

Marx and law

Law



JOURNAL OF LAW AND SOCIETY VOLUME 20, NUMBER 4, WINTER 1993 0263-323X Marx and Law ANDREW VINCENT* There is no sense in which Marx can be described as just a legal theorist. He did not write any systematic works on legal science or jurisprudence; however, his observations on law are both immensely penetrating and contain an extremely subtle interweaving of philosophical, political, economic, and legal strands. Marx was also at the centre of many crucial intellectual and political debates of his time.

In order to try to unpack some of these debates, elucidate his views on law, and retain some overall clarity, I divide my remarks into five sections, which will inevitably overlap. The sections covered are: the problems of discussing Marxist jurisprudence; the philosophical background to the analysis of law and the state; materialism, political economy, and law; base, superstructure, and the ideology of law; and finally, law, politics, and the state.

PROBLEMS OF MARXIST JURISPRUDENCE There are a number of problems for any student of jurisprudence or politics trying to grasp Marx's approach to law. First, there is the puzzling point that neither Marx nor Engels had a positive normative theory of law, crime or deviance. In fact, much of the time Marx appears predisposed simply to ignore the question of law as peripheral, or at least to treat crime as a symptom of the conflict within a class-based society.

' He certainly offers no clear encompassing definition of law. Marx's jurisprudential thought is often premised upon a critique of law per se, and what he has to say tends to be overwhelmingly negative in character.

This is fine if one's purpose is 'critique' and nothing else, but it is a definite handicap if one wishes to say something more positive about the nature of law, law reform rather than its overthrow, or the future of law (e. specially if

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

School of European Studies, University of Wales, Cardiff CF1 3 YQ, Wales 371 C Basil Blackwell Ltd. 1993. 108 Cowley Road, Oxford OX4 JF, UK and 238 Main Street. Cambridge. MA 02142. USA HeinOnline -- 20 J. L. & Soc'y 371 1993 say something more systematic, like *The German Ideology*. However, Marx never allowed its publication in his lifetime and it is commonly dismissed (although not by all writers by any means) as either a work of immature juvenilia or a flawed piece of philosophical polemic which does not come up to the systematic and scientific standards of *Capital*.

Marx, it is also commonly asserted, had intended to write a work on law and the state⁴ (possibly as an extension of *Capital*), but he never realized his ambition. Thus, in consequence, the writings and observations on law that we do have are incomplete and must be picked out from a diverse body of writings. Marx's writings are in fact markedly eclectic and can be roughly divided into four often overlapping types: first, the early, more philosophically inclined pieces, clearly more inspired by the German philosopher G.

W. F. Hegel. Under this rubric would be included the *Economic and Philosophical Manuscripts* (1844), *The Holy Family* (1844), *The German Ideology* (1845/6), and *The Poverty of Philosophy* (1847). The second type of writing is the polemical pieces written for particular political objectives. The <https://assignbuster.com/marx-and-law/>

most famous of these is the Communist Manifesto (1847/8). The overt character of these polemical writings- despite their wide dissemination, immense influence, and popularity - is their simplification of issues and doctrines.

This can be a problem in assessing what Marx actually believed, rather than what he needed to put forward for polemical thrust and cogency. The third group of writings relate to Marx's observations on particular historical events. Probably the most famous of these, and the most convoluted and ambiguous, is the 18th Brumaire of Louis Bonaparte(1852). The writings in this context employ Marx's immensely sophisticated method of close historical analysis, although the final upshot of such pieces has given rise to many hostages to fortune especially over the theory of law and the state.

The final group of writings settle upon his systematic economic theories. The most famous of these are the earlier Grundrisse (1857/8) and the later Capital (1867-85), which remained incomplete at Marx's death. In sum, Marx's observations on law must be, and usually are, picked out from these diverse writings. It is hardly surprising that there should be oddities, fierce contestation, and discrepancies over such fragments. A related point to the diversity of the above writings is the fact that many commentators on Marx argue that there is a marked shift or break in his perspective.

The break usually occurs between the 'younger' and 'older' Marx. The character of the shift, which was called the 'epistemological break' by the French Marxist, Louis Althusser, is between an earlier philosophically and morally-inclined Marx, clearly inspired by Hegel, and the mature Marx, focused on political economy and intent upon constructing 5 an empirically-

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based social and economic science of history and society. This judgement on the distinction between the late and early Marx is often supposed to direct our attention to the late Marx and a consequent dismissal of the early philosophical Marx.

In this reading, Marx's early interest in 'alienation' is superseded by a social scientific theory of economic 'exploitation'. The development of a clear vision of the early Marx was perhaps 372 © Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 372 1993 partially hampered by the fact that the key early writings - the Economic and Philosophical Manuscripts - were not actually discovered and published till the 1920s. Marx certainly never contemplated their publication during his lifetime.

Whether one takes the epistemological break seriously or not, there are undoubtedly changes in Marx's perspective on many issues including law. 6 These cannot be ignored by the student of Marx, although what one reads into these changes remains contestable. Another problem concerns Marx's intellectual relation with Friedrich Engels. There has been a strong tendency in Marxist writings to associate the two men closely with one pristine doctrine. It appears that in fact Marx's definite turn to economics (political economy) was confirmed through his initial contact with Engels' writings.

As editor of the Deutsch-Franziisische Jahrbliicherin Paris, in November 1843, Marx had received an article from Engels, entitled 'Outline of a Critique of Political Economy', which stimulated the economic turn in his own work. Their working relation began a year later in 1844. 1 However, despite their collaboration on works like The German Ideology and The Communist Manifesto, it is far from clear that we should associate them, especially on <https://assignbuster.com/marx-and-law/>

questions of their philosophical beliefs or their subsequent ideas on law and the state.

This point has been made by a number of scholars, although it is still far from resolved. It is clear, for example, that Marx did not formulate a lucid doctrine of materialism, whereas Engels clearly lays out such a doctrine, particularly in popularizing works like *Socialism: Utopian and Scientific* (1880), the *Anti-Diihring* (1885) and the *Dialectics of Nature*. Marx nowhere used terms like 'dialectical materialism' or 'historical materialism'. Neither did he coin terms (which are relevant to the discussion of law) like the 'withering away of the state'.

This latter idea, again, was Engels's terminology from the *Anti-Diihring*. Marx did not apply the notion of dialectics to nature itself. His belief remained firmly fixed in the social sphere of human emancipation. Engels was far more ambitious, some would say foolhardy, extending dialectics to the natural world. ' The ultimate consequence of Engels's doctrine was a virtual reenactment of an older form of mechanistic materialism resonant of the French Enlightenment, which Marx had attacked in his early unpublished work, the *Theses on Feuerbach*.

Engels's doctrines later became established in the writings of Lenin, particularly Lenin's philosophical work *Materialism and Empirio-Criticism* and Plekhanov's *Materialism Militant*, and subsequently it dominated much of the theoretical output of the Second International and the leading Marxist party of the time in Germany - the Sozialdemokratische Partei Deutschlands (SPD).

9 However, Marx's theory of knowledge, if it can be summarized, hung

uneasily between a classical materialism and an idiosyncratic use of Hegelian idealism.

One can overemphasize the differences between Engels and Marx; however, we ignore them at our cost. If we are trying to understand Marx, it is not wise to place too much reliance on Engels's own personal output. One final problem concerns Marx's use of the concept of law itself. There are two terminological points to note here. The first concerns the German 373 D Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 373 1993 word, Recht. It is virtually equivalent to the terms jus, droit or diritto, as distinct from lex, loi or legge. This distinction does not really work in English.

Recht in German is not limited to law or jurisprudence but can encompass the issues of civil law, justice, right, and morality. In Hegel, the initial focus of Marx's interest in law, Recht embodied the above themes, but also what he called the 'ethical life', the state and, ultimately, aspects of world history. In fact, the work on which Marx spent so much time in his early years, Hegel's Grundlinien der Philosophie des Rechts, is sometimes translated as The Philosophy of Law, The Philosophy of the State and, more usually, The Philosophy of Right. It is important to bear in mind this ambiguity when considering Marx's observations on law (as Recht); when Marx addresses law, it is not strictly parallel to English usage. The above connects up with the second point, which is often confusing to audiences from the British or Anglo-Saxon legal traditions. Hegel's work, referred to above, was, as much as anything else, a theory or philosophy of the state. This is encompassed, to some extent, in the broad use of the term Recht. Thus, the treatment of the state might be said, inclusively, to be also a treatment of law.

This kind of approach resonates more with the Roman law and civil law traditions of continental Europe than with the common law tradition of Britain. " However, it is worth taking note of this point since it throws a ray of light on some of Marx's writings; namely, his critique of the state is to a large extent also a critique of law. '2 One small biographical detail could be added here, which might add some substance to this point. When Marx was writing in a more reflective way on the state and law, he was in Germany and France.

His early legal training had been in Germany (although he gave it up for philosophy) and he was reflecting and writing within the Hegelian genre. Much later in his life, in the late 1870s, when puzzling over whether to write more on law and the state, he had been living and working for a number of years in Britain, enough time to pick up on the peculiarities and idiosyncracies of the English legal tradition and its odd relation to the state. This might explain some of his later ambiguities, as opposed to his earlier certainties, on the state. Finally, the interest in Marx on law, despite the work of the Soviet jurist Evgeny Pashunakis in the 1920s and 1930s, and Karl Renner in Austria, was not really a subject of wide-ranging debate until the 1970s. As Maureen Cain and Alan Hunt have commented: the prevailing trend from the 1930s to the 1960s displayed an almost exclusive emphasis on the repressive or coercive character of law, conceived as the direct embodiment of the interests of the ruling class. In this conception law itself is unproblematic: the analysis of legal development or new legislation has the task merely of exposing the class interest³ contained in them.

What was discovered in the 1970s, presumably under the impact of the surge of interest in the Italian Marxist, Antonio Gramsci, was the conception of law as ideology and, in consequence, law as a crucial part of the intellectual hegemony of capitalist societies. In this sense, the more wide-ranging and 374 (D Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 374 1993 popular interest in Marx on law is a relatively recent development. It is thus very tempting, in dealing with this topic, to refer to the developments in Marxism itself to the present day.

The major danger with this path is that the discussion can become wholly enmeshed in the recent material and Marx becomes a distant memory. I have tried to avoid this trap here. Although contemporary developments are not ignored, the principal focus is on Marx's writings. THE PHILOSOPHICAL BACKGROUND TO THE ANALYSIS OF LAW AND THE STATE There are three points to note concerning Marx's philosophical background which are relevant for his later project and his overall understanding of law. First, the premises for his critique of law are derived from his initial philosophical criticism of religion and the state.

Secondly, his analysis of the conception of ideology and the 'illusory' character of bourgeois thought (including law) lies in early essays like 'On the Jewish Question'. Finally, his first inkling of the economic roots to social and political thought can also be found in his early essays - particularly the Economic and Philosophical Manuscripts and his article on 'Law on Thefts of Wood' in the Rheinische Zeitung (1842). I take the first two issues as most significant. The last point, to a large degree, follows from the first two.

From the late 1830s, Marx had determined to get to know Hegel 'from beginning to end'.⁴ Together with Bruno and Edgar Bauer, Arnold Ruge, Max Stirner, and Ludwig Feuerbach (the so-called young Hegelians), Marx studied Hegel's works assiduously through the late 1830s and early 1840s. Feuerbach was the most influential figure in the group. Initially he had been a disciple of Hegel's philosophy, and in some ways he never abandoned it.⁵ Feuerbach, however, did engage in a dialectical critique of Hegel - using Hegel's own method to criticize him.

Hegel's definition of humanity through its thinking abilities, specifically through the notion of Spirit (Geist), is, for Feuerbach, one step short of reality - or, at least, it is inverted reality. Hegel explained humanity through consciousness (or mind); however, for Feuerbach, it is sensuous and materially-rooted humans who think, not some abstract consciousness or mind. The transcendental ego of Kant, the absolute ego of Fichte, or Hegel's notion of Spirit (the great themes of German philosophy) were all seen by Feuerbach as sensuous human creations.

Thus, the basis of Feuerbach's critique of Hegel is that the latter was offering, unwittingly, an 'esoteric theology'. Humans are not vehicles for Spirit (Geist); rather, humans create the notion of Spirit. In fact, for Feuerbach, humans create God in their own image. Thus, in Hegel, 'What was a logic of Being becomes [in Feuerbach] a psychology of human concept formation'.⁶ Philosophy, in actuality, reflects human wants and needs. This critique of Hegel's ontology was directly related to Feuerbach's equally important critique of religion in *The Essence of Christianity*. Hegel's

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HeinOnline -- 20 J. L. & Soc'y 375 1993 philosophy is, in point, interpreted as the last speculative outpost of God. Speculative philosophy and religion needed to be led from the realm of mental abstractions into the realm of sensuous humanity. For Feuerbach, in essence, all 'theology is anthropology'. The true object of religion is not God but idealized humanity. Religion is the alienated form of the individual's recognition of his or her own nature. God is the creation of the human imagination, unknowingly idealizing itself. Thus, Feuerbach claimed that some radical demythologizing was needed.

Love of God is really love of humanity in symbolic inverted form. Theology is kind of psychic pathology. The separation between God and humanity is really a separation within humanity itself. Religion is a form of alienation from our essential natures. The demythologizing was to be accomplished by the technique Feuerbach called 'transformative criticism', namely, the interchanging of the subject and predicate of propositions. For example, an understanding of God is not crucial for understanding humanity; conversely, an understanding of humanity is crucial for understanding the idea of God.

The real subject is humanity, the predicate is God. These arguments affected profoundly the thinking of the young Hegelians. Marx, particularly, was initially enthralled, but soon turned to his own critique of the young Hegelians, especially Feuerbach. In his Theses of Feuerbach, he argued that Feuerbach's great achievement had been to bring holy ideas down to earth. However, he had retained an abstract materialism and theoretical humanism. What was needed was a practical humanism and a new

understanding of materialism which took account of the social and economic reality.

Philosophy must be moved away from mental abstractions and contemplation into the realm of social, political, and economic realities. Feuerbach was thus also subject to the demystification of transformative criticism. Practical and sensuous humanity, embroiled in economic and social realities, is the real subject, not theoretical humanity.¹⁷ This critique of Feuerbach also forms the basis for Marx's critique of Hegel, religion and, finally, the state and law. It also led him to his crucial life project - the study of political economy. Marx accepted, implicitly, one theme in both Hegel and Feuerbach.

Philosophy is about emancipating human beings. History was imbued with teleological significance as to the growing possibility for and realization of freedom, although this theme became very shrouded in his later writings. Religion purported to be about emancipation; however, for Marx, again, the reality was inverted. As he stated: 'The criticism of religion ends with the doctrine that man is the highest being for man'.⁸ Religion per se could not be overcome by simply drawing people's attention to its inverted logic (with due respect to Feuerbach).

For Marx, one had to grasp, critically, the social, political, and economic roots as to why people sought consolation in religion. A criticism of religion was, in essence, social and economic criticism. This exactly paralleled his criticisms of Hegel's notion of the state. For Hegel, humans were self-constituting and self-producing creatures. There was no sense in which we were simply the passive products of historical

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Hegel's Geist (Spirit or Mind) was really labouring humanity. Hegel, for Marx, made the 'exoteric esoteric'.⁹ Hegel had grasped the centrality of labour (self-production) but only in its mental form (in consciousness). Thus, Marx refers to Hegel's philosophy as 'concealed criticism that is still obscure to itself'.²⁰ For Marx, humans produce themselves by actual labour and through the ensuing social relations in the world. Thus, Marx moved from regarding Hegel's philosophy as an esoteric psychology gradually to regard it as an esoteric economic thesis.

Hegel's philosophy of the state (and law) had a correct content but in an inverted and mystified form. Marx in fact treats Hegel's Rechtsphilosophie as summing up German reality at that time (in its mystified form). As Marx put it: The criticism of German philosophy of the state and of law which was given its most consistent, richest and final version by Hegel, is ... the critical analysis of the modern state and the reality that depends upon it'.²¹ Hegel had argued that humanity and civil society were the product of the state.

The state is seen to stand above the conflicts of society. However, for Marx, again the reverse is true. Individuals in civil society, embroiled in economic forces and classes, and hedged about by private property rights, produce the state which, of necessity, reflects differential and unequal property relations and powers. Abstract property rights are embodied in the state. The state exists to maintain this interest. The modern state gives people legal rights and freedoms, premised on the idea of humans possessing property.

However, such property is of necessity premised upon the alienation and denial of such freedom to a large proportion of the population. As Marx observed, the critic must now grasp 'the essential connection of private property, selfishness, the separation of labour, capital and landed property, of exchange and competition, of the value and degradation of man'.²² The logic of private property is the same as that logic of religion. As human beings alienate their essence into God, so workers alienate their essence into the production of goods.

Workers, in receipt of wages, only secure a small proportion of what they produce. Thus, they alienate their essence into goods which others consume, use or embody in their private property - a property upheld by the state and legal system. Moving now to the second point of this section, Marx's early essay 'On the Jewish Question' deals, on the surface, with question of the repeal of legal disabilities for Jews in Germany. The essay is interesting on a number of counts; however, one point will suffice for the present discussion.

Marx indicates that the illusions that were to be found in the religious consciousness could also be found in law. The basic point was that humans turned to religion in particular historical circumstances. Young Hegelians, like Bruno Bauer, had argued that the demands for Jewish emancipation precluded genuine emancipation, since the demand was formulated in religious terms namely, Jews. The state, for Bauer, must abolish all religious categories. The secular state provided the real solution for Bauer. Marx responded to this by 377 C) Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 377 1993 arguing that religion per se was not the problem, but, rather, the state and legal system itself. Religion is an illusory (if crucially important)

pathology, but it is a reflection of a broader 'illusion' pathology within the secular state. A secular state does not free human beings. Rather, the state embodies as many, if not more illusions than religion; illusions of secular states are structurally similar, and, in fact, related to religion. As Marx put it, in somewhat tortuous prose: We do not insist that they must abolish their religious limitations in order to abolish secular limitations.

We insist that they abolish their religious limitations as soon as they abolish their secular limitations. We do not change secular questions into theological ones. We change theological questions into secular ones. History has for long enough been resolved into superstition: we now resolve superstition into history ... We criticize the religious weakness of the political state by criticizing the secular construction of the 23 political state without regard to its religious weaknesses. In short, for Marx, the political world of the secular modern state was as much a tissue of illusions as religion. 4 Underpinning the modern state are the illusions about private property and commerce, and the legal structures which uphold them. The final theme, with regard to his early writing, concerns his essay on the 'Theft of Wood' in the *Rheinische Zeitung* in late 1842. The 'Wood Theft' essay, as Marx later observed, was the first time that he saw clearly the socioeconomic issues which underpinned law (viewed through the lenses of the transition from feudalism to capitalism). The common feudal and customary right of gathering wood was effectively being 'privatized' by commercial society.

Rural poverty was itself the product of the redefinition of property as 'private property'. In this sense, law was facilitating capitalism. Oddly, in this essay, Marx's solution was a restoration of older customary rights (although a

slightly odd use of them) against the new right of private property. As he put it: 'We reclaim for poverty the right of custom which is not a local one⁵ but which is that of poverty in all lands'.² It is worth noting, though, that many of Marx's early writings do not envisage the abandonment of law or the state.

He adopts, in fact, a quasi-natural law or customary law position (from a strictly secularist position), arguing, in essence, that certain newer laws are not really valid or real in the context of what real law 'ought' to be like - namely law ought to be, as Marx put it, 'the positive existence of freedom'.²⁶ It is also clear that he was not envisaging the abolition of the state; conversely, he anticipated a more radical democratic state upholding the fundamental rights and freedoms of the masses. In many ways these quasi-natural law themes and radicalization and democratization of the state do not disappear in his later writings; rather, they are submerged below the intellectual surface. The surface, in many later writings, becomes more positivist and economic in character; however, the underlying themes of human emancipation as a genuine need of human nature, the correct ways in which humans 'ought' to act towards each other, and the future structural character of society, still subsist, but certainly not in any easy or comfortable relation to the positivism. 378 (D Basil Blackwell Ltd.

HeinOnline -- 20 J. L. & Soc'y 378 1993 MATERIALISM, POLITICAL ECONOMY, AND LAW Marx was a materialist of sorts, although, as pointed out earlier, he never described himself as a historical or dialectical materialist. There are various senses which can be attached to the term materialism. Marx had no interest in materialism in the colloquial sense of a 'seeking after consumer

goods' which we might now call consumerism. Neither does he have much interest in mechanistic Enlightenment materialism, seeking to explain humanity via certain mechanical analogies - l'homme de machine.

Neither strict physical materialism nor behaviouralism were of any interest. Marx's concern with materialism must be set against his reaction to Hegel's idealism, as examined in the previous section. Put at its simplest, Marx wanted to insist that human beings must subsist (and labour to subsist) before they cognitively speculate or think a great deal about their condition. Our social and economic being is thus prior to our reflective consciousness. The material conditions of our lives form the true basis for both our cognitive life and our social and political structures.

We can observe here the 'transformative criticism' at work again in the basic rudiments of Marx's thought. The 'subject' is not self-conscious thought, nor is material life the 'predicate': the converse is true. Subject and predicate must be transformed. It is important to bear this method in mind: namely, that Marx comes to his basic materialist conclusions from a philosophical direction. Marx does not suddenly 'see the empirical light' on some Damascus road or come to such conclusions from empirical observation.

His route to such premises is philosophical. One problem here is that even if we focus on Marx's particular type of materialism there are still distinct and competing versions of it. We might call these the stricter and looser versions. We will encounter parallels to this distinction in other areas of Marx's thought and there remains considerable debate as to where Marx's sympathies lay. The stricter materialism might be called 'unidirectional determinism'.

Material conditions causally determine thought and political and social structures.

This is the dimension that Engels, Lenin, Plekhanov, and Kautsky picked up on, and it reappears in structuralist Marxism, amongst other varieties in the later twentieth century. This materialism looks, and occasionally tries to act more like a natural science. " In some more recent analyses of Marx it is connected to the idea of the 'epistemological break'; that is, the mature Marx is the 'scientist' and 'unidirectional determinist'. The alternative looser materialism can be observed in the elusive Marxist doctrine of 'praxis' (where 'theory' and 'practice' have a symbiotic and reciprocal relation).

The basic logic of a praxis argument denies the basic premise of the unidirectionality claim; that is, it asserts that reflective thought and consciousness (as embodied in philosophical, economic or legal thought) can actually affect our material conditions. We can accommodate our theory to our practice and vice versa. Put simply, human reflective thought has definite efficacy; it is not just an epiphenomenon of the material conditions of life. This form of looser materialism can be observed in some of Marx's

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L. & Soc'y 379 1993 writings and in the subsequent Marxist tradition in writers like Antonio Gramsci, Georg Lukács, and Karl Korsch. 29 Such a looser materialism is also more aware of the contestable nature of economic and social categories. The particular form of Marx's materialism is premised on political economy. The basic components of the doctrine can be stated as follows: human beings must subsist in order to survive and in so doing they

labour. In labouring, humans use certain material technologies (crudely) or modes of production.

In working within a mode of production, whether in a medieval rural context with a plough or within a nineteenth century factory with a machine, humans come into relations of production, that is, relations with other human beings within the productive process. Relations of production crystallize into groups called classes whose relations are determined by the particular form or mode of production. As forces of production change, so do relations of production. 3" In capitalism, for example, there are two fundamental classes. Proletarian workers sell their labour for a wage. Workers produce more than receive.

The wage only provides subsistence. The capitalist class sells the products of the workers to gain profit. Capitalism thus subsists by extracting labour value from its workforce. The interests of the capitalist class necessarily conflict with those of the proletariat. Thus, material conditions of economic life form the real basis to social existence. Political and legal structures can only be understood via these material conditions. Marx, in one of his more synoptic semi-autobiographical pieces of writing, Preface to the Critique of Political Economy, called this whole 31 process the 'leading thread' of his studies.

It is worth remarking at this point that Marx's views on this 'leading thread' have given rise to another debate which parallels the stricter and looser senses of materialism. There are interactive and passive notions of economic reductionism. On the passive view (which corresponds to stricter materialism), law and the state emerge instrumentally from economic forces. They have no independent efficacy or reality. The state and law are not

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understood to arise from conscious human intention; rather, they reflect the class struggle that takes place in the context of the economic base of society.

Many Marxist writers find themselves uniformly uneasy with this form of passive reductionism. In this more sceptical reading, Marx's Preface (mentioned above), as well as many works by Engels, are not regarded as adequate representations of the totality of Marx's views. Antonio Gramsci, for example, regularly dismissed this more passive view in the curt phrase 'economism'. For such critics, passive reductionism contains an impoverished and simplistic conception of the state and law. It does not grasp the more interactive quality of the state and legal system, and it ignores the conflicts between classes over authority within state.

Neither does it explain how the economic base actually 'determines' law. The actual causal mechanism remains inchoate in Marx's writings. Marx's texts, it is argued, are rife with potential for more interactive readings. However, the Marx of the Preface could reply to this criticism by arguing that such a view is in imminent danger of 'legal fetishism', where law is seen as both necessary for the existence of society and autonomous from economic or class factors. There is nothing unique about law in the passive reductionist reading.

However, most exponents of interactionism would not want to argue that law has total autonomy; rather, that the law can, in certain circumstances, act upon economic life and can either facilitate or work against a particular mode of production. The ambiguities over these various positions can be

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observed in Marx's classic account of the transition from feudalism to capitalism. As commercial capitalism slowly develops at the economic base it, of necessity, erodes feudal relations. It is no use to capitalists that a workforce is tied by feudal bonds to a particular aristocratic landowner or piece of ancient property.

In addition, communal land (or wood), which all can freely utilize as a common resource, is also deeply inconvenient for capitalism. Property, for capitalists (as in Marx's observations in the wood theft article), must be privately owned and tradable. Labour must also be free of feudal ties in order to travel where the work is needed by capitalists. These processes were obviously facilitated by coercion and outright violence, as in many cases of enclosure; however, as Marx noted, law also expedited the whole process in developing sophisticated systems of property law, contract law, and tort.

In creating a landless poor ('free labour') and a contractual private property-based law, the groundwork for capitalism was gradually laid. The problem is how to read these events. On the one hand, law could be seen (as in the interactive thesis) as semi-autonomous, providing intentionally the conditions for changes in the mode of production. In fact, it is arguable that law consciously constituted the integuments of a mode of production. This argument throws doubt on the unidirectional determinism and passivity thesis.

On the other hand, law can be read as a coercive structure representing the actual dominance of the bourgeoisie of the means of production, but determined by the laws of the economic base. In this latter reading, law has no autonomy whatsoever. It simply and instrumentally reflects the economic

base. Support for both lines of argument can be found in Marx. **BASE, SUPERSTRUCTURE, AND LEGAL IDEOLOGY** The basic idea of base and superstructure follows neatly from the previous section. In fact, once again, we find similar disputes being echoed from previous sections.

One theory sees a precise causal relationship. The other theory sees a looser tendency and more interactive quality in base and superstructure. This latter theory leads some critics to bewail even the use of terms like 'base' and 'superstructure'. It is argued that it would be far better if we treated these terms as more or less useful metaphors, not referring to any empirical reality. 34 As in many of Marx's writings, half the problem here might simply be because Marx never really addressed the problem head on. 5 The terms occur in certain writings, but Marx did not appear to have any inkling of how much significance was going to be placed on them by 381 © Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 381 1993 subsequent generations. The older instrumental causal account of base and superstructure sees a clear correspondence between laws and political institutions (superstructure) and the economic base. As Marx put it unequivocally in his Preface to a Critique of Political Economy: With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed.

In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic - in short, ideological forms in which men become conscious of this conflict... Just as our opinion of an individual is not based on what he thinks of himself, so we

can not judge such a period of transformation by its own consciousness; on the contrary, this consciousness must be explained rather from the contradictions of material life. For example, laws on land tenure in the feudal period (a superstructural phenomenon) changed markedly with the development of capitalism. The real foundation for these changes and the explanation of them would be sought in the actual change in the modes and relations of production - the material base. There are a number of minor problems with the above view. First, it is not easy to see how the above thesis explains why certain types of law occur. For example, how, on the above model, would one explain factory legislation, which controlled the activities of capitalists?

Alternatively, what of social welfare legislation or legislation which enacts progressive redistributive taxation? Admittedly, it could be replied here that such laws indirectly help capitalism by improving the condition of the working class and preventing revolution, while paying a minimum cost. Thus, despite appearances, such legislation aids capitalism: it is in essence still a business proposition. This counter argument might hold for some legislation, but what of other laws which prevent abuse to children, punish rape, or ensure the proper care of the mentally handicapped?

What of laws which define the roles of an official in local or central government or, alternatively, traffic law? Surely it is not as easy to explain these as clearly causally related to the economic base of capitalism. Any attempt to do so would surely look very far-fetched. In other words, the instrumental thesis does not account for the totality of law. Secondly, certain legal rules appear to be part of the relations of production, for example,

contract law. The relations of production are held together by such contractual rules. They form a kind of social glue for such economic practices.

The question arises, therefore, can we separate out contractual law and the relations of production? If the relations of production are constituted by legal vocabulary then there can be no clear determination of the superstructure by the base. Thus, for these, and many other reasons, a number of commentators have felt distinctly uneasy with the instrumental/ causal base superstructure model. 37 In fact, Marx did not use the model with any great frequency and late in life Engels also wrote a number of oft-quoted 38 qualifying letters which appear to give a lot of ground to sceptics.

As noted above, in the quotation from Marx's Preface, Marx often tended 382 (C Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 382 1993 to view ideology from a similar causal perspective. One way of viewing an important dimension of the superstructure is as the body of ideas of a society. Marx refers, in the above quotation, to the legal, political, religious, aesthetic, and philosophical ideas of a society. The quotation clearly takes a 'reductionist' and 'instrumental' view of ideology. Ideas are explained via their connection to the material base.

Legal ideology is thus, once again, part of the consciousness of bourgeois society, and, as Marx clearly observed: 'Just as our opinion of an individual is not based on what he thinks of himself, so we can not judge of such a period of transformation by its own consciousness'. Thus, overt legal ideas and forms tells us virtually nothing substantive - they merely reflect deeper economic changes. 39 It is understandable in this reductionist reading that

Engels and others should thus have referred to ideology as the 'false-consciousness' of a class like the bourgeoisie.

Lawyers might thus be regarded as professional ideologists or 'waged hacks' (in fact like most intellectuals, professional groups, and academics) for the bourgeoisie. Subsequently Marx's ideas came under certain pressures and a number of questions arose. In his early writings Marx appeared to be contrasting 'ideology' with 'reality as practice' - a form of philosophical materialist ontology. Liberal capitalism was in an equivalent position to religion as a distortion of the human essence. Later this contrast became ideology (as distortion) as against natural science (as truth or knowledge).

The change in perspective here refers, once again, to the idea of an epistemological break in Marx's writings. However, in both these views, it remained unclear as to what to include within the term ideology. In some writings it appeared to be widely inclusive - consciousness in general. In other writings he appeared to limit himself to economic and political ideas. The question arose at the time (which is still unresolved) as to whether natural science was part of ideology or was wholly distinct. Marx also did not explain, as mentioned earlier, the precise mechanisms of determinism.

For example, it is not clear (taking A as the economic base and B as legal ideology), whether 'determine' means that A causes B, tends to affect B, or sets parameters to B, or alternatively, whether there is a symbiotic relation of A to B. In strictly practical terms, such corrosive ambiguities do link up to quite ordinary questions on legal activity. As Hugh Collins observes: 'The question is whether a judge follows instrumental considerations with a class

character or operates a discrete mode of reasoning'. Marxists have gone on struggling with the concept of ideology.

Some, like Gramsci, found inspiration in ideas of 'relative autonomy', which allows some leeway for 'a discrete mode of legal reasoning'. In Gramsci's thesis (which for some is present in Marx's writings like the 18th Brumaire), domination under capitalism is not simply achieved by coercion, but, subtly, through the hegemony of ideas. The ideology of the ruling class becomes vulgarized into the common sense of the average citizen. Power is not just crude legal force, but, conversely, domination of language, morality, and culture. Laws, for example, become internalized within the consciousness of each citizen. The masses are quelled and co-opted by this internalization of ideas. The hegemonic ideas become the actual experiences of the subordinate classes. Bourgeois hegemony moulds the personal convictions, norms, and aspirations of the proletariat. Gramsci thus called for a struggle at the level of ideology. Organic intellectuals situated within the proletariat should combat this by developing a counter-hegemony to traditional intellectuals upholding bourgeois hegemony - which might be considered as the basis of a credo for critical legal studies.

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In sum, this perspective does not consider law as just instrumental. Law does not necessarily uphold the interests of the ruling class and it is not simply determined by the economic base; in fact, it may have some counter-determining role on the base itself. These themes will be pursued more intently in the final section. LAW, POLITICS, AND STATE One view of the state
<https://assignbuster.com/marx-and-law/>

and law, which predominates in Marx's writings, is that they are a condensation of the economic interests of the dominant class.

The state is thus viewed as the 'executive committee to manage the affairs of the bourgeoisie'. The state acts as its oppressive agent in civil society, suppressing proletarian interests in favour of capital accumulation. The personnel of the state owe allegiance to one particular class - the bourgeoisie. Lawyers would be viewed as waged lackeys of the bourgeoisie. Law is part of this oppressive mechanism and embodies the ideological mystifications of bourgeois intellectualism. The bourgeois capitalist class dominates political power through its domination of economic power. This is the more traditional view of the state, epitomized in *The Communist Manifesto*. As Marx stated unequivocally in the latter work: Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into law for all, a will whose essential character and direction are determined by the 43 economical conditions of existence of your class. The above argument is a form of class reductionism.

The bourgeois state and legal system are class-based phenomena. Class, for Marx, refers to large social groups linked together in certain social relations within a mode of production. Each class receives differential rewards, power, and status. Relations between classes tend to be conflictual. Within the instrumental perspective, the state and legal system are seen to condense the interests of one class. The state is not a representation of any collective good or impartiality. It is, rather, integral to certain specific economic interests in society.

Class interests are seen to manage the state apparatus in the interests of that class - the bourgeoisie in capitalist society. The history of states is therefore subsumable under class interest. Marx tended, in many writings, to interpret nineteenth-century legislation, particularly in Britain, in such class terms. For example, the passing of the Reform Bill and Ten-Hours Bill, and 384 (D Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 384 1993 the repeal of the Corn Laws, were seen as aspects of the economic conflict between the bourgeoisie and landed aristocracy.

The above view reflects dolefully on a number of issues. First, there does not appear to be any difference between a democratic rule-of-law constitutional state (Rechtsstaat) and an unconstitutional, undemocratic despotism. Both are simply exploitative class-based entities. " The former state simply shields its basic exploitative character more successfully, particularly under guises like the 'rule of law'. Secondly, both the 'general' rule-of-law principle and 'particular' property, contract or criminal laws, are simply there to buttress the property owners of capitalism.

The rule of law is a typical example of legal fetishism, namely, giving law a false autonomy from the economic and class base of society. In times of high productivity, the constitutional capitalist state will give the appearance of some concern, via state spending, but it will show its true colours during periods of economic crisis. The first cuts will always be to the welfare of working people. The rule of law is thus an elaborate confidence trick. 45 Thirdly, Marx suggests that the so-called equal rights of liberal states have grossly unequal effects.

The rights of human beings are in reality the rights of bourgeois men in civil society. 1 They protect individual capitalists in their exploitative practices and they protect the unequal economic results of such practices. Rights are associated with individuals who 'own' them in order to protect private interests. Rights thus shield the basic inequalities and exploitative practices of bourgeois culture. Bourgeois culture ignores material inequalities and slavishly adheres to formal legal, moral or political equality of rights.

Marx found this whole scenario profoundly objectionable. Equally, from the same perspective, the justice that we observe in liberal societies is another aspect of the ideology of capitalism. It concentrates minimally on how goods might be distributed (if it gets as far as distributive justice) and ignores the massive inequalities implicit in the production process itself. In other words, it shuts the stable door after the capitalist horse has bolted. Justice is not a virtue for communists. Marx thus quite explicitly takes an anti-justice and anti-rights stance.

With genuine communism, there would be no classes, no coercion, no conflict, and no private ownership; in consequence, there would be no need for justice or right claims. If there is abundance and communal ownership, then there is no reason for principles of allocation or any allocating or adjudication mechanisms. In sum, Marx objects, in this reading, to the whole notion of the juridical legal state as a complex sham. As law is integral to the idea of the state in Marx, so the antistatist stance of communism implies the abolition of law.

The traditional account above is not without some internal ambiguity, particularly over notions like 'the dictatorship of the proletariat'. This latter doctrine envisages the state as not so much a negative, coercive, backwardlooking institution, as rather an instrument of positive revolutionary change utilized for the benefit, ultimately, of humanity (even if it is still viewed as a transitional entity). Marx's own qualified fervour for the state can be observed, even in *Capital*, where he remarked enthusiastically on the work of 385 0 Basil Blackwell Ltd. HeinOnline -- 20 J. L. Soc'y 385 1993 the Factory Inquiry Commission in Britain, specifically the work of Leonard Horner, as rendering 'undying service to the English working class. He [Leonard Horner] carried on a life-long contest, not only with the embittered manufacturers, but also with the Cabinet'. 47 Marx later commented, with evident relish, that British manufacturers compared the factory inspectorate 4 8 with revolutionary commissioners of the French National Convention. However, this was hardly a negative coercive vision of a class-based state functioning only in the interests of the bourgeoisie.

The stricter class view of the state and law also suggests that if there were no class there would, in turn, be no law and no state. Class conflict is the prerequisite of the state. This view was later crystallized in Lenin's work, *The State and Revolution*. This idea, in turn, gives rise to the idea (initiated by Engels and carried on by Lenin, although many would contend it was also present in Marx) that the state and legal order will 'wither away'. In this sense a communist society would be stateless and lawless (in a strictly descriptive sense).

Thus, from the standpoint of a strict materialism, the state is not a major player. The end result of this looks very much like communist anarchism, although Marx himself argued fiercely against such a conclusion and showed only vitriolic contempt for anarchists like Proudhon and Bakunin. However, Marx never resolved this issue of the relation between communism and mainstream anarchism. However, the class reductionist and instrumental perspective does not represent the totality of Marx's writings. Let us take the question of class first.

Class, in certain works, is seen as more complex, fragmented, and containing fractions with no overt connection to political or legal domination. The state and its legal system, in this reading, clearly does not embody the interests of a ruling class. In addition there can be, as Marx demonstrated with great verve in the 18th Brumaire, intra-class conflict between fractions. Marx mentions four fractions within the bourgeoisie who often conflict: landed property, the financial aristocracy, the industrial bourgeoisie, and commercial bourgeoisie.

In addition, the lumpenproletariat are kept separate from the proletariat, and the petty bourgeoisie from the peasantry. As one commentator has remarked, 'the recourse to "fractions" of classes . . . indicates that . . . "class" is not a sufficiently precise concept to be of value in explaining particular events'.⁴⁹ Law, in this fraction perspective, can actually become a 'site of class struggle'.⁵⁰ Laws are therefore not always oppressive in the interest of one class. In fact, many laws can benefit the working class, for example, factory legislation. Certain laws also result from pressures from multifarious groups outside social classes. In addition, the notion of class

remains deeply ambiguous since Marx nowhere explains its precise relation to property ownership. The doubts over the relation between class and state, outlined in the 18th Brumaire, led Marx to suggest that in the conditions that pertained in France in the period 1848-50, the state did not represent any bourgeois fractions, or even the bourgeoisie in general. In fact, Marx contends that the state and law may work against the interests of the bourgeoisie. 52 This effectively undercuts both the idea of the direct synonymy of 'class' to 'law' and 'state', and also the necessity of class for analysing the state (although both these views are strongly maintained by Marx in *The Communist Manifesto*, amongst other writings). It is these qualifying arguments of Marx which enabled the development of what is now called 'state autonomy theory', which has powerfully shaped late twentieth-century Marxist studies. The theory, in varying degrees, sees the state and law as a factor of cohesion, a site of struggle between fractions of classes, and an institution which may even regulate class conflict.

The basic point is that legal reasoning takes on a relative autonomy from the economic base of society. It is not totally to be explained via modes or relations of production. This relative autonomy thesis might make us consider anew the curt dismissals of notions like the rule of law. Certainly a number of recent commentators have picked up on this theme in Marx, suggesting that the theory of unidirectional determinism of base and superstructure does not really work for explaining the nature of law itself.

Laws are actually integral to certain types of relations of production. E. P. Thompson, following this line of thought, has spoken of law in eighteenth-

century England as 'deeply imbricated within the very basis of productive relations, which would have been inoperable without law'. He continues that we cannot 'simply separate off all law as ideology, and assimilate this also to the state apparatus of a ruling class'.⁵³ Taking on board the Gramscian thesis of ideological hegemony being a sphere of struggle, Thompson contends that disputes are fought out in the sphere of law.

Law certainly still expressed class power; however, part of the success of legal ideology itself was its appearance of impartiality. As Thompson notes, law 'cannot seem to be so without its own logic and criteria of equity; indeed, on occasion, by actually being just... even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just'.⁵⁴ The rhetoric was not therefore empty, even if it was still rhetoric. Semi-autonomous legal logic was thus often used against dominant groups - which was precisely a central aspect of Marx's argument in the 18th Brumaire.

Thus, for Thompson, law does not equal raw class power. It was certainly involved in class power and it redefined property rights in undermining feudalism, but its focus was not exclusively on class interest. Its own logic and rhetoric gave it a partial autonomy which inhibited, in some cases, the dominant groups. It was also a site of struggle between fractions of these dominant groups. As Thompson concludes, such a notion of the rule of law is markedly different from arbitrary despotism. It is, in fact, he notes, a 'cultural achievement'.⁵ The effort to redeem Marx from his anti-statist and anti-law stance, via some notion of relative autonomy, has also had other defenders. Some critics have found in Marx's early writings a number of themes which

add support this vision. For example, in one of his early writings, Marx speaks of law as 'the positive, bright and general norms in which freedom has attained to an existence that is impersonal, theoretical and independent of the arbitrariness of individuals. A people's statute book is its Bible of freedom'.⁵⁶ He also³⁸⁷ Basil Blackwell Ltd. HeinOnline -- 20 J. L. & Soc'y 387 1993 makes favourable noises, at points, about customary law established over 7 time, as against the new laws of the bourgeoisie.⁵ Others have noted, with surprise, that Marx draws distinctions between 'real' and 'unreal' law. For example, on the same page of the article referred to above, Marx speaks of law becoming active: as soon as it is transgressed for it is only true law when in it the unconscious natural law of freedom becomes the conscious law of the state. Where law is true law, i. . where it is the existence of freedom, it is the true existence of the freedom of man. Thus laws cannot prevent man's actions, for they are the inner laws of life. Paul Phillips remarks on this point that: 'The significance of this distinction is that it posits the existence of an order superior to that of mere man-made law⁵⁸ and, to that extent, it is a Natural Law Theory'. Marx, even in his later writings, appeared to believe that there is a condition of freedom and wholeness for human beings, where their real natures will flourish.

There is, as one critic has put it, a 'myth of transparency' in Marx (as in Hegel) - this is 'the vision of a society in which something " standing behind" the set of available social roles and relations... will be revealed in a social order which will have become " obvious" to the participants'.⁵⁹ This notion of positive freedom, wholeness, and perfectibility behind the veil, is both implicit in the discussion of alienation (in the earlier writings), and restlessly

present just under the surface of the later discussions of exploitation and communism. ° This vision of freedom is subtly linked to Marx's strong (if unstated) communitarianism, namely, his deeply-rooted belief that humans are social creatures and can only develop freely within a particular type of community. This is the community which is distorted and lost in capitalism and will be recovered in communism. Humans are meant to develop historically toward such a society. Marx did not like to be associated with such a view, since it smacked of romantic utopianism. However, it is undeniably there throughout the corpus of his writings. Alienation is a prime example of such effectibility lost and regained. The notion developed initially in a theological context. Humans were alienated from God through their sin. In Hegel, the alienation is philosophical: spirit (or mind) externalizes itself in the world. It becomes alien to itself. The task of thought is to overcome the self-alienation of spirit, to perceive itself at home in the world. Overcoming alienation is realizing that the world is not alien to our thought. For Feuerbach, however, the real alienation is that human beings have placed their essence into either God or the Hegelian Spirit.

To overcome alienation is to transform the subject and object - to realize that God is idealized humanity. For Marx, on the other hand, alienation takes on a number of subtle forms. 61 The basic idea is that human alienation is more immediate and practical, and subsumes all the other notions. In discussing the topic, Marx speaks initially of alienation through labour. Labour creates capital and capital escapes the control of labour and takes on a supposedly independent existence, which in turn dominates the original producer.

Workers thus find they are alienated from the product of 388 (D Basil Blackwell Ltd.

HeinOnline -- 20 J. L. & Soc'y 388 1993 their labour. Labour, in this capitalist context, is no longer free and creative. It is necessary for subsistence and thus exercises alien compulsion over the worker. In consequence, workers are alienated from free creativity (which is the true nature of human beings) and they are thus also alienated from their fellow human beings. Overcoming human alienation implies ultimately overthrowing the economic and social forms which generate the loss of reality and the self. The solution to the riddle of history and human alienation is communism. 2 There is strong sense here of a definite underlying human nature, with certain specifiable needs, which can flourish under a specific type of community, which recognizes certain 'natural laws', not necessarily as overt imperatives from some external authority, but more as natural non-coercive norms derived from reason. Despite Marx's appearance as an anti-law theorist, some writers have claimed that it is possible to identify a communist theory of law and justice, and also, possibly, of state (given Marx's early interest in a radical democratic participatory state). 3 In certain writings, particularly The Critique of the Gotha Programme, Marx does indicate that there would be a principle of justice under communism - 'from each according to his abilities, to each according to his needs'. 64 Such a notion of justice would presumably prevent unequal access to the means of production and also prohibit alienation and exploitation. It would also respond distributively to human needs - although Marx leaves the concept of 'need' fairly open. Needs

for social relations, satisfying labour, and the like, move well beyond physical subsistence.

It is difficult not to consider some of Marx's needs as 'wants' or 'interests', which are surely markedly different notions. Tom Campbell, amongst a number of recent theorists, believes that we can reconcile Marx's historicism, and aspects of a looser materialism, with a belief in communist justice and the moral superiority of