A General Theory*, and elaborated his ideas in later editions of the work. Here the fundamentals of a contemporary critique of instrumentalism are already present. So too, Pashukanis criticizes the emphasis given to the coercive aspects of law by other Marxist writers in surprisingly modern terms. In addition, Pashukanis attacks the claim of other Marxist writers that bourgeois freedom and equality are mere shams whose only significance is to deceive the masses. Pashukanis’ reply is that, far from being a sham, freedom and equality — of a particular formal character — are the principles by which a bourgeois society operates. This insight is at the core of the commodity exchange theory of law.

To come to terms with the commodity exchange theory, events in the Soviet Union of the 1920s must be noted. In the aftermath of foreign invasion and civil war, the young Soviet government faced difficult problems of socialist reconstruction. The jurists of Pashukanis’ generation were particularly concerned with the legal manifestation of these problems. That the Czarist system was to be discarded was clear. But along what lines should a new system be established? The classical Marxist texts on law did not provide a clear answer. Engels had prophesied that the state would eventually wither away under socialism, but what of the short run? Was a centralized state needed to organize the transition to socialism? What was an appropriate role for the Communist Party in this process? What legal principles, if any, should the state adopt? Soviet jurists held a wide range of views on these questions. Typically, these views were linked to particular conceptions of the nature of law itself. Throughout the twenties, a vigorous debate on the relationship between law, state, and socialist civil society filled the pages of Soviet legal journals (Jaworski: 1967: 277-280). *Law and Marxism* was a significant entry into this debate.

For Pashukanis, law is a unique form of social regulation. It creates a universe of formally equal individuals whose concrete social and economic positions do not determine their legal status and capacities; class position disappears from cognizable legal relations. The resulting abstracted individuals become the “subjects” of the law, possessed of wills and capable of arriving at agreements with other subjects. Contract is the paradigmatic form of bourgeois law, and parties to legal relations are treated as “bearers of every imaginable legal claim.” (19.78:119) Reflecting property relations, these claims are based upon rights of possession. Thus a system apparently composed of a mass of discrete, equivalent subjects preserves the aggregate inequality of capitalist class relations.

Commodity exchange requires that individuals be juridically free to acquire and alienate property. The conflict of private interests in such transactions is the precondition for the legal regulation of private disputes. Law, therefore, emerges neither from consensus nor the “general will,” but rather from conflicts inherent in the nature of capitalism; conflicts which allow for disputes of every sort except those that entail challenge to capitalism itself. Thus, where commodity exchange as a fundamental economic relation is absent, the legal regulation of contracts involving purchase or sale of goods and labor does not arise. More generally, Pashukanis’ theory leads to the conclusion that capitalism could not exist without law; private and competitive entrepreneurs need its impersonal authority. The legal capacity to perform exchange transactions (and to expect the state to uphold these transactions) is the source of the notion that individuals — as distinct from families, classes, or associations — are the sole bearers of rights. Implicitly, however, capitalist economic relations, but never
the state, are the causal source of all rights. The questions that this position raises for the juridical relation between the individual and the state in capitalist and non-capitalist societies will be examined later.

One objection to any theory asserting a unique correspondence between law and mode of production is that many attributes of "capitalist law" are already present, if only embryonically, in the law of precapitalist societies. Pashukanis' formulation avoids this error, noting that commodity exchange is not entirely absent in such societies. With the triumph of capitalism, however, the commodity form comes to define all social relationships, destroying organic collectives and status distinction of the precapitalist world.

Commodity exchange, an economic transaction, according to the commodity exchange theory of law, must necessarily give birth to formal, possessive individualism. By extension, categories like race, sex, and national origin could be expected to become juridically irrelevant because the abstract equivalence of all legal subjects is an inextricable aspect of the growth of capitalism. The effect of these developments can be traced in law. For example, the distinction between public and private law, which rests on an institutional separation of government from property and a restriction on governmental powers to freely interfere with private contractual agreements was virtually unknown in the Middle Ages despite its existence in Roman law. And though the legal consequences of commodity exchange can be seen most fully in property law and commercial law, they are visible in criminal law as well. Pashukanis suggests that the retributive principle of equivalence between crime and penalty is based on the principles of commerce, but adds that it is only when capitalism reduces concrete labor to abstract labor power, measured by time, does imprisonment for a fixed term become the primary sanction.

The centrality of the formal properties of law in Pashukanis' analysis inevitably recalls Max Weber's treatment of law, but there are important differences. Weber considers rationality in legal discourse to be one of its formal characteristics, but Pashukanis does not. Further, Weber pays more attention to cultural and institutional influences on the historical development of law than does Pashukanis. A crucial contrast with the Weberian perspective stems from Pashukanis' commitment to the abolition of the legal form and with it the state. Weber believes that bureaucratic statist domination is inevitable in capitalist and socialist systems, and also insists on the autonomy of politics.

Contrasts with other major legal theorists outside the Marxian tradition are also useful. For Pashukanis, law cannot be understood as the commands of a sovereign — the view of Austin — nor is it merely a set of norms — as Kelsen has it. Rather, law orders social relations according to definite principles homologous to a society's commodity exchange system. That this ordering may be coercive is true but not distinctive. Nor does law exist in the realm of ideas alone, as is implied by those who regard its principles as deceptively false. Nevertheless, Pashukanis insists that law, one form of state activity, mystifies the true structure of capitalism.

There are several reasons for this conclusion. First, the origins of legal relations in commodity exchange are obscured by legal doctrine, which gives them an a priori rationale. In other words, doctrine treats historically contingent relations as if they were self-evident and eternal principles. Second, contractual equality obscures the exploitation inherent in wage labor. But this exploitation and its mystification take place not because the principles of bourgeois justice are described inaccurately in law. As Marx demonstrates in Capital, it is through the routine operation of these principles that surplus labor is extracted in a capitalist
society, and that its source is systematically obscured. Thus, Pashukanis's treatment of law parallels Marx's treatment of commodity fetishism, where law serves to further mystify class relations. Hence, legal relations are both true and false where bourgeois political power takes the form of a general public authority.

A CRITICAL ASSESSMENT

While Pashukanis' work advances the Marxist theory of law by stipulating a precise theoretical connection between law and economy, his effort is not fully satisfactory. After noting that "the logic or juridical concepts corresponds to the logic of the social relations of a commodity-producing society" (1978:96), Pashukanis simply asserts that legal relations are directly generated by the existing social relations of production. This is hardly adequate. For it is the specificity of this "direct" generation that lies at the core of Pashukanis' theoretical challenge to legal instrumentalism. Indeed, the particular processes by which economic relations influence the law need to be addressed. Pashukanis concedes as much when he comments that the actual evolution of property law was "more complex" (1978:113) than in his simple scheme, though his own theory, he argues, demonstrates the significance of the trend. But what the complex mediations are and what might account for them the author does not say. In contrast, French structuralism seeks to account for such complexities in terms of the famous concepts of "relative autonomy" and "overdetermination." In more factual, historical terms, Weber, while conceding the great impact that merchants had on the development of commercial law, also considers such influences on law as the bureaucratic administrations of European monarchs, the organization of the legal profession, and the separation of church and state as analytically distinct from economic developments.

Despite Pashukanis' failure to articulate the concrete mediations that bring law into correspondence with class interests, it seems likely that he was correct in maintaining that the spread of the commodity form had a tendency to individualize and universalize European law during the emergence of capitalism. Yet, it was probably not the only process to do so. Of course, once other historical influences on law are considered, the question of the relative importance of different mediations is inevitable and calls a Marxian base-superstructure analysis into question. In this regard, the explanatory status of a "commodity form" in non-economic social relations is problematic. To say that the connection is homologous or analogic fails to resolve the difficulty, for it is clear that economic relations are not substantively identical with political or legal ones, whatever their commonalities. Korsch's critical review of Law and Marxism similarly insists on the categorical non-identity of the legal form and the commodity form, and charges the Soviet scholar with having "obliterated" a truly Marxist materialist conception of law (1978:194).

Furthermore, by making commodity exchange the pivotal explanatory variable, Pashukanis implicitly accords greater significance to the way that commodities are distributed than to the way that they are produced. Again, Korsch scores Pashukanis for this unmarxian emphasis. An alternative criticism would attack the conceptualization of distribution only in terms of commodity exchange. Since distribution in precapitalist societies does not occur predominantly through commodity exchange, Pashukanis' theory tells us that the specific attributes that he regards as the essence of legality would have been found only to a small degree in the positive law and its actual enforcement in such social formations. The theory says nothing about the larger part of law in precapitalist societies, the part that does not embody principles of abstract, formal individualism. Nor can a theory which relies solely on
a description of capitalist society's circulation and exchange mechanisms deal competently with the importance of activities concerning the reproduction of class relations. Surely, state activity in this century has come increasingly to be involved — although not without struggle — in wage, educational, health, and welfare matters. State policy may become an arena of conflict over the priority given to the state's role in capital productive vs non-productive matters, particularly when private capitalist accumulation is under stress.

Another problem is posed for Pashukanis' theory by evidence that under some circumstances the spread of commodity exchange relations had an effect that was just the opposite of what Pashukanis suggests. For example, just after the American War of Independence, women had political rights in a number of the states (Pessen, 1969: 86–87). These rights were taken away in the Jacksonian period, and women were excluded by law from occupations that they had previously practiced. Sexual distinctions were thus being intensified in law and society just at the time commodity exchange relations were being extended. This development can be understood in terms of the way the relationships between the sexes were being transformed by economic developments (Barker-Benfield, 1976) but Pashukanis has no way of dealing with this. Like most Marxists of his generation, he had a blind spot when it came to the family and the status of women.

The prominence of racial distinctions in the law of capitalist countries is equally puzzling for Pashukanis. To date, South Africa's apartheid legislation has not been materially weakened by the growth of its capitalist economy. At least in the short run, the participation of the antebellum American South in the international cotton trade strengthened rather than weakened the slave system and its legal dimensions. If in the last twenty-five years racism has become a less explicit feature of American law, this seems less due to the spread of commodity exchange relations than to the civil rights and black power movements. In Germany, Nazi law reintroduced racial distinctions that have been dropped long before. And wherever the European powers established colonies, they established legal systems that made explicit distinctions between Europeans and “natives,” in part to protect the favored position of the colonial power and of white settler minorities in commodity exchange (Greenberg, 1980).

These examples suggest two further vulnerable aspects of the commodity exchange theory. The first stems from an implicit assumption that there is essentially only one form of capitalist state and law. Political differences between fascism and liberal democracy, chattel slavery and wage labor make this assumption suspect. The second weak spot arises from Pashukanis' apparent reliance on a notion of capitalist society that structuralists have critically referred to as an “expressive totality” which neglects the possibility of disjunctions between different levels of the social order. An “expressive totality” thereby fails to provide for the comprehension of conflicts or discontinuities between the economic and politico-ideological levels of society.

Clearly, the simple and absolute connection that is postulated to exist between legal form and commodity exchange requires qualification. Even if Pashukanis is correct in holding that commodity exchange tends, in the long run, to give rise to a law dealing with abstract, formally equal individuals, in the short and medium run, commodity exchange seems, at times, to have reinforced the particularism of law. Without a theory specifying the mediations by which economic relations affect law (and vice versa) there is no way to understand when and under what conditions law developed in one direction or the other.

Similarly, by failing to examine the historical struggles of subordinate groups to achieve
equality, the Soviet author fails to grasp the positive moment in the achievement of formal equality as well as to see that this achievement is not fore-ordained. In his essay "On the Jewish Question," Marx criticized religious emancipation for not going far enough; to free politics from religion was not to free it from privatizing and alienating commercial relations. But he also insisted that, as far as it went, religious emancipation and formal equality were positive accomplishments. Evidently Pashukanis was much more one-sided than Marx in his treatment of formal equality. Indeed, his writing lapses into a rigid "fetishization" of social categories. Such an error turns a theoretical category into a fixed thing. From a Marxian standpoint this is a cardinal error of bourgeois thought, as it erases the capacity to grasp the point that social reality is produced, historically specific, and mutable.

In this regard, the political quietism implicit in the commodity exchange theory of law is reinforced by Pashukanis' views about the effects of legal change. He insists that changed social relations give rise almost automatically to new law, but that law cannot bring new social relations into existence (1978:88). Such a view presumes that discriminations between juridical and socio-economic categories are unambiguous. But where, for example, would taxation or other forms of state fiscal and monetary planning be categorized? Since Pashukanis stresses only the form and never the substance of "capitalist law," the question would remain unanswerable for him.

One central conclusion for the commodity exchange theory of law is that there can be no such thing as proletarian law; law itself is ineradicably bourgeois. By inference, any socialist movement would be wasting its time in trying to change the law as part of its strategy. Even if such efforts could succeed, the impact on people's well-being would be negligible. Korsch contrasted this stance unfavorably with that of Engels, who emphasized the importance of demands concerning law to a socialist program. Perhaps such strategic decisions cannot be rendered a priori by theoretical fiat.

Pashukanis' position that law cannot affect property relations is stated but not derived from any argument about the nature of law or of social relations. Indeed, consideration of opportunities to influence class power juridically remains an important conceptual and practical gap here. Few Marxists will deny that there are stringent limits to law's impact on social transformation, but it is doubtful that they are as narrow as the limits implied in Pashukanis' program.

Although Pashukanis maintained that law would disappear with the commodity form, he held that the underdevelopment of Soviet forces of production in the 1920s did not permit commodity exchange and the legal form to be abandoned just yet. Instead, law was to retain its bourgeois characteristics during the transition to socialism, even though it would have new substantive content. Marx had taken a similar position about the character of law during the transition in the Critique of the Gotha Programme. Unfortunately, Pashukanis did not elaborate the implications of this stance for emerging Soviet administrative practice. For, while a theory in itself cannot be held responsible for history, nevertheless, the failure to articulate criteria for the abolition of law and the governing apparatus may have facilitated Soviet leaders' aggrandizement of state power.

Similarly, some have argued — based upon the experience of Nazi Germany — that there are dangers in dispensing with due process protections in civil and criminal procedures in a capitalist society (Neumann 1954). Pashukanis' own death following his arrest in the purge of 1937 has been used to buttress this position. It is possible that Pashukanis' failure to discuss the use of law to protect citizens against abuses of state power stemmed from an
sensitivity to the juridical rights of citizens in relation to the state, particularly in the
growing fields of public and administrative law. So too, the refusal to consider that legal and
political activity may influence conditions of capital accumulation and its social environ-
ment prohibits the commodity exchange theory from grappling with the significance of new
legal rights that have emerged with the growth of state involvement in the areas of capital and
commodity circulation and reproduction. With the expansion of the administrative agencies
and the welfare functions common to 20th century capitalist states, new legal rights have been
conferred, rights that do not have their direct origin in capitalist exchange relations.
One strong critic of Pashukanis insists that his logic leads to the eradication of citizens’ rights
to protection from the state (Sumner, 1981: 77). In the American context, the erosion of such
protections would include the undermining of older individual rights that go back to the Bill
of Rights, as well as questionable form of criminal law investigation (Anderson & Wynn
1982).

Alternatively, at the time of his writing, Pashukanis might have believed in the imminent
arrival of universal socialist harmony, where inequality and injustice would be relics from the past. Finally, and less speculatively, it can be persuasively argued that Pashukanis’
major theoretical and political concerns were oriented around a vindication of the power of the Soviet state in the period of putative transition to communism. Still, the tenor of Law and Marxism is clear; it demands the abolition of law as a condition of liberation. If the legal form is necessarily a bourgeois fetish, then it has no place in a society once capitalism has been overthrown. To those who maintained that law must be preserved to protect individuals against victimization even in socialist societies, Pashukanis replied that since under socialism the lines separating individuals from one another will become blurred, self-aggrandize-
ment at the expense of others will be inconceivable (1978: 32, 155). An assessment of such
claims rests in part on the plausibility of the notion that self-seeking and instrumentalist behavior toward others originates in commodity exchange alone. Pashukanis ultimately
makes no serious effort to demonstrate that this is so.

Concomitantly, Pashukanis never explores alternative political forms to the centralized state. Workers councils or soviets — for the provision of collective self-governance and justice in the public sphere after the abolition of the legal commodity fetish and the state — go unmentioned. Such omissions are serious flaws in his work and cannot be ignored by contemporary theorists.

AN ALTHUSSERIAN EXTENSION

In Ownership of the Image, Edelman, like Pashukanis, grapples with the linkage of commodity exchange and the legal form in bourgeois society. Each theorist views law as the product of commodity relations. In order to facilitate such relations, bourgeois legal subjects are construed as equals and thus as juridical representations of economic subjects in a society dominated by exchange value rather than by use value. Unlike Pashukanis, however, Edelman does not claim that these features of capitalist law exhaust all discussion of the topic. And Edelman develops a unique analysis of the ideological (‘‘imaginary’’) dimen-
sions of the legal form.

In line with the structuralist effort to eliminate a priori subjectivity from a Marxist science, Edelman’s most novel contribution to legal theory emerges from his elaboration of the bourgeois ideology-legal subject nexus. The legal subject and its corollary, the legal form, he argues, rest on bourgeois ideology. Such ideology views the individual as someone
Anderson and Greenberg

who owns himself. He is animated by an autonomous will and, therefore, is free to dispose of his labor power and his possessions as he sees fit. What *Ownership of the Image* offers is an anti-subject counterproposal for a theory of law.

The quintessential rights, formal freedom and equality, that bourgeois law presumes to exist—whether natural to individuals or granted by social contract—in fact derive from the objective characteristics of capitalist commodity relations. The ideological representation of these subjects and their social relations, therefore, contributes to the perpetuation of capitalist society by disguising its origins and consequences. Moreover, the perpetuation of exploitative social relations, based on equal exchange within the realm of circulation, is necessary for exploitation to continue. The individual, therefore, is constituted as a subject who “chooses” to enter into commodity relations with others under stipulated conditions. These arguments are derived from Marx’s treatment of capitalist exploitation and Althusser’s treatment of capitalist exploitation and ideology. Edelman first elaborates on these concepts as they are relevant to a general discussion of law. He then applies these ideas to specific legal problems concerning the development of copyright law in still photography and cinema, and the political rights of Algerian workers in France.

A major part of Edelman’s book is devoted to a presentation of the evolution of French law regarding the ownership of photographic images. In the mid-nineteenth century, French courts were asked to decide whether the photograph of a scene in the public domain, for example, a street scene, could be copyrighted. The courts said that it could not, on the grounds that photography was a mechanical act which did not involve creativity or instill the product with the personality of its creator. Therefore, there was nothing for copyright to protect. At that time, the law was resistant to the notion that someone who operated a machine, like the camera, could be a creator. This resistance, however, was less a matter of immanent legal reasoning and more a reflection of the status of craft production. Edelman argues that disqualification of rights over such machine labor began to change in response to economic exigencies.

Early in the twentieth century, commentators began to point out that the livelihoods of millions of people who worked in the photography industry would be jeopardized if legal copyright protection were not extended to photographs. Without such legal protection, the mere physical photographic image would be worth little as a commodity. This change in legal criteria provides for what Edelman calls the “overappropriation of the real.” Here something owned by one person, for example, a house, comes to be owned by another in the form of a photographic image which is also a valued commodity. Thus, Edelman asserts (but cites no substantiating evidence) that the emerging economic importance of photography largely in the form of significant amounts of capital committed to the industry, led to legal revision in this field. What is of particular interest in this regard is the rationale for the decision: since photography involves specialized techniques, the product necessarily bears the imprint of its author. In turn, this logic serves both to constitute the juridical subject (commodity owner) and to establish the existence of a new commodity that results from the act of photographic creation. This “juridical production of the real” signals the interrelation

1. It is interesting to note that Edelman chose as his topic an area of law where the issue arises of individual creativity and intellectual labor—things conventionally associated with the individual subject’s immaterial property—for his structuralist aims.
between commodities, commodity producers, and commodity owners from a bourgeois legal perspective.²

The introduction of film photography posed a new conceptual dilemma for the courts, for without copyright protection the film industry would not have been possible, particularly with the capital-intensive introduction of sound. Edelman implies that the courts had no alternatives to the provision of juridical protection. The question was how to provide it. Unlike still photography, film making is a collective endeavor; it involves a producer, director, script-writer, actors, etc. But the law does not acknowledge collective subjects. It requires that legal rights take the form of commodity ownership and only an individual can own something. If ownership is to be awarded to the creator — that person who is uniquely responsible for the product and control over its fate — which one of the many collaborators on the film is to be recognized as the creator-owner? The courts decided that it was the producer because he bore the financial risk. All other participants, consequently, were assimilated to the category of proletarians who performed uncreative labor. As such, they were legally entitled to wages but not profits.

Whatever cinema’s differences from still photography, however, an important feature is shared. In both cases, new, privately owned commodities, possessing specific legal status, have come into existence through the “overappropriation” of already existing commodities and persons. Consider: A photographs or films the face of B. This image is purchased by C who publishes it in a book of photographic portraits and who profits from the sale of this book. That such “overappropriations” come to take this specific juridical and exchange commodity form is a built-in tendency of capitalism. Of course, the way that law excludes legal subjects from property ownership or stipulates the ways by which such ownership may be achieved, is an equally important consideration.

In pursuing his structuralist logic, Edelman strictly ascribes the producer-as-owner decision and the reasoning used to justify it, to the growth of productive forces of the film industry. In this regard, capital expansion leads to the collectivization of creative labor while doctrinally it preserves the individual legal subject. This development serves to refurbish the bourgeois ideology of individual subjectivity and creativity in an iron-clad manner. Torn between the need to accommodate the industry and the existing legal doctrine of authorship, the court did not hesitate to endorse the former, while preserving the ideological appearance of the latter. Thus, Edelman identifies the courts as a state apparatus which reproduces capitalist economic and ideological relations as it makes law.³

On this basis, Edelman rests his structuralist conclusion that capital itself is juridically recognized as the true creative subject, although this outcome is not stated explicitly in judicial decisions. The utility of Edelman’s argument in regard to an analysis of public law or collective legal subjects, however, is unclear. Collective ownership is obviously not utterly foreign to express acknowledgment by bourgeois law. For example, the state in capitalist societies is a collective owner sometimes engaged in commodity exchange or other forms of

². Nevertheless, the practical application of this criterion by the courts, we are told, proved to be uncertain and contested as late as 1959. (Edelman, 1978:50)

³. In taking this position, Edelman is nodding in the direction of those who have argued for the partial autonomy of law from the ruling class, but only slightly. As Edelman portrays the courts, the substance of their decision is always aligned with capitalist class interests. The language in which decisions are expressed, however, is governed by an autonomous legal tradition. Thus form is autonomous, but not content.
capital accumulation such as taxation. Yet, the state is not juridically confused with the individual.

Nevertheless, Edelman’s conclusion is meant to overcome any lingering objections to the position that creativity or intellect, whatever their socially derived content, are distinctive properties of individual subjects. For him, the character of individuals is constituted by bourgeois ideology with its stress on individual consciousness and voluntarism.

Edelman argues that as the film industry evolves along capitalist lines, it poses questions for the courts which “embarass” existing bourgeois doctrine. In order to avoid contradictions between the legal apparatus and capitalist development, the courts decide the disputes that are brought to them in ways that are compatible with the requirements of industry. Yet, to legitimate their decisions, jurists must couch their decisions, not in terms of the practical consequences of adopting one rule or another, but in terms of formal legal doctrine.

At first sight, Edelman’s position bears some resemblance to American realism or “judge-made” law. On closer examination, however, his thesis is fundamentally divergent because his judiciary is not construed as standing above class interests in pursuit of sociologically informed justice. Rather, Edelman’s judiciary reproduces and reflects the capitalist underpinnings of technological and legal developments; knowledge possesses class interest. Still, the juridical reasoning used to facilitate economically grounded decisions often becomes more and more strained. Thus, as certain disputes over property ownership are brought into court, photography “seizes” or “catches” law “in the act” of ideological deception as it tries to accommodate structurally determined verdicts to a recalcitrant doctrine.

That judges employ tortured logic to arrive at conclusions which they have decided to reach for reasons they would prefer not to state will hardly come as a surprise to anyone who routinely reads decisions. That Edelman finds this realization an embarassment to law may have to do with differences between continental and Anglo-American legal systems; judicial decision-making has traditionally had less legitimacy in the former. But, in light of Edelman’s anti-capitalist political thrust, it must be stressed that the difficulty in maintaining doctrinal consistency is unlikely to be unique to capitalist judiciaries.

Of course, it may be true that the points at which changes or inconsistencies appear vary among social and legal systems. In fact, the location of those points at which inconsistencies appear tell us something about law and its relationship to society. Edelman’s study of laws pertaining to copyright for photographic and film properties, therefore, may be quite instructive if it can point to contradictions or time-lags in French legal doctrine. So too, an exploration of changes in juridical logic provides a suggestive method by which to examine the relationship between legal doctrines and specific areas of capitalist development.4

Unfortunately, Edelman offers no insight about how a particular case or category of cases comes to be resolved in the courts. The process by which a social dispute becomes translated into a legal conflict — whether resolved through negotiations among attorneys or through court actions — must be addressed if the larger workings of the courts are to be illuminated. As is known, the histories of legal actions are dependent on a variety of individual and organizational contingencies (Blumberg, 1967; Galanter, 1974; Anderson, 1980); Edelman disregards these dynamics.

4. The fruitfulness for legal analysis of studying doctrinal inconsistencies or shifts has already been demonstrated by other scholars (e.g., Horwitz, 1977).
Implicitly, Edelman treats capitalist interests as if they were always shared by the entire class. He seems unable to distinguish between the necessity of the court supporting the interests of a particular capitalist litigant or sector of capital in a particular case and the necessity of serving the general interests of capital. The analysis thus fails to illuminate the considerations that can be expected to govern the judicial handling of cases involving conflicts of this type.

Regarding Edelman's theoretical debt to Althusser, the essay on Ideological State Apparatuses appears to be more influential than the earlier work on contradiction and overdetermination, although the latter is cited in *Ownership of the Image*. Unlike Althusser's use of the categories of contradiction and overdetermination, it seems implicit in the concept of ISA that no contradiction between ideology and the functional needs of capitalism may arise. The ISA, however, is one means by which to suppress challenges to capitalist domination that stem from economic contradictions.

Objections that have been raised against the static nature, inevitability, and functionalism suggested by Althusser's ISA essay become relevant here. First, developments that may generate and disseminate ideas and procedures which are inadequate to the perpetuation of capitalism cannot be easily comprehended under the rubrics of ISA, reproduction, and the commodity form, whereas for structuralism all laws must serve the interest of the entire bourgeoisie. Second, structuralism fails to provide clear rules for locating social phenomena in the productive or reproductive sectors; property, in particular, is both an economic and legal reality. Third, an ISA orientation obviates consideration of emergent opposition. That Edelman and other structuralists are capable of finding essential truth where others remain ensnared by ideological appearance suggests that capitalism has not succeeded in obliterating all intellectual challenge.

Other related problems in the text demand attention. First, in holding that law is a major contributor to the ideological domination of the bourgeoisie, the author may be generalizing too readily from the way that lawyers think. They may take legal doctrine seriously, but that does not mean that the rest of the population does. Although Edelman focuses on the way that the law creates the juridical subject and the capitalist mode of production ideologically, he presents no evidence that lay persons pay much attention to the conceptual underpinnings of law, much less that they passively accept the premises of legal doctrine. That structuralists dismiss the role of subjective consciousness in their studies only begs the question of the original impetus for ISAs. Indeed, popular discontent with court decisions in controversial cases in the United States shows how limited the power of legal institution is in gaining acceptance for unpalatable ideologies.

On the assumption that the law affects people by constituting effective legal actors and relations and by shaping their belief systems, Edelman calls on militant intellectuals to expose "the poverty of the apologetics of the system in their own academic disciplines." Why not? His expectation, though, that "the critique of the ideological notions of the law carries within itself the death of bourgeois legal sciences'" seems naively idealistic in its failure to recognize the material supports for bourgeois ideology. Indeed, such a quotation recalls the millenarian tone of radical lawyers in the United States in the early 70s (Lefcourt, 1971; Kinoy, 1971). While such exhortations to young radicals were indeed heartening, they can only be read nostalgically a decade later. Does Edelman, like his American counterparts, think that unmasking bourgeois ideology is sufficient to defeat the bourgeoisie in practice? We thought that Marx had shown the fallacy of such idealism long ago.
Edelman's exaggeration of the presumed attention paid by non-lawyers to legal decisions (presumed, that is, under the notion of an ideological and pliant legal subject) also prevents him from seeing that in its coercive aspects, the law makes a contribution to the reproduction of capitalism that is quite different from the contributions made by non-legal sources of ideology. It does this not only through the criminal law, where specific performance is commanded or forbidden — in particular, where attempts to alter property relations and political arrangements may be criminalized — but perhaps even more importantly, by upholding or failing to uphold voluntary private agreements. To understand the basis on which law does this, it is surely necessary to understand legal doctrine. But it is not by socializing lay persons that this doctrine has its effect. Rather, it is through the threat, and sometimes the reality, of enforcement.

Though the political limitations of Edelman's call are manifest, they are largely the political limits of the period in which his ideas were formed — a period of capitalist hegemony, legislative participation by the major left-wing political parties in France, and the absence of revolutionary class conflict. Given the limits of the political possibilities in post-war France (with the exception of the uprising of May 1968), to call for more would have been idealistic.

Focusing next on the commodity form in Edelman, even if we accept that the legal form facilitates commodity exchange — it is still reasonable to inquire as to the basis of comparison between these legal and economic categories as well as the basis for the original distinction. The economic commodity form stipulates that all actors are free to exchange their possessions and their labor. The stipulation appropriate to the legal form however, is less obvious. While the actor is presumably free to alienate his property or labor, the actor in capitalist democracies cannot choose to alienate legal rights such as civil liberties. At best, he may choose not to exercise these rights.

So too, a satisfactory commodity exchange theory of law must be equipped to examine the implications of the state's unique ability to impose costs for non-compliance with its rules. This ability permits the state to define subjects in contractual relations, and also to regulate the sorts of relations actors can enter. For example, there is no law requiring people to marry. But in specifying through law what sorts of relationship the courts will recognize and uphold as marriages, the state is capable of influencing private decisions about entering such agreements, even when individuals do not call upon the state's power to back them up in cases of a dispute. Such contracts demonstrate the practical limits to the state's power to reproduce bourgeois social relations and legal subjects. Ironically, private law, that most bourgeois legal arena, is treated by Edelman in a manner too simple to do justice to the reality. Of course, this need not call into question the state's formal or potential capacity to impose the commodity exchange form on legal subjects. Nevertheless, the contingent and negotiable aspects of the imposition of the legal commodity form, if it exists, are relegated to theoretical obscurity.

Edelman does, however, outline a more nuanced, if subsidiary view of the effects of legal ideology in a brief chapter on ideological struggles. Quoting Engels, he argues that when the proletariat adopts the bourgeois notion of equality and demands that the law be taken "at its word," the ultimate latent aim of the demand — whatever its immediate application — is the abolition of classes. This is so, he says, because the fulfillment of bourgeois ideas requires the abolition of bourgeois society. To take this alternative view of law is implicitly to look beyond mere annihilation of bourgeois legal categories toward their
possible transvaluation in a socialist society. Law here is viewed as potentially more than an ISA as it holds out promises that cannot be fulfilled, under existing social arrangements. Failures or violations of legal rules and standards may encourage protest and even more general forms of protest. This position suggests an affinity with Althusser’s concept of contradiction, for contradictions may arise between the economic, ideological, and political levels of society.

This secondary theme in Edelman’s work has strategic implications different from instrumentalist views. If law only mystifies people into accepting an alienated and exploited condition, or functions univocally as a tool of capitalism, then the legal theorist strives solely to expose the obfuscation. But if the law itself is implicated in the contradictions of a social totality and contains at least the germ of liberating social arrangements, a more complex stance toward rules of public life and political power is required.

PASHUKANIS AND EDELMAN: CRITIQUE AND COMPARISON

Although the works of Pashukanis and Edelman contain fresh and provocative insights regarding law, the weaknesses of their analyses should now be clear. First, because law does not literally embody relations characterized by the extraction of surplus value through the free sale of labor power, the significance of the legal commodity form is highly problematic. Legal and economic categories and conduct, while integrally linked, are not identical. Yet, it is precisely the thrust of formalist legal theories to collapse the categories of political economy and law while still relying on a substructure-superstructure model of society — even if only “in the final analysis.”

Second, this collapse forbids consideration of non-economic expressions of law and legal conduct, conduct not directly linked with the relations of production or the functional reproduction of a capitalist order. The potential for tension or contradiction is vitiated. Third, relations among individuals as well as potential challenges to existing organs of power can only drop from sight in formalist equations or be relegated to the realm of anomaly. Fourth, this orientation annihilates consideration of subjects’ possible legal or political rights (whatever their genetic or immediate functional connections to capitalism), as well as individual and collective rights vis-à-vis political power. Thus, for Marxist legal formalism, law has no potential — whatever the class constellation — for development as a body of rules applied in the service of social justice and equality.

In regard to the law’s legitimating and hegemonic horizons, the question arises: what might happen if people come to take seriously the unrealized promises made to them by the bourgeoisie? This locates in the conflict between the promise of formal juridical equality and substantive inequality, a potential contradiction in contemporary capitalist (and possibly socialist) societies. This conflict was germane to the civil rights and feminist movements and can be anticipated to recur. One burden, consequently, on any Marxian legal theory is to address the strategic question: how can a socialist movement best exploit such conflict? What are the potential gains or drawbacks to a socialist movement which utilizes this arena of conflict? Such unanswered questions underscore the limitations of formalist Marxist legal theory.

This examination of two Marxist analyses of law, analyses that have generated a great deal of interest and attention, reveals how much yet remains to be done. One crucial task for a Marxian theory is to understand the role of law in relation to its social context in order to
illuminate the class nature and possible oppositional horizons of law. In carrying out this task, a number of questions must be addressed. One involves comprehension of the concrete forms, contents and practices of law and legal institution in each social system. What accounts for differences?

To date, most attempts at explaining law have been restricted to capitalist social totalities, be they liberal, corporatist, or fascist. Although Marxists have paid some attention to the changes in the character of the state associated with the transition to the oligopoly stage of capitalism or fascism (Neumann, Kirchheimer, Pollock for Germany, Renner for Austria) relatively little work has been done on the specifically legal aspects of this development. The transition to an economy dominated by oligopolies has been accompanied by legal innovations: regulatory law, labor law, a shift away from unrestricted freedom of contract. Such developments have given law attributes that diverge from those examined by Pashukanis and Edelman, as their theories are largely restricted to the sphere of unregulated private relations. Still less work has been done on law in precapitalist social formations or in existing socialist societies. Until these gaps are filled, a systematic comparative treatment of law will be impossible.

In attempting to answer these questions, we need to account for the absence of the logical and factually adequate connectives between the state form and the mode of production; for historically there have been several capitalist state forms, not one. These variations have had major ramifications both for the substance of legal codes and their social effects. In asserting the necessity of taking variations in state forms into consideration, we are explicitly rejecting the possibility of providing an adequate account of law on the basis of the mode of production or distribution alone. Cultural and political influences on the law must be explicitly allowed. To carry out the sort of program implied by these comments, a surer command of legal history than is displayed in the works studied here is required.\(^5\)

A second set of questions concerns the way that law secures the ideological hegemony of capitalism. The existing literature displays a range of views. Instrumentalists — such as Quinney or Coke — have opined that the values and norms embodied in criminal law and its enforcement are radically different from those held by a majority of the population. For them, law affects behavior primarily by threatening violators with punishment. Edelman takes a second position in suggesting that law — when in contradiction with capitalist economic developments — can provide a basis for working class opposition to the capitalist state. The greater part of his text, however, asserts that law is pliant to the needs of capitalism. Lastly, since Pashukanis flatly denies that law can meaningfully alter social relations or popular consciousness in service of the working class, its normative and legitimating significance is nil. Taken serially, these positions offer, at best, partial truths.

Missing from each of these views is the insight that law’s contribution to continued class hegemony is ambiguous. Specifically, the acceptance of legal ideology may be uneven, depending on the particular case at stake. People do take law into account in carrying out their affairs. When they do so, however, they do not merely follow law. They attempt to evade it, they bend it to their purposes and assert their own interpretations of what it is and should be. So too, they may calculate the likelihood of law enforcement in organizing their

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5. The handful of Anglo-American Marxian studies making use of historical materials, e.g. the works of Beirne (1976), Steinberg (1981), Thompson (1975), Hay et. al. (1975), Klare (1978) and Kennedy (1979) among others, offer a wealth of historical detail from which other studies could now benefit.
From Substance to Form

conduct. That all of these options are shaped by the general nature of class society and its particular distribution of resources of actors does not deny their influence.

Here it also is worth retaining Neumann’s distinction between “class justice” and “political justice.” Distinctions between historically diverse types of political and juridical domination and justice do matter. To some degree, law and its enforcement are responsive to the formal constraints of a constitutional legal system as well as to the exigencies of immediate class interests. Naturally, such formal constraints are not self-enforcing. Nor are public officials above error, ignorance or venality — a truth often overlooked (when not overstated) in Marxian literature on law and the state. Often enough the powers of the state are used for self-aggrandizing actions which may do nothing to further the general interests of class domination. In all these ways, the law mediates the class system.

One burden of a Marxian theory must be some response to the broad question: in what ways can theory help to locate areas of possible class conflict and to orient potential juridical or political activity (whether inside or outside traditional legal institutions)? It may be taken as given that the state serves as an arena: to regulate conflict among sectors of the capitalist class; to rationalize and routinize class relations; to create formally free and equal juridical subjects suitable for capitalist productive relations; and to provide ideological and coercive services to maintain this class arrangement. But in order to work well, whether in times of economic expansion or contraction, legal and state institutions in a liberal democratic state must plausibly appear to be constrained by the very rules which constitute them and to provide the things that they promise. For the fascist state, in contrast, law is applied only to management of the economy, where the economy is defined so narrowly as to effectively liquidate the very possibility of a working class as a political subject (de Brunhoff, 1978: 69). Another question to be addressed pertains to the highly charged issue of centralization/decentralization, but it only can be noted here. The recent radical criminology advocacy of community-controlled popular justice does not begin to deal with this at all.

Finally, Marxian analysis of law must look to the future. It needs to open a discussion of the socialist public sphere, the possible form and substance of socialist justice, as well as the organization of a socialist state or its functional replacement. Marx took these issues seriously in his writings on the Paris Commune, but today his comments are inadequate for a society in which government administration and the infrastructure of civil society have grown to such enormous proportions. Today, the historical legacy of Stalinism and “actually existing” socialist states makes such concerns central, not just for theorists, but for all those concerned with radical social change and liberation.

BIBLIOGRAPHY


