

# Marxist Theories of Law Past and Present: A Meditation Occasioned by the 25th Anniversary of *Law, Labor, and Ideology*

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TOMLINS, CHRISTOPHER L. *Law, Labor, and Ideology in the Early American Republic*. Cambridge, UK: Cambridge University Press, 1993.

FRASER, NANCY, and RAHEL JAEGGI. *Capitalism: A Conversation in Critical Theory*. Cambridge, UK: Polity Press, 2018.

*Capitalist society seems particularly disorderly of late, a disorder contributing to the beginnings of what we hope will be a renewal of Marxist legal scholarship. This essay reviews some key developments in Marxist analysis of law from the 1970s to the present. Over all, our essay traces a back and forth between Marxists' emphasis on theoretical inquiry on the one hand and empirical and historical work inquiry on the other. We argue that Christopher Tomlins's 1993 book, Law, Labor, and Ideology in the Early American Republic, remains salient for thinking about ways to combine Marxist theoretic and historical work to understand the role of law in capitalist social formations and that Nancy Fraser and Rahel Jaeggi's recent book Capitalism: A Conversation in Critical Theory offers complementary resources for a renewal in Marxist legal thought. We conclude that further development of Marxist legal thought will require a mix of both empirical and theoretical innovations, and we identify political questions that Marxists will need to address.*

## INTRODUCTION

In the past decade or so, socialism has been making headlines again. Bernie Sanders, a self-declared democratic socialist, has been a major factor in the last two US presidential elections. Labor militancy is also on the rise. In 2018, nearly 500,000 Americans were involved in strikes, the most since the mid-1980s (US BLS). More people are discussing capitalism in critical ways than has been the case in many decades—including its relation to economic inequality and environmental

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This essay originated in a session organized by Nate Holdren at the American Society of Legal History meeting in 2018 to mark the 25th anniversary of the publication of Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993). The authors would like to thank Barbara Welke for encouraging them to turn the conference panel into an essay, and to thank Sachia Longo, Umut Özsu, and Christopher Tomlins for their comments on earlier drafts.

destruction.<sup>1</sup> Most recently, the 2020 coronavirus pandemic has led some commentators to draw explicit links between capitalism and the occurrence of and state responses to pandemics (Wallace et al. 2020; Taylor 2020). In this more critical environment, there are also some limited signs of a rise in new Marxist legal scholarship that considers both how law is shaped by, shapes, and, perhaps, can reshape capitalist social relations.

As Marxist legal scholars and students of labor history, we welcome this new scholarship. In this essay, we survey the terrain of Marxist sociolegal scholarship since the late 1970s in order to identify themes from earlier times that we believe remain salient today. This survey focuses on our own scholarly interests in employment, class, and historical methods. Nonetheless, we believe the works we highlight are of particular importance because they exemplify important trends over time. Specifically, we trace developments over time in Marxist legal thought, from an emphasis on theory, to a growing emphasis on historical inquiry, to the present where there remain important issues in both kinds of scholarship, to efforts to integrate the two. We place particular emphasis on the work of Christopher Tomlins, which attempts to combine Marxist theorizing and legal history, and on the recent efforts by Nancy Fraser and Rahel Jaeggi to renew our understanding of capitalism. In our view, Tomlins's *Law, Labor, and Ideology in the Early American Republic* remains especially fruitful to engage with. That work, combined with Fraser and Jaeggi's recent work, *Capitalism: A Conversation in Critical Theory*, offers a framework that can enrich multiple kinds of inquiry and in multiple geographic and temporal contexts, while also providing a common vocabulary for scholars in those different settings. We conclude that further development of Marxist legal thought will require a mix of both empirical and theoretical innovations and identify political questions that Marxists will need to address.

## MARXIST THEORY OF LAW BEFORE LAW, LABOR, AND IDEOLOGY

### The Revival of Marxist Legal Theory: The First Wave

In 1976, near the beginning of his article, "Law, State, and Class Struggle," Alan Hunt claimed: "There has been relatively little attention paid by Marxists to law" (reprinted in Hunt 1993, 17).<sup>2</sup> While true at the moment of its publication, at least in the English-speaking world,<sup>3</sup> the article itself helped trigger an intense but short-lived revival of Marxist theorizing about the law that lasted until the mid-1980s. A common starting point for much of this theorizing was a move away from a reductionist view of the law, which many had come to identify as "the" Marxist perspective. Although it is actually rather difficult to identify any serious Marxist theorist who embraced such a highly reductionist account of law, the popular conception in most of the English-speaking world of the Marxist view of law as reductionist meant that it was important to begin the renewal of Marxist theorizing by discrediting this view.

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1. Among the most influential works are Picketty (2014) and Klein (2014).

2. References to Hunt's work are to *Explorations in Law and Society* (1993).

3. For earlier continental developments, see Louis Althusser's and Nicos Poulantzas's writings in the mid-1960s, especially Poulantzas (2008) and Althusser (1969). We note that the publication dates here refer to the English translations. These works appeared in the early 1960s in France.

The primary source for the reductionist interpretation of Marxist theory was found in the oft-cited passage from Marx's "Preface to a Contribution to the Critique of Political Economy" (1859): "[T]he sum total of these relations of production constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness" (quoted in Cain and Hunt 1979, 52). Law was located in the superstructure, its form and content determined by the needs of the base. It did not follow that superstructures were unimportant—they stabilized the base—but economic bases got the superstructures they needed. On this reading, the essential form and content of law could quite literally be read off the needs of the base. To the extent Marxists embraced the view of law and legal history as epiphenomenal, they had little incentive to theorize or study it more deeply.

Hunt and others keen to renew Marxist theorizing about law had no problem identifying several pathways out of this crude determinism, grounded in classic Marxist texts. For example, the above-quoted passage continued:

At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production or—what is but a legal expression for the same thing—with the property relations within which they had been at work before. (Ibid.)

While the meaning of the formulation is not self-evident, it suggests a much more complicated understanding of the base-superstructure relation that could not confine law to an ontologically distinct superstructure. Other frequently cited sources for a less reductionist view of the Marxist theory of law include Engels's letters written in the 1890s. In his letter to Joseph Bloch, for example, Engels (1890a) explicitly rejects a crude economism:

According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life. Other than this neither Marx nor I have ever asserted. Hence if somebody twists this into saying that the economic element is the *only* determining one, he transforms that proposition into a meaningless, abstract, senseless phrase. The economic situation is the basis, but the various elements of the superstructure—political forms of the class struggle and its results, to wit: constitutions established by the victorious class after a successful battle, etc., juridical forms, and even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas—also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their *form*.

A month later, in a letter to Conrad Schmidt, he spoke in more detail about law and the basis for its relative autonomy from the material conditions of life:

It is similar with law. As soon as the new division of labor which creates professional lawyers becomes necessary, another new and independent sphere

is opened up which, for all its general dependence on production and trade, still has its own capacity for reacting upon these spheres as well. In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself*, and which does not, owing to inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. (1890b)

So rather than a simple determinism, Engels expressed a dialectical understanding of law as an element in a totality in which complex interactions and contradictions develop between its elements and are resolved over time, while nevertheless adhering to the primacy of the economic—the forces and relations of production.

While these texts provided the raw material for a revival of Marxist theorizing about law, the path out of determinism was not through exegetical disputes, in part because crude determinism had few defenders.<sup>4</sup> Rather, those reviving a Marxist theory of law turned for inspiration to twentieth-century developments in the Marxist tradition.

One important source was Gramsci's insight on the role of hegemony, namely that coercion alone could not sustain a capitalist social formation and that a society's population needed to be convinced of its legitimacy. Hunt's 1976 article did not cite Gramsci, but Hunt nevertheless emphasized that law sustained domination by the ruling class through both coercion and ideological domination. While ideological domination was partially achieved through law's valorization of formal equality and freedom, abstracted from the reality of unequal social relations, class struggle at times required real concessions to secure the consent of the governed, who could then use newly won legal rights to protect their interests (Hunt 1993). Hunt made the Gramscian roots of his thinking explicit in another 1976 publication, "Perspectives in the Sociology of Law" where he talked about how the struggle for hegemony influences the content of law. "The relative strengths of different social forces both materially and ideologically are represented in the changing content of law, its emergence, and its relation to the process of social change" (1993, 57).

Another path out from under reductionism led through the work of Evgeny Pashukanis, a Soviet legal theorist whose book *Law and Marxism* first published in 1924, did not become widely available to English-speaking readers until 1978.<sup>5</sup> Pashukanis did not focus on the content of law but rather its form under capitalism, "starting with its most abstract and pure shape" (1978, 71). He argued that it was only under capitalism that the regulation of social relations assumes a legal character and that the legal character takes its form from the exchange of commodities. Commodity exchange presupposes the existence of formally equal and free individuals endowed with the capacity to own property and enter into contracts and to exercise these capacities in pursuit of their self-interest. "The logic of juridical concepts corresponds to the logic of

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4. Exegetical disputes were also tainted by their association with sectarian and Soviet Marxism, where the price of heresy, to put it mildly, could be high. It may have also been the case that Marx's and Engels's writings on law were scattered through their works and it was only in 1979 that an edited collection of their legal writings was published in English. See Cain and Hunt (1979).

5. For an extended discussion of Pashukanis's work and its historical context, see Head (2008).

social relations of a commodity producing society” (ibid., 96). It also follows that the legal subject, like the commodity, is a reified form that creates the appearance of equality while masking the underlying unequal social relations. Thus, the development of the bourgeois legal form is dialectically related to the development of a capitalist social formation understood “as a rich totality of many determinations and relations” (ibid., 66; quoting Marx’s *Gundrisse*). Moreover, by focusing on the derivation of the pure form of bourgeois law, Pashukanis left open space to analyze the actual content and institutions of law historically, that “took place in a far less well-ordered and consistent manner than the logical deduction set out above might suggest” (ibid., 114). In this way, Pashukanis made clear that the commodity form of law is a useful theoretical abstraction but that theoretical abstractions cannot be substituted for empirical investigations of law in a particular conjuncture.

Chris Arthur in England and Isaac Balbus in the United States played a major role in bringing Pashukanis’s work to the attention of Anglo-American scholars. Arthur rejected a reductionist Marxist reading of law as corresponding to the material interests of the ruling class, instead characterizing law as an ideological form. He then introduced Pashukanis’s work to explain the historical specificity of the legal form under capitalism, which requires abstract rights-bearing subjects capable of engaging in commodity exchange (Arthur 1977, 31).<sup>6</sup> That same year, Balbus published a short but important essay in which he argued for an essential homology between the legal form and the commodity form, emphasizing the double abstraction involved in the construction of real human beings as formally equal rights bearing subjects just as products with distinct use values created by concrete labor are abstracted into exchangeable commodities. From this, Balbus derived an additional observation, less explicit in, or perhaps a break from, Pashukanis about the relative autonomy of law. Balbus emphasized that law needed a degree of autonomy from currently existing capitalists precisely so that it could serve a systemic role. If law were simply to obey the preferences of the most powerful actors, it would cease to perform the ideological function of masking the real inequality of capitalist social relations behind the veneer of formal legal equality. “[T]he autonomy of the Law from the preferences of even the most powerful social actors (the members of the capitalist class) is not an obstacle to, but rather a prerequisite for, the capacity of the Law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a *class*” (Balbus 1977, 585).

Another early revivalist, Andrew Fraser, also drew heavily on Pashukanis, but criticized him on Gramscian grounds for failing to understand the need for legitimation beyond the form and norms of bourgeois law.<sup>7</sup> According to Fraser, while the law constructs legal subjects, it does not wholly determine their consciousness as individual, formally equal, rights-bearing individuals. The experience of inequality and domination in the realm of exchange may provoke dissatisfaction and resistance so that the

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6. At the time he wrote this article, Arthur had to work from a poor translation of the work. He subsequently edited and introduced the new translation, *Law and Marxism: A General Theory* (Pashukanis 1978).

7. We note here that Fraser (no relation to Nancy Fraser, whom we discuss below) took a hard right turn later in his career. See Fraser’s Wikipedia (2020) page. That said, his earlier Marxist work was important at the time of its publication.

dominant classes must secure consent from outside the legal form and norms of marketplace rationality. Fraser, however, did not elaborate upon this insight or its implications. Instead, he shifted to a discussion of a new form of legality that emerged in what he called the “Corporate-Welfare State.” Reflecting the change in capitalism, which shifts from a competitive to a monopoly stage, increasingly managed through the state, regulatory law becomes predominant. Law is no longer concerned with the resolution of conflicting claims between rights bearing individuals but with the coordination of interests through administrative means in the name of achieving a notionally shared social purpose. The underlying social purpose, however, was continued capital accumulation upon which the life of society depended. Fraser feared that this new legal order would increasingly rely on an expanding realm of administrative controls that aimed to coordinate social action according to universalistic values of rationality, fairness, and equality, suppressing any space for meaningful collective life (1978, 147). Fraser’s general point, that a Marxist theory of law for the late twentieth century needed to be responsive to the development of capitalism, is an important one, whether or not one agrees with his description of the corporate welfare state. However, this turn was not widely followed at the time, and while his article was often cited as evidence of a revival of interest in Marxist theorizing about the law, it had relatively little traction.

A third path away from determinism, most prominent in the United States, led through the Critical Legal Studies (CLS) movement, founded at a conference held in Madison, Wisconsin in 1977. In actuality, the “movement” was comprised of a diverse group of heterodox legal scholars joined together as much by their critique of liberal legalism as by any common social or legal theory. Scholars associated with CLS rejected orthodox liberal claims that law was neutral or separable from politics and that legal outcomes could be determined from preexisting legal principles. More substantively, they sought to show how legal liberalism’s construction of legal subjects as formally equal autonomous individuals masked class, race, and gender inequalities that constrained their freedom and autonomy.<sup>8</sup>

In the movement’s early stages, a few prominent CLS scholars were attracted to and influenced by developments in critical Marxist theory. Mark Tushnet, for example, published an article in 1978 in which he offered some preliminary reflections on how a Marxist analysis of law might develop. He identified three challenges a Marxist theory would have to address. First, it would have to show the material basis for the legal form and its specific ideological content without falling into the reductionist trap. Second, it would have to show how the structure of the legal system supported its autonomy from the political and economic structures of capitalism, without falling into the legal autonomy trap. Third, it would have to give content to the relative autonomy of the law (Tushnet 1978, 96). Tushnet then critically surveyed recent work by CLS scholars that had something of a Marxist bent and offered some speculative hypotheses about the role of lawyers for understanding law’s relative autonomy. However, he did not develop responses to the three challenges he identified.

Another prominent CLSer, Karl Klare (1979), rejected base-superstructure determinism in favor of a constitutive theory of law, which he built from two historical

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8. For example, see Kairys (1982).

studies, one by Douglas Hay and the other his own (123). Hay's classic study, "Property, Authority and the Criminal Law" first published in 1975, illustrated the ideological role of the law in legitimating class rule through the exercise of mercy to soften the harsh edges of coercive law, and the emerging importance of law as a form of organizing social practices (discussed in Klare 1979, 128-130). From his own work on the enactment (1935) and subsequent deradicalization of the US National Labor Relations (Wagner) Act, which established a statutory scheme for collective bargaining, Klare pointed to the dual valences of the law as both an expression of the demand for industrial democracy and as a system for institutionalizing and containing class struggle. In its implementation, legal decisions by the labor board and the Supreme Court emphasized the latter as against the former (*ibid.*, 130-31). Drawing from these historical studies, Klare identified the praxis of lawmaking in capitalist social formations as alienated, such that it becomes a mode of domination through its repressive, facilitative and ideological functions. Yet Klare also embraced E.P. Thompson's controversial defense of the rule of law arguing, as Thompson had, that the rule of law was two-sided (although not evenly so), providing dominated classes with legal rights they could invoke to vindicate their interests. Klare's constitutive legal theory provides both a way to understand how law reproduces class rule, but also tools to resist it.

In short, an outburst of Marxist theorizing across the English-speaking world in the late 1970s produced a rich body of work that offered a variety of paths forward from the base-superstructure reductionism associated with Marxist orthodoxy. Gramsci's insights about hegemony complicated the role of law in reproducing the capitalist social formation, opening up its possibilities as a site for class conflict and compromise. Pashukanis's method of abstraction identified the homology of the legal and the commodity form, but left open ample space for a rich analysis of the determination of law's content at a given time and place. Some early CLSers drew on these and other influences to suggest additional ways of understanding the links between law and capitalist social relations, such as the role of the legal profession and praxis.

## A Second Wavelet of Marxist Legal Theory

The revival of Marxist theorizing crested in the late-1970s, but academic interest in working through its promising innovations waned. This retreat coincided with the conservative political turn typified by the election of Margaret Thatcher in the UK (1979), Ronald Reagan in the United States (1980), and Brian Mulroney in Canada (1984), but these events were unlikely its direct cause. Rather, the immediate influence was the "linguistic turn" in academia, the turn to discourse, which entailed a rejection of Marxism's materialist project.<sup>9</sup> Its impact was greatest in the American CLS

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9. For an extensive critique, see Palmer (1990). William Sewell, originally an enthusiastic participant in history's linguistic turn, argued in 2010 that this turn served to push economic history into economics departments that were becoming increasingly focused on mathematics. The combined effect was that "historians were turning away from economic topics at the very moment when economic realities became particularly puzzling, dramatic, and consequential" (Sewell Jr. 2010, 156). This account is supported by the intellectual history of the history profession and the economics profession in the late twentieth century provided in Rodgers (2011).

movement, heir to the realist tradition that rejected the formalist claim that judges decided cases by applying the law to the facts of the case. Rather, they argued, judges could always interpret legal precedents and statutes to justify a variety of outcomes, so the result of any particular case was contingent. However, in the CLS movement legal indeterminacy increasingly lost any connection to the social and instead became grounded in the fundamental contradiction “that relations with others are both necessary to and incompatible with our freedom.” Duncan Kennedy, a leading figure in the CLS movement, posited that this contradiction was both intense and pervasive, “an aspect of our experience of every form of social life” which produced irresolvable dichotomies that drove legal consciousness and the development of law (1979, 2013). In effect, Kennedy presented an alleged self/other contradiction that he treated as an ontological or existential condition, a condition that is transhistorical rather than specific to capitalism as a particular historical form of society. Needless to say, if law is driven by a contradiction that is pervasive to every form of social life, there would be no place for the development of a Marxist theory of law or, indeed, any social or materialist theory of law.<sup>10</sup> In short, having once more slain legal formalism, CLSers’ claim that the content of law was radically indeterminate and could not be meaningfully explained by social or economic developments external to the law meant they had promptly reembraced legal autonomy—with a vengeance.

Since most CLSers had never engaged with Marxist theorizing, the step from legal realism to radical indeterminacy was a small one. In Tushnet’s case, however, it required a sharp break from his earlier engagement with the development of a Marxist theory of law. Tushnet articulated the reasons for his new skepticism about the prospects for a Marxist legal theory in two 1983 pieces, one a review of Hugh Collins’ 1982 book (282), *Marxism and the Law* and the other an article in *Nomos* (171–88). The articles identify a number of difficulties facing a Marxist theory, including the problems of mechanism (how did the economic structure influence law) and of law’s arguably constitutive role, but the clincher for Tushnet was law’s indeterminacy.

One does not have to believe as I do that this indeterminacy is total to understand that indeterminacy of any significant degree will doom the comprehensive project. Not only will it be clear that the result could have been different, so that the link between the rule invoked and the material base will be entirely adventitious, but the rule itself could have been different, so that the link that is supposed to explain things would have to be reconstructed entirely ad hoc. (Tushnet 1983a, 288–89)

If this were all that was possible, Tushnet argued, at best there could be “a sociology of individual cases” (1983b, 176). But even if such a sociology were possible, it would not be a Marxist sociology.<sup>11</sup> The abandonment of a Marxist theory of law, he thought, left Marxism as no more than “a statement of affiliation with an international tradition of struggle for liberation” (1983b, 185). Tushnet’s formulation seems to presuppose that a Marxist theory of law is necessarily reductionist, a point that contemporaries of

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10. The classic statement is Gordon (1984).

11. For a discussion of this engagement, see Rasulov (2014).

Tushnet, such as Balbus (1977), had already decisively repudiated, and with which we agree.<sup>12</sup> In any case, whatever else one might say about the radical contingency hypothesis, which has been, in our view, convincingly critiqued elsewhere,<sup>13</sup> its embrace by CLSers ended their engagement with the development of a Marxist theory of law.

While Marxist theorizing in the mainstream of CLS ended, Marxist theorizing of law did not. A number of scholars continued to explore the pathways they and others had earlier opened for examining the relation between law and economic relations without lapsing into legal autonomism or economic determinism. Central to this endeavor were attempts to address two of the problems Tushnet identified in his 1983 writings, the problem of mechanism and the constitutive role of law. Here we consider the efforts of two theorists to work through these and other problems in the Marxist theory of law.<sup>14</sup>

Alan Stone's (1985) chief contribution to Marxist theorizing was his concept of "essential legal relations," which he defined as "the legal relations that mirror and legally define the fundamental economic relationship in society" (ibid., 50). In a capitalist social formation, private ownership of the means of production and of labor power, as well as the freedom to contract and the enforceability of contracts, are requirements of its existence. However, as Stone recognized, essential legal relations are an abstract category, perhaps much like Pashukanis's commodity form of law, and a model was needed to explain how particular legal rules are derived from essential legal relations.

To accomplish this, Stone developed a theory about the mediations between essential legal relations and particular laws. Even while legal decisionmakers may reflexively accept essential legal relations, they will often disagree about the particulars, as litigants and interest groups seek to advance their interests without challenging the social order. As a result, modest restrictions on freedom of contract, relief from contract enforcement, and limits on the exercise of property rights are common legal outcomes. Finally, Stone argued that much law is quite distant from essential legal relations and the greater the distance, the weaker their gravitational pull. Not only is there space for relative autonomy, but that space is variable.

Finally, we come back to the work of Alan Hunt, who continued his theoretical explorations of a Marxist theory of law in a series of articles in the 1980s. Hunt was drawn to law-as-ideology as a key to understanding law's relation to social relations. He started from the proposition that:

[I]deology is a social process that is realized in and through social relations. At the same time, ideologies have their own distinctive characteristics, the

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12. Another Marxist contemporary of Tushnet's who repudiated reductionism was Nicos Poulantzas. In his book *State, Power, Socialism*, published in French in 1978 and in English translation in 1980, Poulantzas argued that the state was autonomous from the capitalist class and from any immediate needs of capitalism. Like Balbus, Poulantzas argued that this autonomy was what allowed the state to play its role in capitalism. To be sure, Poulantzas qualified the autonomy of the state as relative, rather than absolute, but what he meant by relative autonomy would fall under what Tushnet called significant indeterminacy. Thus Poulantzas stands, like Balbus, as a counterexample to Tushnet. See Poulantzas (2014, 127–29).

13. For example, see Tomlins (2012), Marks (2009), and "The Theory of Critical Legal Studies" in Hunt (1993, 139).

14. Due to space constraints, we omit a discussion of Hugh Collins's (1984) book, *Marxism and Law*, another work contributing to this wavelet of Marxist legal theorizing.

most important of which are an internal discourse such that the elements of an ideology are not reducible to a mere reflection of economic or social relations. (Hunt 1985 in Hunt 1993, 122)

Having rejected the metaphor of reflection, Hunt turned to the sticky question of the relation between legal ideology and the material reality of capitalist social relations. Like Stone, Hunt found it useful to consider the question at different levels of abstraction. While the form of law (or for that matter “essential legal relations”) might be an appropriate concept for an analysis of law and capitalism at the highest level of abstraction, it falls short when we focus attention on law in concrete social formations (*ibid.*, 129). So at the very least, historical analysis is crucial for understanding the relation between law and the economy in any particular social formation. Hunt also made the important point that we should not assume legal ideology successfully legitimates the social order or, to put it in Gramscian terms, that it achieves hegemonic status. Rather, he argued that we should focus on the question of law’s “effectivity,” leaving open the extent to which law legitimates capitalist social relations or is itself perceived as legitimate (*ibid.*, 122–23).

These formulations still left important questions unresolved and Hunt turned toward the task of developing Klare’s initial formulation of a constitutive theory of law, which Hunt found to be “an aspiration toward a theory that does not, as yet, exist” (*ibid.*, 177). To begin that development, Hunt proposed that we inquire into “the necessary requirements for the existence of a social institution or practice, and the means by which these conditions are secured or provided” (*ibid.*). Initially, Hunt did not articulate the *legal* conditions of the existence of capitalist social formations as Stone and, before him, Pashukanis had done. However, he returned to this problem in a later essay, “The Critique of Law” where he proposed a relational theory of law, defined as an approach that both “facilitates the recognition and exploration of the degree and forms in which legal relations penetrate other forms of social relations” and the ways extralegal relations penetrate legal relations (1987 in Hunt 1993, 22–26). This formulation was quite preliminary and Hunt returned to it a few years later in “Marxism, Law, Legal Theory and Jurisprudence” (1991 in Hunt 1993, 249). Here Hunt identified the core question for a Marxist theory of law: “what part does law play in the production and reproduction of the class relations that are characteristic of capitalist societies” (*ibid.*, 258). Like Stone, he turned to the idea that key legal relations form part of the conditions of existence for capitalism and he discussed in a preliminary way how those legal relations arise. Unfortunately, Hunt offered little more to advance our understanding of the central issues with which Marxist theories of law have grappled.

## Summary

The erroneous idea that Marxists were economic reductionists, based on a selective reading of some classic texts in the Marxist tradition, had become pervasive enough among Western scholars to close off space for Marxist inquiry into law. Thus, the revival of Marxist theorizing in the mid- to late 1970s involved pushing back the economic vision of Marxism. That revival opened up important spaces for investigating

the relation between law and capitalist social relations. In doing so, this wave of Marxist legal scholarship also pushed against legal formalism's treatment of law as an autonomous field driven by its internal rules. From that theorizing emerged a consensus that law was *relatively* autonomous, in the sense that it was conditioned and shaped by economic relations, but that law also conditioned and shaped those relations. However, this formulation really just opened a theoretical space that required further elaboration and mid-level theories if Marxist theory were to provide a foundation for investigations of concrete instances, present or historical. While CLSers' embrace of the radical indeterminacy hypothesis led them away from attempts to develop these early insights, others took up the challenge and produced some useful theoretical tools to inform investigations of law in capitalist social formations.

One useful theoretical insight was the identification of legal conditions essential for capitalism's existence. Rooted in Pashukanis's commodity form theory of law, Stone and Hunt both argued that capitalism was inconceivable without an essential legal form and content. Another insight was the role of ideology, which provided a way of understanding how law produced essential legal relations. Second wave theorizing embraced a materialist understanding of ideology as developing out of foundational social practices, so that law too, as an ideological practice, would develop in a way that was functionally compatible with and thus (re)constitutive of those social practices. But, as Stone and Hunt recognized, not all law was hegemonic or effective and the further one moved from essential legal relations, the more the likelihood of law being contested increased and its effectiveness decreased. Finally, Marxist theorists of law recognized the importance of being attentive to levels of abstraction and of adopting conceptual tools appropriate to the level of abstraction at which one was working. The commodity form of law or essential legal relations were tools appropriate to an understanding of the relation between law and capitalism at the highest level of abstraction, but could not explain the form and content of law at a particular juncture. Indeed, there was no single form or content of law appropriate for capitalism in all times and places. The view that the actual role of law in a social formation could only be understood through an investigation of its historical context was not a refutation of Marxist theory, but a consequence of its development.

## THE HISTORICAL TURN: LAW, LABOR, AND IDEOLOGY

### Labor Law History

The turn to history in Marxist legal theory, not surprisingly, was more often than not toward labor history and, in particular, the history of labor and employment law. This flowed naturally from the centrality of capital-labor relations in Marx's analysis of the capitalist mode of production and, in particular, the extraction of surplus value in the "hidden abode of production" (Marx 1976, 279). Although Marx emphasized the need to go behind the sphere of exchange, where buyers and sellers appeared to contract as free agents, it was nevertheless through the contract of employment that workers entered into wage relation, making the law regulating employment relations a natural site of conflict. Marx documented this phenomenon in his discussion of laws regulating

the length of the working day (*ibid.*, 340–416; especially 389–411). As well, there was a long history of workers' collective action, which law frequently targeted and repressed, making its zone of toleration a contested one (Tucker 1991, 15–54).<sup>15</sup> Thus, for a Marxist legal scholar interested in exploring the intersections of law and class, labor and employment law was the obvious place to turn.

Labor history itself had already undergone a period of significant development by the time of the historical turn. The older labor history, often associated in North America with the work of John Commons and the Wisconsin school, favored studies of labor organizations and protective employment law and was grounded in a pluralist and progressive frame that treated workers as an interest group that the state could and should accommodate. Post-World War II collective bargaining regimes, supplemented by workers' compensation and other minimum standards laws, were embraced as the realization of this vision. By the mid- to late 1960s, however, a "new" labor history was being written, one that was critical of existing industrial relations and welfare state regimes. Rejecting a pluralist frame, the new labor history was often Marxian-inspired, placing class formation and conflict within the context of capitalist social relations and their structural inequalities that law could ameliorate but not resolve. Moreover, the focus of this scholarship was not just on labor institutions, but on working-class experience broadly conceived to include social reproduction as well as paid wage work. The work of E.P. Thompson and his students was especially influential.<sup>16</sup>

Thus, the turn of Marxist theorizing to history found a compatible environment in the broader field of labor history. However, this scholarship represented one tendency within a larger scholarly conversation about the history of labor law.<sup>17</sup> Like the field of labor history more generally, labor law history in the late 1980s and 1990s was quite vibrant in a way that resists summary.<sup>18</sup> However, we can follow the strands of theorizing discussed above into the field of labor law history to provide a brief taste of its influences on this early "new" labor law history.

One strand, represented by William Forbath's 1991 book, *Law and the Shaping of the American Labor Movement*, was heavily influenced by CLS, with its emphasis on language and the constitutive nature of law, but without its embrace of radical indeterminacy. Forbath understood that the common law's antipathy to workers' collective

15. See also Harring and Strutt (1985, 123–37; especially 125–30), for an overview of class conflict and repression in the Wisconsin lumber industry, used to criticize the work of Willard Hurst for neglecting this history in his work on that industry. The *American Bar Foundation Research Journal* is the predecessor journal to *Law & Social Inquiry*.

16. This discussion is drawn from Tucker (2017).

17. For early surveys of the field, see Holt (1989) and Tomlins (1995).

18. We remain convinced that labor history and the related subfield of labor law history, both as practiced then and now, are crucially important fields. Labor history is still intellectually vibrant, though unfortunately it has significantly lost prestige, institutional support, and presence in academic curricula. That labor history is less successful now within academic markets is less indicative of anything about labor history than it is one of many indictments of markets as arbiters of social value. That said, in our view, labor and labor law history would likely benefit as well from more explicit engagement with Marxism and more contextualizing of its object of analyses within a larger account of capitalism. There are Marxists who are labor historians, to be sure, and there are multiple ways to do Marxist scholarship. Our sense is that labor historians are more likely to produce scholarship that has Marxist themes like those pioneered by E.P. Thompson's *Making of the English Working Class* (1968). In our view, greater focus on structure would be salutary. For two works in that vein, see Pearson (2016) and Mitrani (2013).

action was not a contingent outcome, but rather that the class background of the judiciary significantly influenced that outcome (1991, 33–34). However, he also emphasized the hegemonic power of judicial pronouncements: “The language of the law, along with other discourses of the powerful, lays down the very terms within which subordinate groups are able to experience the world and articulate their aspirations” (ibid., 170). It was the law’s word, as well as the coercive force that lay behind it, that turned the American labor movement away from its earlier republicanism to an embrace of narrow, interest group politics and business unionism. Yet, there remained a tension in Forbath’s work between his presentation of law as class-based and coercive, a view consistent with a Marxist perspective, and a more CLS-inspired view that “the language of the law in America is best conceived as a tradition of discourse with divergent and conflicting strands” (ibid., 171), which leaves open the pursuit of emancipatory projects through law, using the tools of the legal trade.

Forbath does an admirable job of depicting the extent of law’s violence, in word and deed, against the American labor movement and while his argument about law “shaping” the American labor movement is convincing, his stronger argument that the voluntarist trajectory of the American labor movement is explained by its legal environment is not. For example, Forbath thoroughly documents the ways courts served employers in disputes, but he does not explain why US employers relied on the law more heavily than employers in the UK or Canada, given that courts in those countries appear to have been equally anti-union. Moreover, despite the far more limited role of coercive law in class relations in those countries, both labor movements embraced voluntarism rather than seeking direct state intervention. One does not have to be a Leninist to suggest that trade unions under capitalism are likely to act as bargaining agents for their members rather than as organizations advancing broad class interests. In our view, and in keeping with mainstream CLS views at the time, Forbath over-emphasized the role of law in shaping the American labor movement. Law is certainly one important factor in class relationships in capitalist society, but it operates as part of an ensemble of factors both material and ideological.<sup>19</sup>

A second strand, represented by Christopher Tomlins’s (1985) book, *The State and the Unions*, was marked by a Marxist emphasis on class and the way the structures of capitalist accumulation shaped American labor law. Tomlins reveals his Marxist roots in the preface. He rejected both the instrumentalist view of the law as consciously chosen to “serve the interests of identifiable business elites” and the claim that the state acts autonomously of the economy (1985, xiii). Here he noted “state institutions have escaped political and ideological constraints arising from private capital’s influence over investment, output, and employment only in rather exceptional circumstances” and indeed noted the “very form and structure of the state, of the law which is the state’s language, has continued to exhibit an ‘essential identity’ with the essence of capitalism” (ibid., xiii–iv). To support his position, Tomlins turned to Balbus’s claim that the autonomy of the law from powerful social actors is a condition for law to contribute to the reproduction of the conditions that make capital possible. This, Tomlins claimed, is the explanation of the state’s “relative autonomy” that informs the work that follows (ibid.). In an article that appeared as part of a retrospective symposium on the book,

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19. For an appreciative but critical review of Forbath’s book along these lines, see Tucker (1992a).

Tomlins made it clear that he was not “animated by the core commitments of CLS” as the passages quoted above make abundantly evident (2013, 214; Tomlins reproduces the passage we have quoted to make the point).

This sets the stage then for our consideration of Tomlins’s subsequent book, *Law, Labor, and Ideology in the Early American Republic* (1993).

### ***Law, Labor, and Ideology***

Eight years separate the publication of *The State and the Unions* and *Law, Labor, and Ideology in the Early American Republic*, and in that period Tomlins moved from a rather straightforward explication of the relative autonomy of law to denser and more complex claims about the role of law in capitalist social formations or, perhaps, more particularly, the role of law in the development of American capitalism. Tomlins’s first major claim in *Law, Labor, and Ideology* emphasized contingency, in what might seem like a point of resonance with CLS. Tomlins argued that law became what he called the preeminent modality of rule in the United States in the aftermath of the American Revolution. Tomlins described law’s rule as having both an “institutional and imaginative structure” (1993, 33). The institutional aspect referred to order-giving power: law involves some people obeying others and deciding who will be made to obey whom. The imaginative aspect referred to law’s ideological power to legitimate social practices and relationships, and to provide society with “a set of images” of itself, which served to define what people understood as the basic facts of social existence (*ibid.*, 34).

At first glance Tomlins’s description of law as a modality of rule might seem simply like a new term for CLS claims about law as socially constitutive. What Tomlins actually did, however, was historicize and render contingent law’s quality of being socially constitutive. We find in history, Tomlins argued, various institutions and related vocabularies playing socially constitutive roles. Those institutions and vocabularies are hierarchized—some are more socially constitutive than others. Which institutions are most socially constitutive in any given time and place requires empirical investigation. The book kept an emphasis on law as socially constitutive in the times and places it analyzed, while also arguing that law’s socially constitutive power was not inherent to law but rather was a contingent effect of a particular history.

Tomlins also emphasized dissonance and struggle in law’s processes of social constitution. Working class people had their own images of society; they argued for the existence of different facts of social life, and called for some of those facts to be abolished and new ones to be constituted. In these ideas and aspirations, working class people in the Early Republic “differed, strikingly in some cases” from the law’s understanding of society (*ibid.*, 34).<sup>20</sup> As workers acted on their understandings, they came into conflict

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20. Tomlins offered extensive examples of the alternative social visions held by working class people, focusing on working class republicans in particular, in the book’s prologue and throughout the book’s detailed case studies of specific areas of labor and employment law. Throughout these examples, Tomlins depicted working class people as claiming the existence of power relationships within the economy where law often saw consensual, voluntary exchanges. He also depicted workers as claiming greater obligations for the state to either act as a countervailing force against the power of employers or to facilitate workers’ creating such a force themselves through collective action, while law tended to treat itself as a neutral arbiter of largely rational, efficient markets in labor power. See especially Tomlins (1993, 1–16).

with employers and with the law. This meant that the law of work was home to significant “instability or dissonance between dominant context and lived experience” (ibid., 34).

*Law, Labor, and Ideology's* resonance with CLS is most strongly present in the parts of the book treating law as socially constitutive. Tomlins sounded further from CLS in his treatment of law as not indeterminate, but rather as a determining, indeed dominating, social force. If CLS treated law as a ball and socket joint, capable of moving in many different directions unpredictably, Tomlins treated law as a cell door, slamming and locking shut. The early American colonies entered into a process of political revolution and, to a limited extent, social revolution. The eventual result was a society not especially different from England. Certainly, there was variation in some institutional particulars, but both were highly class-stratified capitalist societies secured by formally democratic institutions. Tomlins suggested that there was a possible moment of real social transformation in the American Revolution, one captured by the idea of “police” through which “the sovereign people [could] participate in the framing of the collective good” but that possibility was foreclosed after law became the primary modality of rule (ibid., 58–59).

Tomlins made these theoretical and historical arguments in the book's magisterial first part. The book went on in its second, third, and fourth parts to examine the working out of the “instability and dissonance” between employers and employees, and between working class people and the law (ibid., 33). These parts focused specifically on the law of conspiracy, the law of master and servant, and the law of employers' liability. In effect, *Law, Labor, and Ideology* operated at two levels of interpretive or theoretical abstraction. In the first part, Tomlins emphasized law as a force of class domination per se. After that, he largely emphasized law's role in particular struggles in which working class people had real stakes, including law's hindrance of unionization efforts by workers in the early nineteenth century and law's relative hostility to workers' efforts to sue their employers due to workplace injuries. Tomlins's emphasis in his discussion of those struggles was not on law as domination per se but on how specific legal processes and specific outcomes in particular struggles made workers' lives worse: law made it harder for workers to bargain collectively with their employers; law left injured workers with their injuries uncompensated. That focus on particular instances and losses endured by working class people gives the book admirable historical detail and texture. At the same time, narrating and analyzing time- and place-specific conflicts and harms in working class life is one kind of project, while theorizing the relationships between class and law as categories and as social processes of domination is a second kind of project. Tomlins did not integrate the two projects into a single conceptual framework so much as he moved between them.

To be fair, Tomlins was in good company here. Volume One of Marx's *Capital* moves between vastly different degrees of analytical abstraction, a movement that does not add up evenly and that does not establish one level of abstraction as always preferable for explaining social phenomena. Scholars operating primarily at different degrees of abstraction have coexisted uneasily within the Marxist tradition. This is in part due to the ways those degrees of abstraction map loosely onto differences of academic discipline. It is also because preferences for different degrees of abstraction often relate to political differences. Focusing on law as a background condition for the existence of

capitalist social relations tends to go in tandem with pessimism about political recourse to law, while focusing on law in specific social formations tends to be associated with cautious optimism about the potential to mobilize law for defensive or even emancipatory purposes.

The question of how to move between levels of abstraction in talking about law is perhaps the central problematic in Marxist theorizing about law. Tomlins's adoption of law as a modality of rule on its own did not resolve the problematic so much as set up a historically specific context in which to think about it. But unlike in his previous book, where the economy seemed to be constituted outside of law, here Tomlins complicated the picture by emphasizing the greater role of law (and in this context the courts) "as central actors in the reproduction of the social order" (*ibid.*, 297). Tomlins is at pains to challenge functionalist or instrumentalist accounts of the law's content; instead he argues that, while law "must remain consistent with 'the principles structuring the dominant or hegemonic discourses' abroad in society at large" (*ibid.*, 294; citing Woodiwiss 1990, 11), "[w]hat is law at any given moment is determined by legal discourse's own rule of formation rather than by its proponent's obedience to an overweening exterior influence" (*ibid.*, 294).

Yet Tomlins's detailed explorations of the common law of conspiracy, master and servant and employers' liability convincingly showed that the courts constructed the labor market as a private realm of individual freedom and choice, denying the salience of workers' understandings of the world of work, characterized by the unequal power relations at the foundation of capitalist class relations. How then to explain this result as autonomously derived from adherence to the common law's internal rules of formation? No doubt the judiciary made great efforts to justify the law as a deduction from common law premises, but only in rare instances did the result fail to provide employers with the outcome they desired.

The role and power of justification, however, was crucial for Tomlins, not just to avoid functionalism and instrumentalism, but because it provided the foundation for the contribution and efficacy of law as a mode of rule.

[C]ourts reveal themselves as central actors in the reproduction of the social order, creators of representations—facts—of daily working life that make the present "usable" by imparting to what is merely contingent a powerful aura of certainty. . . . In this way the courts helped to render the structure of power that lay behind and effected such outcomes not merely mysterious but in fact virtually invisible." (*Ibid.*, 297)

Yet, absent from the text was any attempt to demonstrate that judicially pronounced law had these imputed effects on the working people subjected to it. Working people just as likely may have viewed the legal modality of rule as a coercive and instrumental imposition of class rule. Indeed, workers engaged in political campaigns to reform or replace the common law through legislation.<sup>21</sup>

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21. On workers' mobilization demanding laws limiting work hours in mid-nineteenth century England, see Marx (1976, 389–411). On similar efforts in the United States, see Forbath (1991, 43–48). On unions' demands for legislation curbing judges' power to issue injunctions, see Tomlins

## Conclusion

The turn to labor history could not, of course, resolve debates in Marxist legal theorizing about the role of law in capitalist social formations any more than Marxist legal theory could resolve debates about the role of law among labor historians. But that was not the point. Rather, the turn of Marxist theorizing to history (and the turn of labor historians to Marxist theorizing) should be assessed on whether this dialectical interaction was mutually illuminating, opening new spaces for thinking about law's contribution to the production and reproduction of capitalism and for understanding the geographically and temporally specific ways that capitalism developed. Thus, while we may not agree with some of the conclusions Forbath and Tomlins reached about the relative autonomy of the common law and its role and efficacy in shaping the development of the labor movement or naturalizing the legal foundations for a newly constituted capitalist labor market, we recognize the important contribution their work made by grounding theory in material reality and by using theory to open up interpretive possibilities for historical investigations.

## RENEWED FOCUS ON SOCIAL TOTALITY AND SYSTEMIC CONTEXT

### A Renewal of Marxist Theorizing About Law?

There are some signs of a renewal of Marxist thinking about law. In a 2018 article, Tomlins argued that, within legal history broadly, Marxism has been pushed to academia's margins, with the sole exception of the study of international law.<sup>22</sup> He also argued that in the context of present social crises within capitalism there is a pressing need and, to some extent, an opportunity for specifically Marxist legal history to flourish (*ibid.*, 535–37). A good example of these possibilities is Rose Parfitt's new book *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*. Parfitt draws heavily on Pashukanis while synthesizing a wealth of other Marxist theorists, drawing as well on both empirical and theoretical research on international law. She marshals that material to examine the League of Nations' response to Italy's invasion of Ethiopia, and international law's construction of those events, to demonstrate

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(1985, 63–65). In Canada, the nine-hours movement confronted and successfully challenged criminal conspiracy laws, and then was folded into the struggle to reform employer liability and secure factory acts. See Tucker (1990), on the struggle to reform employer liability and secure factory regulation, and (1991), on the struggle against criminal conspiracy laws.

22. Readers might reasonably ask why Marxism has remained relatively more robust within scholarship on international law and why this scholarship exhibited a renaissance of Marxism earlier than some other fields. As scholars working on North American law and history, we do not feel entirely equipped to answer that question. Tomlins's treatment in his recent essay "Marxist Legal History" seems convincing to us. Tomlins suggests that Third World Approaches to International Law (TWAAIL)—all at once a set of ideas and a network of scholars, as was CLS in its heyday—and the presence of robust social movements helped to create and maintain greater space for Marxist inquiry among scholars of international law and among legal scholars outside North America. See Tomlins (2018, 535–37). We suspect that the Marxism probably gained official legitimacy and institutionalized presence in many other countries to a degree relatively greater than it did in the United States and Canada and that this too is a factor.

how it aided rather than limited imperialism. Parfitt (2019) argues that international law equates good government and rule of law with the legal enshrinement of capitalist social relations, thereby authorizing the invasion of noncapitalist states by capitalist states and making capitalism compulsory. A further example, among others,<sup>23</sup> of the revival of Marxist legal theorizing is Paul O’Connell and Umut Özsü’s (forthcoming) anthology, *The Elgar Research Handbook on Law and Marxism*, which surveys a wide range of areas of law from a variety of perspectives within the Marxist tradition.

Should these works prove to be signs of a new, fourth wavelet of Marxist legal scholarship, in our view that new wavelet would do well to give greater attention to a larger analytical picture of the reproduction of capitalist social relations, while retaining a sense of law’s relative autonomy and relative constitutive power. The recent work of Nancy Fraser and Rahel Jaeggi offers resources for that larger analytical picture.

### ***Capitalism: A Conversation in Critical Theory***

In their recent<sup>24</sup> book, *Capitalism: A Conversation in Critical Theory*, Fraser and Jaeggi (2018) have sought to provide an overview of how to understand capitalism in broad strokes. They aim to summarize a great deal of ground within the Marxist tradition(s)—especially the tradition descended from Frankfurt School Critical Theory—while also innovating within Marxism.

In discussing capitalism, Fraser and Jaeggi reject a base-superstructure model and instead differentiate between an economic foreground and a noneconomic background. They define the economic foreground in rather orthodox terms, including the division between owners and producers, the commodification of wage labor and the extraction of surplus value. However, they also identify a noneconomic, noncommodified background that establishes the necessary conditions for the economic foreground’s existence (ibid., 28–29). These include social reproduction, nature, and the polity. Importantly, unlike orthodox Marxists, they reject the claim that the economic foreground one-sidedly determines the background (ibid., 47). Rather, the noneconomic social, economic, and political background are “instituted differently, on different terms, and they operate in accord with different norms” (ibid., 49). Capitalism, then, is *not* conceptualized simply as an economic system but as “an institutionalized social order” (ibid., 52).

Fraser and Jaeggi also reject a functionalist view of this order. There is no guarantee that the background conditions necessary for the smooth functioning of the capitalist

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23. For another recent work of Marxist legal history, an examination of the creation and immediate aftermath of workers’ compensation laws in the United States, see Holdren (2020). We will also note the blog *Legal Form*, organized by Jasmine Chorley, Rob Hunter, Dimitrios Kivotidis, Eva Nanopoulos, Paul O’Connell, and Umut Özsü. The blog can be thought of as something of an electronic analog to the Critical Legal Studies conferences through which CLS constituted itself as an intellectual network. *Legal Form*’s network leans strongly in the direction of international law, in keeping with the relative robustness of Marxism within that area of study, especially compared to the relative scarcity of Marxist scholarship in national fields or in mainstream socio-legal studies.

24. We highlight Fraser and Jaeggi’s book because it is an ambitious and recent attempt to think about capitalist society as a whole and to synthesize a wide range of material. There are of course other Marxist works worth engaging, old and new. For a few examples, see Meiksins-Wood (1995); Harvey (2010); Heinrich (2012); and Olin Wright (2015).

order will be produced. “Far from being simply given, capitalism’s institutional divisions often become both sites and stakes of conflict, as actors mobilize to challenge or defend the established boundaries separating economy from polity, production from reproduction, human society from non-human nature, exploitation from expropriation” (ibid., 54). With a nod to Karl Polanyi’s (1957) *The Great Transformation*, Fraser and Jaeggi argue that where polity, reproduction, and nature are excessively subordinated to the economy, severely dysfunctional consequences are likely to follow and social resistance is likely to emerge. Fraser and Jaeggi call these “boundary struggles” which, in their view, decisively shape the structure of capitalist societies as much as class struggles over commodity production and the distribution of surplus value.

Drawing an explicit parallel to philosopher Thomas Kuhn’s writing on paradigm change in the sciences (2012), Fraser and Jaeggi argue that we find in the history of capitalism two basic kinds of periods, normal and abnormal ones (2018, 65). In normal periods, a regime of accumulation is in place and operating sufficiently to promote social order. In abnormal periods, crises begin to break out as different populations organize to oppose what they see as harms they suffer. These boundary struggles aim to resubordinate the market to other norms and to defend areas of social, personal, natural, and political life from market pressures. It would be easy to read this account of capitalist crises as entirely subjective, but Fraser and Jaeggi take pains to emphasize that social movements arise specifically in response to objectively generated pressures and tensions within capitalism. In their view, then, capitalism is inherently crisis-prone such that capitalist society’s periods of stability should be explained rather than simply presumed.

The institutionalized order framework can readily enter into conversation with earlier Marxist theorizing about the role of law. The conception of law as a necessary background condition for capitalism but not dominated by capitalism resonates well with earlier Marxist theorizing. For example, we can read Pashukanis’s commodity form of law as an expression, at the highest level of abstraction, of law as a background condition for capitalism, but which recognizes that actually existing legal orders are the product of historical developments shaped in part by the law’s internal dynamics. Marxist philosopher Louis Althusser further develops this insight in his difficult text on law in *On the Reproduction of Capitalism*, written in the late 1960s but not published until 1995 and not translated into English until 2014. Here Althusser expresses the view that private law is based, in the last instance, on property rights, which themselves derive from three general legal principles: each individual enjoys legal personality; the legal freedom to use the goods one owns; and equality before the law (ibid., 57). This understanding bears a strong similarity to Pashukanis’s commodity form of law. However, Althusser recognizes that law is a formal system that aspires to internal consistency and comprehensiveness, and that also abstracts itself from the concrete social relations of the legal persons whose acts it governs. This explains Althusser’s somewhat paradoxical claim that law only exists as a function of existing relations of production but that the relations of production are completely absent from the law itself (ibid., 59). Law is, on the one hand, an apparatus of repression, but its efficacy depends on its acceptance, which is rooted in legal and moral ideology, which Althusser locates outside the law. Hence, we might conclude, not only is law a background condition of capitalist relations of production, but the legitimacy of law itself lies outside of law, in ideology. Finally, Fraser and Jaeggi’s formulation resonates with Hunt’s later

work, discussed in the first part of this essay. Hunt argued that capitalist society has to maintain its own preconditions, with law being an especially crucial background condition for the existence of capitalist economic relations (1993, 177).

Fraser and Jaeggi's notion of capitalism as an institutionalized social order with noneconomic backgrounds that are sometimes relatively autonomous and sometimes not autonomous also resonates conceptually with Tomlins's point in *Law, Labor, and Ideology* that law's rise to prominence after the American Revolution was a contingent historical event. That idea allows room for, or indeed, demands, investigation into the degree of autonomy that public power, judicial or legislative, had or has in specific times and places. This helps avoid the Scylla of reducing law to superstructure, and the Charybdis of absolute indeterminacy. Legal scholarship also fits well into their analysis in that at least some of the time law is part of the public power that capitalism both needs and sabotages.

In addition to points of resonance, Fraser and Jaeggi's book and Tomlins's book have points of dissonance as well. Examining the tensions between the conceptual frameworks of the two books generates useful questions for developing Marxist legal thought. Fraser and Jaeggi's book is in part a call for public power to regulate the economy. Tomlins's account, however, suggested pessimism about the power of law, especially the common law, to tame markets. By showing working-class people enduring loss after loss at the hands of the judiciary, *Law, Labor, and Ideology* can be read as suggesting that when common law is the preeminent modality of rule, we should expect law to serve domination and exploitation. This raises questions beyond Tomlins's scope in the book: Why does common law keep doing what it does? Is law's service of class rule an accident or a socially imposed necessity?

Tomlins argued strenuously—even polemically—against a reductionist or instrumentalist account of law as following in lockstep with the needs of the economy. The result was a strong assertion of the relative autonomy of law. *Law, Labor, and Ideology* seemed to suggest that what determined the outcomes of the conflicts the book depicted—over the law of conspiracy and collective bargaining, the scope of employer authority as defined by the law of master and servant, and the law of workplace injuries—were the reasoning processes and discourses of the common law itself. This implied some degree of contingency—if the legal discourse determined the outcomes, then a different legal discourse would have created other outcomes—and a degree of proximity to CLS.

Fraser and Jaeggi, on the other hand, present a picture of a social world shot through with pressures arising from its basic organization as a capitalist social formation. They emphasize capitalism as a social order—we would say a social totality—that is in some ways constrained and certainly constraining.<sup>25</sup> In this account, law is subject to structural pressures to serve capitalism. This may sound like the bad old economic reductionism, but the point is not that law must obey the economy. Rather the point is that capitalism as a type of society and class structure will predictably generate problems of conflict and social disorder. Law has been repeatedly called upon to deal with those problems. Capitalists and capitalist governments have lost out some of the time—

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25. On the concept of social totality, see Bhattacharya (2017), especially the editor's introduction and David McNally's article in the volume (94–111). See also Heitmann (2018, 589–606).

law does not always and only serve individual capitalists and capitalist states—but the effect has been to help serve the ongoing reproduction of capitalist society. In this account, law's service of capitalism is not contingent. Furthermore, that service is less the result of some character internal to law than it is the result of the social totality within which law is embedded.<sup>26</sup> On this account, law has sometimes helped create shifts from one regime of accumulation (i.e., one kind of capitalism) to another. That can have vitally important stakes in working class life, but the options within law have all been a matter of different versions of a capitalist social order.

This in turn raises questions about the nature of the public power that Fraser and Jaeggi wish to see separated from the economy. They argue that public power, including law, tends on a recurrent basis to become colonized or subordinated by the economy. That argument is harder to make if one thinks, in line with Tomlins and CLS, that law or public power constitute the economy in the first place. The point becomes, then, less that public power should be independent of private power, and more that public power should politicize and reconfigure private power.<sup>27</sup>

Inquiry into law could enrich Fraser and Jaeggi's formulation especially with regard to law's relationship to work, employment, class, and economy. Their book is perhaps at its thinnest on those issues. Their larger framework could shed light on the history of labor law, by raising questions of how employer decisions are both subjected to and constitutive of the imperatives of capitalism, and by placing employer behavior and the law of work in relation to the reproduction of capitalism.

Marxist legal scholarship might also examine themes discussed in some non-Marxist scholarship on labor and employment law, and industrial and human relations.<sup>28</sup> It might also explore and analyze the strategies and tactics of labor and social movements in the United States and Canada that have avoided, challenged, and in some cases exceeded the limits of industrial or state legality. There is no shortage of examples. For example, in Ontario, Canada, the Ontario Coalition Against Poverty defied the law on numerous occasions, which lost them much of the financial support provided by the labor movement (Ross 2011, 86; Greene 2005, 5). The Fight for \$15 and Fairness, which has scored significant victories in the United States and Canada, engaged in aggressive lobbying at different geographic scales, depending on legal jurisdiction and local political conditions (Juravich 2018, 104; Jeffries 2018). In the United States, there has been a wave of teachers' strikes in predominantly Republican states where teacher collective bargaining lacks a strong statutory foundation, while in Canada militant teacher unions battle provincial governments that restrict or suspend preexisting collective bargaining rights, leading to lengthy and often successful constitutional challenges (Blanc 2019; Slinn 2011; Tucker 2018).

Labor movements and social movements adopt multiple but often differing strategies. Their choices are partially shaped by the legal environment in which they operate,

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26. For a related discussion of the political differences between emphasizing that law structurally serves to reproduce capitalist social relations versus emphasizing the potential for law to serve other purposes, see Özsü (*forthcoming*). Özsü articulates this as a difference between thinking strategically in a specific historical conjuncture versus thinking structurally, and argues that Marxists should endeavor to do both, even if the two are sometimes in tension.

27. On private power, see Anderson (2017).

28. See, for example, Befort and Budd (2009); Estlund (2010); and Garcia (2012).

but the legal legacy may itself bear the imprint of past labor and social movement struggles, which may, in turn, be reshaped by current actions.<sup>29</sup> Teachers' strikes and Fight for Fifteen's aggressive lobbying for higher minimum wage are examples of two such different, if perhaps compatible, strategies.<sup>30</sup> In Fraser and Jaeggi's terms, are these struggles to replace neoliberalism with a new and more distributively just regime of capitalism, or defensive struggles to prevent the emergence of an even more vicious regime, or, perhaps, struggles to dismantle or erode capitalism? More recently, Erik Olin Wright (2019) has described capitalism as a complex ecosystem that combines various kinds of power relations in which capitalism remains dominant. This understanding is helpful in that it invites us to consider strategies for eroding capitalism by "changing the rules of the game that make up the power relations of capitalism in such a way as to open up more space for emancipatory alternatives" (ibid., 93).<sup>31</sup> Wright then turns to the capitalist state, which, like the economy, he describes as "loosely coupled, heterogeneous systems of apparatuses, within which the mechanisms that help reproduce capitalism are dominant" (ibid., 99). Wright identifies contradictory forces that prevent the state from being a perfect vehicle for the reproduction of capitalism, and in particular the challenge of democracy. However, he does not address the role of law, its internal contradictions, and whether law and legal strategies could open up spaces within which labor and social movements could more effectively resist, tame or erode capitalist social relations.

Marxists will likely disagree on how to understand these developments or on the possibilities for using law as part of an emancipatory struggle. In practice, Marxism is often a conceptual backdrop against which to disagree—but that disagreement and understanding will be enriched by a combination of theoretical and empirical analyses of both past and present that take law seriously.

## SOME CONCLUDING OBSERVATIONS

Fraser and Jaeggi's *Capitalism: A Conversation in Critical Theory* and Tomlins's *Law, Labor, and Ideology in the Early American Republic* contain analogous tensions. There was a tension in the latter over whether or not the workers who engaged in particular economic and legal conflicts, over employee injury and the right to organize, really could win, and what it would mean to win. It is unclear if those workers really had a chance to win their court cases or if their loss was overdetermined. It is also unclear what kind of

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29. The imprint from below of social movement on the law is not necessarily left wing—there are right wing social movements, after all. In addition, social movements' imprint on the law is always combined with the imprint from above of politically dominant groups and parties, and the state's own structures and tendencies: the state and law are not an empty vessel filled with content from the outside. Nicos Poulantzas (1979) addressed these patterns by arguing that the state was "the material condensation of the relation of forces between classes and class fractions." For an elaboration on these ideas see Khachaturian (2017).

30. For an argument for one specific strategy for the labor movement, by a union-side attorney, see Burns (2011).

31. We are also cognizant of the longstanding debate over whether reforms are system-changing or system-preserving. For example, Rosa Luxemburg famously cautioned that those "who pronounce themselves in favor of the method of legislative reform *in place and in contradistinction* to the conquest of political power and social revolution, do not really chose a more tranquil, calmer and slower road to the same goal, but to a *different goal*" (emphasis in original). See her *Reform or Revolution* (1900, pt. II, ch. 8), but note the italicized words.

victory a win in court would constitute. In some respects, in a Marxist view, workers lose if capitalism persists, but Marxists also recognize that changes to the rules of the game, even though the game remains the same, reduce the harms capitalism inflicts on workers and may be a stepping stone toward the erosion of capitalism (Wright 2019, 53–58). The tone of *Law, Labor, and Ideology* was dark, emphasizing loss and domination, but at the same time Tomlins embraced the view of law as a space in which dissonant views struggled for recognition and in which the outcome was not structurally predetermined. In this less totalistic view, workers' experiences of unfair treatment in capitalism can gain legal traction, producing reforms to the rules of the game, which may be system-conserving, but also system-eroding; their long-term effects being unknown and contingent, depending on the outcome of future conflicts and struggles (Wright 2019, 102–04).

This brings us to a tension in Fraser and Jaeggi's work: while Tomlins's work is darker in tone, Fraser and Jaeggi emphasize possibility in the fact that capitalism seems to generate struggles systematically. They are unclear, however, as to whether we should see boundary struggles as emancipatory, in a big picture sense, or as ultimately system-conserving. Indeed, they recognize that boundary struggles may extend market logic into politics and social reproduction, as in the case of neoliberalism. Thus, while they are certain that capitalism as an institutionalized social order is crisis prone and that we are in the midst of a deep structural crisis in which the subjugation of the polity, social reproduction and the natural world to the pursuit of endless accumulation is producing enormous harm, Fraser and Jaeggi do not have deep faith that capitalism will inevitably produce its own gravediggers. To put it differently, the tone of Fraser and Jaeggi's work is one of guarded optimism. The political, environmental, and reproductive crises of capitalism, as well as growing conflict at the point of production, create spaces for both defensive and transformative struggles, but "history does not always unfold the way we want it to" (Fraser and Jaeggi 2018, 222). These tensions in both works point to the difficulty in conceptualizing an actual ending to capitalism and whether smaller scale conflicts do or do not contribute to such an ending.

In our view, future Marxist scholarship would do well to build upon these themes by investigating, both theoretically and empirically, the nature and character of capitalist crises, and the role of law in preventing, creating, and resolving those crises.<sup>32</sup> This work would also benefit from greater attention, again both theoretically and empirically, to the classical problems of the interaction between structure and agency. Fraser and Jaeggi's work provides a valuable structural account, yet agents seem overly self-generating and underexplained, while Tomlins and Forbath both overstated the degree to which legal ideology and structure determined workers' subjectivity. One fruitful area of legal inquiry might be to examine empirically what working class people—as individuals, in their organizations (above all unions), and in collective mobilization—in fact make of the laws under which they live.<sup>33</sup> We suspect that for the time being

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32. For one example of this kind of inquiry, drawing on Marxist theory, Marx's own analyses of what he called primitive accumulation, and empirical legal inquiry, see Özsü (2019).

33. This line of inquiry might allow for fruitful dialog with earlier scholarship on "legal consciousness" such as Ewick and Silbey (1998), which generally does not consider the kinds of issues that concern Marxists and labor scholars, such as how working people think about repressive or accommodative labor laws. Sally Engle Merry's (1991) book, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*, an earlier key work in the "legal consciousness" literature, had a similar limitation. Merry focused

Marxist legal analysis will continue to operate at different levels of analytical abstraction and face challenges connecting inquiries at those different levels, but with greater attention over time might develop better ways to make that connection. Marxist legal scholars would do well to read and write both theoretical and empirical work, in the hopes of eventually producing better hybrids of the two.

In addition, we hope more Marxists, legal scholars, and above all Marxist legal scholars will pay attention to developments in the world of employment, the law thereof, and workers' organizations and mobilizations. Labor and labor law history remain vital areas of scholarship because the world of employment and the law thereof are in transition and are often increasingly brutal for workers. The rise of precarious work, the fissured workplace, global value chains, and the gig economy are all manifestations of capital's continuing drive to extract and appropriate for itself value from labor.<sup>34</sup> These developments undermine the efficacy of protective labor and employment law regimes built in the Great Depression and the post-World War II era, leaving workers more exposed to unrestrained market forces, often to the detriment of their health.<sup>35</sup> The relative decline of labor unions and of labor history has meant that there is less professional encouragement to pay attention to these subjects. This is a matter of change within universities, rather than any decline in the importance of these areas of society and of law.

At the same time, workers seem to be increasingly contesting the neoliberal assault on their security and standard of living, whether through the revitalization of strikes or political campaigns for higher minimum wages. Marxist legal scholars can contribute to these developments both by analyzing the ongoing role of law in maintaining class relations and the subordination of society to capital accumulation, and by challenging law's legitimacy when it does so.<sup>36</sup>

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on how working class people occasionally used law to deal with disputes with other working class people. That is certainly a worthy topic, and Merry, like Ewick and Silbey, displayed admirable granularity in accounting for ordinary people's understandings and experiences of law's presence in their lives. That said, these works shed little light on the relationship between law and the social category of class or on class as itself as a category of constraint. See Tucker (1992b). More recently, Susan Silbey (2005) suggested that research focused on legal consciousness had to some extent run out of steam, having, in her words, become "domesticated within what appear to be policy projects: making specific laws work better for particular groups or interests" (*ibid.*, 324). Marxian legal scholars might wish to refocus on working-class consciousness, perhaps in a Thompsonian or new labor history mode, to consider the lived experience of labor law. We would welcome more scholarship along these lines, though such work would proceed best, in our view, if it retained a strong emphasis on class as structural constraint, and not only as experience.

34. See Vosko (2005), defining precarious employment as work for remuneration characterized by high levels of uncertainty, low income, a lack of control over the labor process, and limited access to regulatory protection; Weil (2014), characterizing workplaces by a fragmentation of production through networked arrangements such as franchising, extended supply chains, and outsourcing challenge protective labor regulation; Suwandi (2019), demonstrating how lead firms in the Global North use mechanisms of value chain governance to enhance their control over and extract value from labor in the Global South; Huws (2014), new technology opens new fields of capital accumulation accompanied by restructuring of work arrangements that facilitate the extraction of surplus value; and Kessler (2018), exploring the experience of working in the gig economy as a contractor and the challenges it presents.

35. For example, see Stone (2004); and Lewchuk, Clarke and de Wolff (2011).

36. For an exemplary work along these lines, see Glasbeek (2018), describing many of the daily practices of capitalists and their corporations as criminal in nature, even if not always criminal by the letter and formality of the law, thereby challenging both the legitimacy of liberal law and the wrongdoing that it condones.

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