

# Critical Legal Studies and Marx’s Critique: A Reappraisal

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INTRODUCTION.....	389
I. THE CLS PACKAGE.....	393
II. MARXISMS, ORTHODOX AND DISSIDENT .....	396
III. MARX’S CRITIQUE AND THE CHALLENGE IT POSES TO CRITICAL LEGAL INQUIRY .....	399
<i>A. The Social Constitution of Capitalism</i> .....	400
<i>B. Social Relations and Social Form</i> .....	401
<i>C. Value, Struggle, and Emancipation</i> .....	405
<i>D. Form, Formalism, and Reification</i> .....	406
IV. THE THEORETICAL CONSEQUENCES OF AN INADEQUATE CONCEPTION OF CAPITAL .....	409
CONCLUSION.....	411

## INTRODUCTION

Karl Marx never offered fully developed critiques of law or the state, let alone theories of jurisprudence or legal history.<sup>1</sup> Many Marxists subsequently made the attempt—but efforts to articulate Marxian<sup>2</sup>

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1. “[N]owhere in the Marxist classics do we find a well-formulated, coherent and sustained theoretical analysis of the state.” Bob Jessop, *Recent Theories of the Capitalist State*, 1 CAMBRIDGE J. ECON. 353, 357 (1977).

2. I use the adjective “Marxist” when referring to specific political and intellectual currents and “Marxian” when referring to Marx’s writings and others’ interpretations of them. On the distinction between “Marxian theory” and “Marxisms” past and present, see PAUL MATTICK, *THEORY AS CRITIQUE: ESSAYS ON CAPITAL* (2018). For a rigorous but accessible restatement of Marx’s critique and Marxian theory see TONY SMITH, *BEYOND LIBERAL EGALITARIANISM: MARX AND NORMATIVE SOCIAL THEORY IN THE TWENTY-FIRST CENTURY* 73-130 (2017). For an introduction to Marx’s “critique of political economy as a critical theory of society,” see FREDERICK HARRY PITTS, *CRITIQUING*

conceptions of law and state have often foundered on the limitations of relying on compressed or polemical claims in Marx's early texts.<sup>3</sup> Nevertheless, the elaboration of Marx's critique of political economy necessarily involves critical inquiry into law. Legal relations are mutually constitutive with other social relations; law is a crucial moment in the totality<sup>4</sup> of capitalist social relations. Critical inquiry into capitalism's history requires attention to (among other things) law and jurisprudence. In the words of historian Jairus Banaji,

the forcible creation and regulation of labour-markets are an intrinsic feature of capitalism and Marxists need to abandon the naïve view that law somehow stands "outside" this process and is not intrinsic to it. Duncan Kennedy and his colleagues in "Critical Legal Studies" demonstrated as much in the 1980s.<sup>5</sup>

The Critical Legal Studies<sup>6</sup> (CLS) movement was not Marxist.<sup>7</sup> In the 1970s and 1980s, participants in the first wave of the movement criticized legal liberalism from a variety of radical and anti-establishment positions.<sup>8</sup>

CAPITALISM TODAY: NEW WAYS TO READ MARX 3-6 (2017).

3. Christopher Tomlins, *Marxist Legal History*, in THE OXFORD HANDBOOK OF HISTORICAL LEGAL RESEARCH 519 (2018) (foregrounding early polemics by Marx and Engels as the "requisite prolegomenon" to the Marxist critique of the state). On the limits of Marx's early writings, see SIMON CLARKE, MARX, MARGINALISM AND MODERN SOCIOLOGY 86-91 (1991). See generally PATRICK MURRAY, MARX'S THEORY OF SCIENTIFIC KNOWLEDGE 3-84 (1988) (on the development of the young Marx's critical thought).

4. "[T]he capitalist mode of production can only be grasped as a complex totality. However, this is not the complexity of relations of structural interdependence, it is the complexity of an historical process, a process of class struggle which develops on the basis of contradictory historical foundations." Simon Clarke, *The Global Accumulation of Capital and the Periodisation of the Capitalist State Form*, in OPEN MARXISM 1: DIALECTICS AND HISTORY 133-150 (Werner Bonefeld et al. eds., 1992).

5. JAIRUS BANAJI, THEORY AS HISTORY: ESSAYS ON MODES OF PRODUCTION AND EXPLOITATION 15 (2010).

6. This article focuses on the first wave of CLS in North America, but it must be remembered that critical legal scholarship was and remains an international endeavor. For background, see Peter Fitzpatrick & Alan Hunt, *Critical Legal Studies: Introduction*, 14 J. L. & SOC'Y 1 (1987); Alan Hunt, *The Critique of Law: What Is "Critical" about Critical Legal Theory?*, 14 J. L. & SOC'Y 5 (1987); Martin Krygier, *Critical Legal Studies and Social Theory—A Response to Alan Hunt*, 7 OXFORD J. LEGAL STUD. 26 (1987).

7. "[C]ritical legal scholarship . . . is left-wing, yet it is deeply critical of Marxism." James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1984). Over the period 1977-1983 Mark Tushnet, originally one of the more Marxism-adjacent attendees of the Conference on Critical Legal Studies, seemingly came to the conclusion that "a distinctively Marxist theory of law has failed." Morton J. Horwitz, *Mark Tushnet, Legal Historian*, 90 GEO. L. J. 131, 134 and *passim* (2001). See generally Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSNAT'L LEGAL THEORY 622 (2014) (summarizing and critiquing the "standard account" of the relationship between CLS and Marxism).

8. On CLS as a historical phenomenon, see Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1990); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 435-67 (1995); Pierre Schlag, *Critical Legal Studies*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 295 (Stanley Katz ed., 2009); Rasulov, *supra* note 7. On legal liberalism see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998). For contemporaneous accounts of CLS, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982); Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986); Duncan Kennedy & Karl Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L. J. 461 (1984); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate*

Many participants claimed the mantle of the Legal Realists or acknowledged them as an influence.<sup>9</sup> They presented their task as the demystification and destabilization of legal liberalism. However, despite notable scholarship (and a certain amount of notoriety), by the mid-1990s no less of a critical luminary than Duncan Kennedy had pronounced the movement moribund.<sup>10</sup> CLS included figures who were sympathetic to or considered themselves Marxists, but their influence and their engagement with Marx ebbed with the changing trajectory and fortunes of the movement.<sup>11</sup> Other figures—including some of the most prominent ones, such as Roberto Mangabeira Unger—rejected Marxism as an untenably monocausal, teleological, and structurally rigid theory of society.<sup>12</sup>

Over the life of the movement, critical legal scholars came to dismiss Marxism as inappropriate for their tasks. Many were wedded to the dichotomization of Marxism into two strands: “scientific” and “critical.”<sup>13</sup> The former was held to be dogmatic, historically determinist, and illiberal in outlook, while the latter was critical, pluralist, and receptive to syncretic encounters with psychoanalysis, existential philosophy, and literary theory. But the tendency of the movement over the course of its generative period in North America (roughly from 1977 to the mid-to-late 1980s) was toward the rejection of Marxism *per se*, both as a label and as a theoretical guide (or even foil).<sup>14</sup> Although many influential contributors to CLS were conversant with Marxism, the thrust of CLS as a whole was ultimately non- or anti-Marxist.<sup>15</sup>

Law and state, on the one hand, and production and exchange, on the other, are mutually constitutive within the broader array of capitalist social relations.<sup>16</sup> A critique of one is necessarily a critique of each. This insight was not lost on members of CLS, indebted as they were<sup>17</sup> to the Legal

*History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

9. Debra Livingston, ‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669 (1982); Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383 (1980).

10. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 9-10 (1997). Compare *id.*, with Mark Tushnet, *Critical Legal Theory (Without Modifiers) in the United States*, 13 J. POL. PHIL. 99 (2005) (arguing that CLS critiques have been internalized or absorbed by large sectors of the legal academy).

11. Rasulov, *supra* note 7, at 630 and *passim*. An example of how closely linked some participants in CLS were with contemporaneous Marxist theorists may be found in Stuart Hall & Alan Hunt, *Interview with Nicos Poulantzas*, MARXISM TODAY 194 (1979).

12. See, e.g., ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1982).

13. See, e.g., Schlegel, *supra* note 8, at 393 n.9.

14. Rasulov, *supra* note 7, at 625-28.

15. *Id.* at 632.

16. “[R]elations of production themselves take the form of particular juridical and political relations . . . which are not mere secondary reflexes, nor even just external supports, but *constituents* of these production relations.” ELLEN MEIKSINS WOOD, DEMOCRACY AGAINST CAPITALISM: RENEWING HISTORICAL MATERIALISM 27 (1995).

17. Cf. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 LEGAL STUD. F. 327 (1991)

Realist tradition.<sup>18</sup> Both traditions developed that insight in terms of political economy (though in very different registers), with a focus on the distribution of wealth and the effects of power upon that distribution. Absent from any such approach, however, is a critique of the very concepts that populate political economy and mediate social behavior in capitalism. Marx's contribution was to offer such a critique "through a systematic reconstruction of the essential determinations ('social forms') of the capitalist mode of production"<sup>19</sup>—a dynamic and contradictory system, riven with conflict and contingency, but dominated by capital's essential social forms. Any critical theory of society that does not foreground capital necessarily omits that which is central, dominant, and dominating in our social world.

I argue that the CLS critique—or, rather, the package of critiques that emerged over the course of the movement—is insufficient to ground an emancipatory critique of law, which must incorporate a specifically Marxian critique of capitalism.<sup>20</sup> The systematic critique of political economy must include an account of the legal constitution of commodities, production relations, and money. It must also include a thorough consideration of how law is mutually constitutive with other forms of capitalist social relations. CLS's inattention to capital renders its legacy inadequate for the purposes of guiding critical legal inquiry. Without a critique of capital, the CLS package cannot account for the features of our social world that are foregrounded by Marx's critique. These include the socially and ecologically destructive consequences of capitalism's inescapable drive toward expansion, growth, and extraction; an inverted social world in which the products of humans' activities assume dominant and dominating forms, constraining and mediating subjectivities and action alike; and the manifestation of capitalist social relations through the constitutive antagonism between capital and labor (the capital relation). The imperative to valorize capital pervades (in however mediated and contingent a manner) the totality of social relations, including law and the state. Overcoming capitalist unfreedom is possible only through the profound transformation of capitalist social relations.

This Article proceeds as follows: Part I recapitulates the most salient and distinctive features of CLS critiques: the critique of legal indeterminacy,

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(surveying, *inter alia*, discursive and analytic resources in the Realist tradition that are available for use in critical legal inquiry).

18. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470-94 (1923); ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952).

19. SMITH, *supra* note 2, at 73.

20. Although it is beyond the scope of this essay, I contend that the "law and political economy" movement of the present day must also answer to the same criticism. See, e.g., Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

critiques of the distinction between law and politics, and critiques of law's role in reproducing social hierarchy and domination. These critiques represented a profound dissatisfaction with the liberalism of the midcentury American legal academy.<sup>21</sup> However, they were often developed in tension with Marx's own immanent critique of liberalism. Parts II and III advance an alternative reading of Marx, one that can be brought into generative contact with the CLS critique of Marxist legal theory for the sake of future attempts to develop left legal thought. I survey some of the most important non-classical interpretations of Marx and Marxisms in Part II. Part III focuses on the critique of political economy and the theorization of capital as Marx's distinctive contributions to social theory. The critique of capital illuminates the ways in which the accumulation of value constrains human agency and is constitutive of the systematic unfreedom encompassing the lives of the vast majority of people on the planet. Part IV draws upon recent work by the philosopher Tony Smith, who argues that left-liberal criticisms of inequality and unfreedom under capitalism are limited by inattention to the role of capital in the constitution of our social world.<sup>22</sup> Smith's critique is applicable to any normative social theory that does not foreground capital in its account of domination and unfreedom. Any reconstruction of legal theory and legal history from the left must, I contend, confront Smith's challenge. I conclude by reflecting on how a new encounter between critical legal inquiry and Marx's critique of political economy can contribute to the reconstruction of left legal theory.

I hope to encourage those who are interested or invested in the CLS project to revisit Marx's critique without prejudging it. I also hope to encourage those who are committed to building upon Marx's critique to read CLS carefully and sympathetically, with an eye toward incorporating their insights into the systematic critique of law and state. I am not interested in chastising the "crits"<sup>23</sup> for not being Marxists.<sup>24</sup> Students of Marx and critical legal scholars have much to learn from each other. I want to spark a long-overdue discussion about the reconstruction of a thoroughly critical and avowedly emancipatory theory of law.

## I. THE CLS PACKAGE

First-wave CLS critiques were premised on commitments shared, to

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21. See generally JUDITH N. SHKLAR, *LEGALISM* (1964); DUXBURY, *supra* note 8, at 205–99; KALMAN, *supra* note 8; LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2006).

22. SMITH, *supra* note 2.

23. The term was and is multivalent—by turns defiant, affectionate, ironic, or dismissive—depending on the context of the utterance. I use it here only as a convenient shorthand.

24. For examples of such chastisement, see Stefan Sciaraffa, *Critical Legal Studies: A Marxist Rejoinder*, 5 *LEGAL THEORY* 201 (1999); E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 *J.L. & POL'Y* 415 (2000).

varying extents, by multiple authors. The first was the claim that law is constitutive of individual consciousness;<sup>25</sup> that is, the categories that dominate our personal and social lives are molded by legal rules and institutions. The second was that legal actors are makers—witting or not—of social relations and social hierarchies.<sup>26</sup> The interpenetration of law and society and the legal constitution of persons and consciousness are instances of praxis or “social-world producing activity.”<sup>27</sup> Finally, legal rules and institutions are the outcomes of contingency and conflict.<sup>28</sup> They are neither instantiations of timeless concepts, nor are they products of principled deliberation and abstract institutional design. The critics rejected the old formalist conceit—revived by latter-day textualists calling themselves constitutional originalists<sup>29</sup>—that the law forms a coherent unity with its own immanent logic in which principles may be discerned, and from which rules may be deduced. Multiplicity and incoherence are evident throughout statutes, cases, and doctrine.<sup>30</sup>

These commitments yielded several core claims when brought into contact with courts, the legal profession, and legal education. The first was that law is characterized by indeterminacy. In many cases, the available legal materials do not exhaust the possibilities for an outcome. Legal rules do not determine legal outcomes, nor do they constrain judicial-making in a robustly predictable way. Law as a whole is internally contradictory; the content of one area of the law may be at odds or cross-purposes with that in another.<sup>31</sup> Indeterminacy can inhere in the social context in which legal materials are encountered—it is not necessarily a feature of those materials themselves. As such, no amount or kind of formal specification is guaranteed to prevent indeterminacy.

The second core claim was that law is a form of politics.<sup>32</sup> It is not a socially distinctive mode of reasoning.<sup>33</sup> Law and politics are

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25. Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1983); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

26. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

27. Karl Klare, *Law-Making as Praxis*, 40 TELOS 123, 124 n.4 (1979).

28. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 8.

29. Mark Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

30. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1975); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

31. Boyle, *supra* note 7; Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1984); Gordon, *supra* note 25; David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243 (1983); Kennedy, *Form and Substance*, *supra* note 30; Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); Tushnet, *supra* note 29. For a rejoinder from the mainstream see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

32. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 8.

33. They associated this claim with the “legal process” school (of Hart and Sacks vintage). *See, e.g.,*

interpenetrated, and they construct social hierarchies and orders. When applying this frame to the concept of rights, the crits argued that “rights talk” conceals and naturalizes injustice, rather than preventing it.<sup>34</sup> Law does not always constrain the operation of power relations and hierarchies; it also veils them. Furthermore, legal rules and materials cannot be understood outside of their historical contexts and trajectories; they do not obtain in a socio-historical vacuum.<sup>35</sup> Legal texts are not reliable guides to the trajectories of the social conflicts that preceded them.

Finally, legal liberalism privileges an abstract and idealized rational subject—whereas individuals are in fact embedded in overlapping histories and communities.<sup>36</sup> In criticizing the form of subjectivity privileged by mainstream liberal thought, participants in CLS came into conflict with the nascent right-wing law and economics movement<sup>37</sup> (and resembled some of the agonists in contests between liberal individualists and communitarians).<sup>38</sup> Critical legal history, in particular, played a crucial role in highlighting the importance of consciousness and social situatedness. For example, Robert Gordon's emphasis on law's capacity to be “constitutive of consciousness” has had an important impact on the work of multiple cohorts of legal scholars.<sup>39</sup>

The crits articulated their critiques in response to what they saw as a *faïnéant* legal academy.<sup>40</sup> They emphasized the absent credibility of an enterprise that had come unmoored from its social context. They did not see the cultivation of students' critical faculties taking place in law schools. Instead, they saw charades and exhaustion: the rote catechization of nostrums about the rule of law, the ritual humiliations of law school hierarchy, and the collective failure to grapple with the law's uneven record as a means for pursuing progressive social outcomes.<sup>41</sup> The liberal legal academy was not magisterial—it was shambolic and sad. Legal liberals

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Boyle, *supra* note 7.

34. Paul O'Connell, *Human Rights: Contesting the Displacement Thesis*, 69 N. IR. LEGAL Q. 19, 21 (2018). See generally Anthony Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541 (1983); Morton J. Horwitz, *Rights*, 23 HARV. C.L.-C.R. L. REV. 393 (1988); Kennedy, *supra* note 26.

35. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1977); DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* (2006); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1978).

36. See, e.g., Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1984). See also Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 74 ff. (2014).

37. Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1, 1-13 (1987).

38. See, e.g., COMMUNITARIANISM AND INDIVIDUALISM, (Shlomo Avineri & Avner De-Shalit eds., 1992).

39. Gordon, *supra* note 25, at 109.

40. See, e.g., John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103 (1984).

41. Kennedy, *supra* note 26; Unger, *supra* note 12.

“were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars.”<sup>42</sup>

## II. MARXISMS, ORTHODOX AND DISSIDENT

The plurality and heterogeneity of Marxism (or Marxisms) were reflected in many CLS texts. In some cases, “Marxism” denoted the shopworn official ideologies of the U.S.S.R. and its satellites, the structuralism associated with figures such as Louis Althusser,<sup>43</sup> or Marxian economics<sup>44</sup> conducted as a positivist science. However, in other moments (often earlier on in the trajectory of the movement), “Marxism” referred to alternative critical traditions whose inquiry focused on subjectivity, social relations, and modes of experience. In such moments, the Marxism of interest to the crits was what had come to be known as Western Marxism.<sup>45</sup> This current—or confluence of currents—was an important reference point for crits seeking to articulate critiques of law’s role in the constitution of capitalist social relations while avoiding the pathologies of traditional Marxism.

In this context it also important to note the “dissident Marxisms”<sup>46</sup> that flowered immediately before the period in which CLS developed, such as autonomism, *operaismo* (“workerism”),<sup>47</sup> and the *neue Marx-Lektüre* (“new reading of Marx”)<sup>48</sup>—the last of which would inspire attempts to elaborate “form-analytic” theories of the capitalist state as an essential form of capitalist social relations.<sup>49</sup> Furthermore, this period was one in which decolonial and anti-imperialist Marxisms had global currency,<sup>50</sup> activists

42. Unger, *supra* note 12, at 675.

43. LOUIS ALTHUSSER, *FOR MARX* (Verso 2005) (1965). See generally Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 *ALSA F.* 32 (1982); Klare, *supra* note 27.

44. See, e.g., CLARKE, *supra* note 3, at 95.

45. See, e.g., DICK HOWARD & KARL E. KLARE, *THE UNKNOWN DIMENSION: EUROPEAN MARXISM SINCE LENIN* (1972). On the term “Western Marxism” see PERRY ANDERSON, *CONSIDERATIONS ON WESTERN MARXISM* (1976).

46. Aaron Benanav & John Clegg, *Crisis and Immiseration: Critical Theory Today*, in *THE SAGE HANDBOOK OF FRANKFURT SCHOOL CRITICAL THEORY 1629-48* (Beverly Best, Werner Bonefeld, & Chris O’Kane eds., 2018).

47. See STEVE WRIGHT, *STORMING HEAVEN: CLASS COMPOSITION AND STRUGGLE IN ITALIAN AUTONOMIST MARXISM* (2002).

48. See, e.g., HANS-GEORG BACKHAUS, *DIALEKTIK DER WERTFORM. UNTERSUCHUNGEN ZUR MARXSCHEN ÖKONOMIEKRITIK* (1997); HELMUT REICHEL, *ZUR LOGISCHEN STRUKTUR DES KAPITALBEGRIFFS BEI KARL MARX* (1973); VALUE: THE REPRESENTATION OF LABOUR IN CAPITALISM, (Diane Elson ed., 1979). For an introduction see Ingo Elbe, *Between Marx, Marxism, and Marxism: Ways of Reading Marx’s Theory*, *VIEWPOINT MAGAZINE* (2013), <https://www.viewpointmag.com/2013/10/21/between-marx-marxism-and-marxisms-ways-of-reading-marxs-theory/>.

49. See, e.g., *STATE AND CAPITAL: A MARXIST DEBATE*, (John Holloway & Sol Picciotto eds., 1978). For a synoptic, retrospective view, see Soichiro Sumida, *Die Zusammenfassung der bürgerlichen Gesellschaft in der Staatsform*, 2017 *MARX-ENGELS JAHRBUCH* 41-60 (2018).

50. See, e.g., SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* (1974); JAMES BOGGS & GRACE LEE BOGGS, *REVOLUTION AND EVOLUTION IN THE TWENTIETH CENTURY* (1974); CHERYL PAYER, *THE DEBT TRAP: THE INTERNATIONAL MONETARY FUND AND THE THIRD WORLD* (1975); *MARXISM IN LATIN AMERICA FROM 1909 TO THE PRESENT: AN*

and scholars pursued pathbreaking inquiries into the mutual constitution of race and capital,<sup>51</sup> and Marxist feminists explored the articulation of critiques of gendered and sexual domination with the critique of political economy.<sup>52</sup> All told, CLS's historical moment witnessed an efflorescence of new developments in theoretical production and analytic insight within Marxism.

Some dissident Marxisms revived the immanent critique of political economy developed by Marx in *Capital*<sup>53</sup> and related texts<sup>54</sup>—a critique long overshadowed by interpretations that viewed Marx as *contributing* to political economy.<sup>55</sup> They also responded to the inadequacies and distortions of the official Marxisms of established communist parties. Despite substantial differences in method and focus, they departed from official Marxism in many respects. On this point it is important to note that the critique of value was a particular focus of the *neue Marx-Lektüre*. Through close study of Marx's texts they rearticulated Marx's critiques of value, commodities, and money.<sup>56</sup> Marx's critique of value makes clear that capitalism is a system in which labor is abstracted through specific forms of social relations, such that individuals are dominated by the particular ways in which they relate with one another—ways that appear as the independent movements and properties of commodities. What are commonly referred to as economic phenomena—the compulsion of the market that forces workers to seek employment; competitive pressures on firms that compel capitalists to reduce labor costs or revolutionize production; the imperative for capital to seek out (or coercively create) new and expanded markets and investment opportunities—are nothing other

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ANTHOLOGY, (Michael Löwy ed., 1980). See also ANDRE GUNDER FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967).

51. See, e.g., JAMES BOGGS, THE AMERICAN REVOLUTION: PAGES FROM A NEGRO WORKER'S NOTEBOOK (1963); CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (1983).

52. See, e.g., Heidi I. Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, 3 CAPITAL & CLASS 1 (1979); Christine Delphy, *The Main Enemy*, 1 GENDER ISSUES 23 (1980); Lise Vogel, MARXISM AND THE OPPRESSION OF WOMEN: TOWARD A UNITARY THEORY (1983).

53. 35 KARL MARX, MARX & ENGELS COLLECTED WORKS: CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOLUME I (1994).

54. See Karl Marx, *Results of the Direct Production Process*, in 34 MARX & ENGELS COLLECTED WORKS: ECONOMIC MANUSCRIPTS OF 1861-1864 (1994); KARL MARX, 28-29 MARX & ENGELS COLLECTED WORKS: THE "GRUNDRISSE" (1986-1987). Close study of these texts, along with the different drafts and editions of *Capital* (especially with respect to differences in the first chapter on commodities), was central to the *neue Marx-Lektüre* and related currents. See PITTS, *supra* note 2, at 21-137. See also Diane Elson, *The Value Theory of Labour*, in VALUE: THE REPRESENTATION OF LABOUR IN CAPITALISM 115 (1979); PATRICK MURRAY, THE Mismeasure of Wealth: Essays on Marx and Social Form (2016). The *locus classicus* for study of the value-form is ISAAK ILLICH RUBIN, ESSAYS ON MARX'S THEORY OF VALUE (Black and Red 1972) (1928).

55. MATTICK, *supra* note 2, at 72-101.

56. Cf. MURRAY, *supra* note 3; MURRAY, *supra* note 54. "Even in his lifetime Marx was constantly exasperated by the failure of his readers and critics to grasp the significance of his analysis of the value-form." CLARKE, *supra* note 3, at 98.

than the activities and relationships of social individuals. Such a critique understands “‘the economy’ as an historical social construct, dependent for its existence on humans’ perpetuation of certain modes of conceptually mediated action.”<sup>57</sup> They are contingent, historically-specific human creations that have, in turn, come to dominate humans themselves. Escaping capitalist unfreedom is not simply a matter of redistributing surplus value, but of abolishing or transforming the social relations through which the production and realization of value have come to dominate society. Capitalism is not simply a juridico-political arrangement in which value is maldistributed or stolen from workers. Its injustices may not simply be remedied through a restructuring of law in order to redistribute the surplus expropriated from exploited workers.<sup>58</sup>

Meanwhile, many crits were eager to distinguish themselves from anything resembling an orthodox-Marxist insistence on the necessity of certain social outcomes. Kennedy argued that the outcomes of legal “struggle are not preordained by any aspect of the social totality.” For him, “the outcomes within the law have no ‘inherent logic’” and a theory detecting such a determinist logic imposes systematicity where there is none.<sup>59</sup> (This “social indeterminist position”<sup>60</sup> represented the confluence of the rejection of legal formalism and the rejection of structuralism alike.) For Unger, Marxist social explanations superimpose rigid conceptual structures that are vitiated by people’s experience of (and constructive participation in) particular social contexts.<sup>61</sup> Both Kennedy and Unger understood Marxism to deny the ineluctable centrality of consciousness, which for them was a locus of normative concern and the font of social contingency. Some major players in the early days of the Conference on Critical Legal Studies—such as Karl Klare, Mark Tushnet, and Peter Gabel—all either identified as Marxists (at least initially) or had themselves closely studied varied currents in Marxism. Klare, whose work on jurisprudence and judicial decision-making<sup>62</sup> foregrounded the concept of social reproduction and the state’s relation to it, presented arguments<sup>63</sup> drawing upon a deep understanding of Western Marxism.<sup>64</sup> Tushnet initially defended a Marxist

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57. MATTICK, *supra* note 2, at 77.

58. For further development of these claims, see *infra* Part III, §§ B-C.

59. In the same passage, Kennedy notes that law “is an aspect of the social totality, not just the tail of the dog”—in other words, law is not just a superstructural reflection of an economic base. Kennedy, *supra* note 26, at 599.

60. Schlegel, *supra* note 8, at 396.

61. UNGER, *supra* note 12. “Unger rejects Marxism and other structural theories on the ground that they defy historical experience.” Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J.L. & Soc. 387, 390 (1987).

62. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977).

63. Klare, *supra* note 27.

64. See, e.g., HOWARD & KLARE, *supra* note 45.

conception of legal theory but later rejected Marxist social explanations as analytically inert.<sup>65</sup> In their critiques of rights and the separation of powers, other crits often echoed claims made by theorists working in or adjacent to Marxist currents—sometimes explicitly so.<sup>66</sup> At other times, *marxisant* vocabularies were conjoined with inquiry conducted in an existential register, interrogating the contradictory production of social meaning and social alienation through the mediation of legal relations.<sup>67</sup> As a bloc, however, the crits increasingly tended to maintain a studied ambivalence about Marx, let alone Marxism.<sup>68</sup>

### III. MARX'S CRITIQUE AND THE CHALLENGE IT POSES TO CRITICAL LEGAL INQUIRY

According to the Marxian critique of political economy, as it was rearticulated by various dissident Marxists, “the economy” is neither natural nor overdetermined by timeless principles of human sociality *per se*. Phenomena appearing as economic are manifested in determinate relations between real social individuals. The Marxian critique detects, in the dynamics of our society, the continued reproduction of the capital relation (the relation between capital and labor). This relation is mediated by struggle between capital and labor—both of which find themselves, as a consequence of the imperative to valorize capital, in a relationship of mutuality and reciprocal antagonism. As such, social relations as a whole are constitutive of a totality. They are not just a congeries of contingently churning social relations. Such a totality is incomplete and shot through with contradiction. It reproduces through social antagonism, not in spite of it.<sup>69</sup> The Marxian critique is not reductively determinist. Rather, it describes the determination (often incomplete, usually contradictory) of the specificity of social relations by social form. In other words, Marx's critique exposes the historically specific character of capitalist social relations,

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65. See *infra* Part III, § D.

66. See, e.g., Chase, *supra* note 34.

67. See, e.g., Gabel, *supra* note 25.

68. See, e.g., Kennedy, *supra* note 36; Mark Tushnet, *Marxism as Metaphor*, 68 CORNELL L. REV. 281 (1983). Tushnet's later appraisal of Marxism contrasts starkly with earlier writings in which he occupied a more orthodox-adjacent position. See, e.g., *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978). See also Boyle, *supra* note 7.

69. Martin Jay claims that the concept of totality has fallen into “strong disrepute.” MARTIN JAY, *MARXISM AND TOTALITY: THE ADVENTURES OF A CONCEPT FROM LUKÁCS TO HABERMAS* 514 (1984). See also ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* 125 (1985) (arguing that “[t]he incomplete character of every totality necessarily leads us to abandon, as a terrain of analysis, the premise of ‘society’ as a sutured and self-defined totality”). However, it is important to stress that the social totality as apprehended by the critique of political economy is not a monolith. See Lars Heitmann, *Society as “Totality”: On the Negative-Dialectical Presentation of Capitalist Socialization*, in *THE SAGE HANDBOOK OF FRANKFURT SCHOOL CRITICAL THEORY* 589 (Beverly Best, Werner Bonefeld, & Chris O’Kane eds., Jacob Blumenfeld trans., 2018); Chris O’Kane, *The Path of Negative Totality*, in *THE SAGE HANDBOOK OF MARXISM* (Sara R. Farris, Beverly Skeggs, & Alberto Toscano eds., 2020).

distinctly and ineluctably expressed through social forms peculiar to capitalism.

This Part offers a critical restatement of some of the aspects of Marx's critique that are most salient for the purposes of legal inquiry. I have attempted to avoid writing polemically. However, there is no concealing that what follows flows from my preferred reading of Marx's critique, which I contend may be read in a manner that is responsive to or resonant with many of the crits' concerns. I hope to motivate a reconsideration of the prospects for melding critiques of political economy with critiques of legal development, jurisprudence, and legal education. For that reason, my exposition of Marxian theory will also refer to important themes and claims in the crits' considerations of Marxism. I focus on common readings that informed many crits' objections to or dismissals of Marx. The most important of these relate to the contradictory constitution of social relations; the mediation of social relations by the form of value and the consequent inversion of the social totality; and the juridico-political form of appearance of this inverted social world.

#### *A. The Social Constitution of Capitalism*

Marx's critique is frequently dismissed as an instance of economic determinism.<sup>70</sup> According to this objection, Marx's critique is analytically self-limiting; it elevates the economic over everything else, including the political and the legal. Central to this claim is the idea that Marxian inquiry discharges propositions about economics rather than critiques of the concepts populating liberal social thought. The objection may be split in two: an objection to class-reductionism, and an objection to "economism"—the privileging of production as the first cause of the social. However, Marx's critique does not focus on class as an economically-determined marker of identity or consciousness, nor does it conceive of class in terms of the distribution of goods to particular groups.<sup>71</sup> It focuses on the class character of capitalist society, which can be reproduced only through the struggle between those controlling the means of production, and those selling their capacity to labor so that they may go on living. Class antagonism is part and parcel of a society in which most people do not control land, machines, plant, and other desiderata of production. Such people have few or no alternatives to seeking work for wages. Struggles between labor and capital are necessarily constitutive of capitalist society as such.

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70. SMITH, *supra* note 2, at 68–9.

71. WERNER BONEFELD, CRITICAL THEORY AND THE CRITIQUE OF POLITICAL ECONOMY: ON SUBVERSION AND NEGATIVE REASON 101-20 (2014); Salar Mohandesi, *Class Consciousness or Class Composition?*, 77 SCI. & SOC'Y 72 (2013).

Marx's critique rejects the "profound category mistake"<sup>72</sup> of treating the economic and the political as separate domains of social activity. It emphasizes the "reciprocal causality"<sup>73</sup> between juridico-political relations and economic relations, not their fictive separation.<sup>74</sup> It is true that Marxism has long been associated with the economistic base/superstructure metaphor, in which the forces and techniques of production reside in the base, determining legal and political relations as mere reflections.<sup>75</sup> The metaphorical demarcation between an economic base and a juridico-political superstructure—whose content is determined by changes or shifts in the base—can be found in many twentieth-century Marxisms; this has indeed been a hindrance to the elaboration of Marxian critiques of law.<sup>76</sup> The base/superstructure metaphor is, however, a concept derived from classical political economy. Marx did not sufficiently criticize it in his own scattered statements about law and the state.<sup>77</sup> The persistence of the metaphor in twentieth-century Marxism gave many contributors to CLS many opportunities for dismissing Marx's critique as overly schematic and rigidly deterministic.

However, capitalism's constitutive social relations are *mutually* constitutive. Production is not an unmoved mover. Marx's critique traces the ways that, despite the mutual constitution of different social relations, those social relations come to be dominated by capital and its imperatives. The desiderata of the reproduction of the capital relation impose severe constraints on contending political formations. Departures from capitalism are possible only at the cost of the destruction of huge amounts of wealth and the intensification of social conflict. The antagonistic reproduction of capitalist social relations does not reflect a social ontology in which agents' choices are made for them (as an economistic account would have it). It discloses an inverted or "topsy-turvy" social world in which persons' relations with one another assume fetishized forms that come to dominate them.<sup>78</sup>

### *B. Social Relations and Social Form*

The question of social form<sup>79</sup> is at the root of a major misreading of Marx,

72. SMITH, *supra* note 2, at 189.

73. *Id.* at 185.

74. *Id.* at 183-91, esp. 187-89.

75. Klare, *supra* note 27; BONEFELD, *supra* note 71, at 165-66.

76. Marc W. Steinberg, *Marx, Formal Subsumption and the Law*, 39 THEORY & SOC'Y 173, 174-75 (2010). See, e.g., G. A. Cohen, *Base and Superstructure: A Reply to Hugh Collins*, 9 OXFORD J. LEGAL STUD. 95 (1989); HUGH COLLINS, *MARXISM AND LAW* (1982) (debating the usefulness and tenability of the base/superstructure metaphor).

77. BONEFELD, *supra* note 71, at 165-92. See also WOOD, *supra* note 16, at 49-53.

78. BONEFELD, *supra* note 71, at 53-75; SMITH, *supra* note 2, at 98-116.

79. The discussion of social form in this section draws upon CLARKE, *supra* note 3, at 49-143; MURRAY, *supra* note 54; SMITH, *supra* note 2, at 73-160; and Elson, *supra* note 54.

one which inhabits not only many foundational CLS texts but also dismissals found throughout non- and anti-Marxist scholarship. This is the notion that Marx propounded a substantialist or physicalist theory of value, in which labor is objectified (literally) in physical commodities through productive labor.<sup>80</sup> Such a view is indeed absurd. But Marx's critique of the form of value makes clear that value is not a physical attribute of this or that commodity; it is a form of relations among people. It is a social form, not a physical form: "to understand value is to understand a social practice and a discourse that is part of it."<sup>81</sup>

In capitalism, relations between persons are constantly mediated by relations between things, nowhere more so than in the case of value's most abstract form: money. The money form mediates the exchange of values—representations of elements of abstract, socially necessary labor time—in the meeting between buyer and seller.<sup>82</sup> The seller who brings a commodity to exchange possesses a particular commodity that is the result of discrete production processes; but in successfully effecting a sale, the seller represents that commodity as an equivalent portion of an abstract form—social labor, labor in the abstract.<sup>83</sup> Moreover, there is a superficial complementarity—indeed, legal equality—of roles between buyer and seller. But this equality conceals the unevenness of the exchange when it takes place between worker and capitalist.<sup>84</sup> Capitalists do not force individual workers to sell their labor-power to them, and yet individual workers find that they must do just that, as I argue in Part IV.<sup>85</sup>

Commodities are socially validated through exchange, not through their production alone. Under generalized commodity production, value is realized through the conjoined circuits of production and exchange. In the pursuit of profit under conditions of competition capitalists will tend to overproduce commodities, precipitating crises in which commodities are devalued and further production is halted (regardless of social need). As such, the mediation of social relations between persons by things is at the root of capitalism's tendency toward crisis<sup>86</sup> as well as the fetish character of commodities<sup>87</sup>—that is, commodities appearing to govern their own behavior and even that of people. Money, commodities, and property appear to be independent actors that impose their requirements upon people, while people appear to act on behalf of or under the compulsion of things like capital and wages. Capitalist and worker alike are subject to the domination

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80. SMITH, *supra* note 2, at 63.

81. MATTICK, *supra* note 2, at 81.

82. CLARKE, *supra* note 3, at 104-8.

83. *Id.* at 105.

84. "Between equal rights force decides." MARX, *supra* note 53, at 243.

85. On this point *see infra* Part IV.

86. CLARKE, *supra* note 3, at 218, 233.

87. *Id.* at 103. *See also* SIMON CLARKE, MARX'S THEORY OF CRISIS (1993).

of a social form that is inherently crisis-prone.

It might seem that alienation, fetishism, and the mediation of social relations by money describe a deplorable sedimentation of illusions separating us from ourselves and from one another. For Marx, however, alienated labor and the fetish-character of commodities—in which the relations among people appear in the form of relations between things, that is, commodities—make up the actual state of affairs in capitalist sociality. As Marx put it, they “are forms of thought expressing with social validity the conditions and relations of a definite, historically determined mode of production, *viz.*, the production of commodities.”<sup>88</sup> We are all dominated by a real abstraction<sup>89</sup> deriving from concrete human activities predicated on the (historically specific) social validity of the categories of generalized commodity production. In Marx's words, “individuals are now ruled by *abstractions* whereas previously they were dependent on one another.”<sup>90</sup> The production of any given commodity in order to gain money for the acquisition of other commodities is predicated on the (quite reasonable) assumption that that's what everybody else is doing:

Commodity fetishism is the form of appearance of particular social relations of production, but it is not merely an illusion. It really is the case that the relations between individuals and things are determinate, while the relations between particular people are accidental. . . . [I]t really is the case that social relations are mediated by relations between things. The illusion lies . . . in the belief that this social power derives from the commodity as a thing, rather than being seen as a particular form of alienated social relations.<sup>91</sup>

In Marx's critique, the working class is not celebrated because it produces value; it is recognized for its centrality in the reproduction of capitalist social relations. The critique of the form of value discloses the inverted character of our historically peculiar social world. The worth of things—almost all things—is discernible not through their usefulness to those who might need them, but only through their social validation through exchange for the universal equivalent form—money—mediating their circulation and presupposed by their production.

Alienated labor does not consist in the producer's exertion and exhaustion, still less in the transfer of some kind of substance from worker to product. Commodities are potential use-values that obtain exchange-value in the context of their sale: labor is socially validated only in the exchange of value as represented by money. Capital accumulation thus requires the unimpeded flow of the conjoined circuits of production and

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88. MARX, *supra* note 53, at 91.

89. BONEFELD, *supra* note 71, at 121-43.

90. 28 MARX, COLLECTED WORKS, *supra* note 54, at 101.

91. CLARKE, *supra* note 3, at 103.

exchange. The alienation of the waged worker consists in the fact that she is not interested in making something useful, but rather in making something that the capitalist can exchange for the universal equivalent form of value—money. The mediation of exchange by money is felt as palpably by the worker as it is by the capitalist. The former’s reproduction is dominated by the need to sell her labor-power—that is, to acquire wages—in order to gain access to things she needs in order to survive—almost all of which are commodities. The latter can hold on to wealth only by constantly seeking to accumulate more capital (a process that, from the capitalist’s perspective, appears not to involve independent contributions on the part of workers, even though production entails the exploitation of labor to a greater or lesser degree). In both cases value mediates social relations. People can only relate to one another through things, and money appears to be the only objective measure of worth. Under “the laws of self-expanding value which rule the world . . . nobody is free, neither the workers nor the capitalists.”<sup>92</sup> Alienated labor under conditions of exploitation and immiseration—the conditions that are the best that most people can hope for under capitalism—is the compulsory production of things one may not even want in order to acquire money to pay for what one needs.

Marx’s theory of value is not a contribution to political economy but to its critique. Glossing Marxian value theory in the 1970s, Diane Elson chiasmatically referred to it as a “value theory of labor” (rather than a labor theory of value) in order to establish its discontinuity with political economy.<sup>93</sup> Marx’s theory of value has also been characterized as a “monetary theory of value” (to emphasize the centrality of money and the importance of exchange).<sup>94</sup> The basic point here is that Marx emphatically does *not* claim that “class struggle involves workers attempting to recapture a portion of the value created through their labor for their own use and enjoyment, while the capitalist class uses the state as an instrument to allow the continued ‘theft’ of the surplus.”<sup>95</sup> Exploitation and domination are intrinsic to any conceivable arrangement of capital accumulation. Capitalists will always try to get the most out of the commodity they purchase from workers (their labor-power) by extending the working day, imposing stricter work discipline, or by speeding up or mechanizing labor processes. If they fail to do so, they will be undercut by competitors who do. The central injustice of capitalism is not that workers are deprived of

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92. C.L.R. James (as J.R. Johnson), *Production for the Sake of Production*, 1943 WORKERS PARTY BULLETIN 198, 207 (1943), <https://www.marxists.org/archive/james-clr/works/1943/04/production.htm>.

93. Elson, *supra* note 54.

94. MICHAEL HEINRICH, AN INTRODUCTION TO THE THREE VOLUMES OF KARL MARX’S *CAPITAL* 63-64 (2012).

95. Kirstin Munro, “*Social Reproduction Theory*,” *Social Reproduction, and Household Production*, 83 SCI. & SOC’Y 451, 453 (2019).

the full fruits of their labor, but that they are structurally compelled to produce commodities (to be sold by the capitalist) in order to acquire the money that is required for access to commodities—and almost all of their wants and needs are accessible only as commodities. Moreover, we are all compelled to participate in the reproduction of capital as a social relation. This results in the apparent absurdity of what we take to be a non-agent—capital—appearing to enjoy agency at the expense of social agents themselves. And yet capital is nothing but the product of humans' social activity. The unpropertied either make and re-make capitalism or else suffer hunger, deprivation, and misery.<sup>96</sup> The propertied make and re-make capitalism or else risk financial ruin and joining the ranks of the unpropertied.

### *C. Value, Struggle, and Emancipation*

Two important political consequences flow from the critique of the form of value. First, emancipation is not possible through an institutionalized recognition of workers' contributions to the total social production of value.<sup>97</sup> The working class is indeed central to the critique of political economy. But the centering of wage-labor in Marx's critique of capitalism is not the brittle optimism of a rigid worldview. It is the product of a ruthless analysis and the expression of a desperate hope. Those who seek and rely on wages—immiserated, brutalized by the geno- and ecocidal desiderata of capitalist production, and often surplus to the productive requirements of capital accumulation—cannot emancipate themselves through the universalization of waged labor. “To be a productive laborer is,” as Marx put it, “not a piece of luck, but a misfortune.”<sup>98</sup> Workers can only emancipate themselves by struggling to abolish capitalism, not to reform it.

Second, the critique of the form of value discloses the impossibility of a stably redistributive capitalism, and the impossibility of planning and coordinating collective production—with reference to capitalist metrics, that is. No universal basic income, system of worker-owned cooperatives, or participatory budgeting scheme can displace or overcome the imperative to valorize capital.<sup>99</sup> All such schemes are system-immanent with respect to capitalism; they do not posit its abolition. Value must be understood not in terms of the distribution of the social product but the constitution of social

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96. A point also emphasized by WOOD, *supra* note 16, at 28-9, 109, and *passim*.

97. This point is also worth noting in the case of the chaotic and incoherent form taken by production in the U.S.S.R. See DONALD A. FILTZER, *SOVIET WORKERS AND STALINIST INDUSTRIALIZATION: THE FORMATION OF MODERN SOVIET PRODUCTION RELATIONS, 1928-1941* (1986); HILLEL TICKTIN, *ORIGINS OF THE CRISIS IN THE USSR: ESSAYS ON THE POLITICAL ECONOMY OF A DISINTEGRATING SYSTEM* (2016); Christopher J. Arthur, *Epitaph for the USSR: A Clock Without a Spring*, 30 *CRITIQUE: J. SOCIALIST THEORY* 91 (2002).

98. MARX, *supra* note 53, at 510.

99. SMITH, *supra* note 2, at 279-334.

relations themselves. The valorization imperative can only be overcome, not tamed. The sublation of existing social relations—neither their affirmation nor their amelioration—is the ultimate horizon of any emancipatory politics informed by Marx’s critique.

The crits did not center this reading of value relations, focusing instead on the occlusion of power by ideology. They deftly demonstrated how law can cloak, conceal, or naturalize relations of power. They did not, however, attend to the social inversion of capitalism, in which social relations are mediated by the products of social activity, such that people really do relate to one another through things, things themselves really do appear to be invested with social power, and the acquisition, hoarding, and exchange of money dominate all persons. Let us explore the legal dimensions of this inverted world.

#### *D. Form, Formalism, and Reification*

Many crits argued that Marxists essentialize the targets of their critiques.<sup>100</sup> They held that when Marxists talk about law, they reify it “as a single coherent block”<sup>101</sup> rather than a disputed terrain of rules, norms, meanings, and practices. Marxist legal theory, on this view, ironically finds itself mired in the idealism of an older jurisprudence—even as Hohfeld, the Realists, and the crits themselves had moved on to an attentiveness to the contradictions between social conditions, on the one hand, and particular rules, norms, and discourses, on the other.<sup>102</sup> Marxist legal theory smuggles a counterfeit formalism back into the law—meaning that “the only candidate for a viable Marxist [legal] theory is one that deals with the form and not the content of the law.”<sup>103</sup> As such, in the early 1980s Mark Tushnet argued that Marxist theory failed to survive contact with consensus reality.<sup>104</sup> The historical experience of the Warren Court, for example, seemed to contradict Marxist models of social determination and held forth the promise of realizing progressive social aims within the practice of law.<sup>105</sup> According to this argument, any viable Marxist legal theory must acknowledge the distinctive logics and grounds of particular social spheres (such as law)—perhaps by emphasizing the “relative autonomy” of law, such that its specificity is not simply determined by other factors (e.g. relations or production or property ownership).<sup>106</sup>

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100. See Tushnet, *supra* note 68, at 281-82.

101. Kennedy, *supra* note 36, at 995.

102. This argument is developed in Rasulov, *supra* note 7.

103. Tushnet, *supra* note 68, at 289-90.

104. See, e.g., Tushnet, *supra* note 68.

105. See, e.g., Horwitz, *supra* note 7.

106. See, e.g., Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 L. SOC’Y REV. 571 (1977). Balbus’s article is also noteworthy for the attention it draws to Evgeny Pashukanis’s commodity-form theory of law, which proposes a homology

The appeal of the concept of relative autonomy—whose most prominent Marxist exponent was Nicos Poulantzas<sup>107</sup>—is found in its analytic tractability: it is suitable for investigation within and of particular conjunctures. This tractability brings with it a certain level of risk. Wielded carelessly, the concept of relative autonomy can lose critical bite. Some Marxian critics argue that it borrows heavily from liberal conceptions of social ontology.<sup>108</sup> It has a certain social validity in that it reflects the appearance of the distinction between the political and the economic. But one should be careful not to accept the division of the juridical from the economic as a natural fact.<sup>109</sup> The separation of law and state from relations of production and exchange is contingent and unstable, and it is reproduced through struggle—the same struggle that is constitutive of capitalist social relations in their totality. This separation serves to depoliticize and naturalize capitalism, such that it seems banal and unremarkable—when it is, in fact, historically peculiar, contradictory, and potentially contestable.<sup>110</sup> Tushnet suggested that a choice had to be made between fidelity to Marxism and describing reality. But why not ask, instead, whether the Marxian critique necessarily precludes the possibility that individuals and collectivities may act in such a way so as to pursue the transformation of social relations? Capitalist social relations comprise a totality—but it is a totality riven by contradictions, whose specificities are constituted through antagonism and reproduced through struggle.

Tushnet argued that Marxists could only account for the Warren Court with reference to the relative autonomy of legal institutions and practices from production relations.<sup>111</sup> Arguably, it would be easier still to understand the experience of the Warren Court as illustrative of the wide variability in the content of the legal and political relations constitutive of capitalism. Nevertheless, the critics were not satisfied by relative autonomy or other theoretical frameworks that understand law to be a (mere) determination of

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between the legal form and the commodity form of value. EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (1989). While not widely adopted on its own terms, Pashukanis's theory remained an important touchstone for many engaged in the critical recovery of alternative and dissident Marxisms. See, e.g., John Holloway & Sol Picciotto, *Introduction: Towards a Materialist Theory of the State*, in *STATE AND CAPITAL: A MARXIST DEBATE* 1, 18-24 (John Holloway & Sol Picciotto eds., 1978).

107. See NICOS POULANTZAS, *STATE, POWER, SOCIALISM* (1978).

108. See, e.g., Simon Clarke, *Marxism, Sociology, and Poulantzas's Theory of the State*, in *THE STATE DEBATE* 70 (Simon Clarke ed., 1991).

109. SMITH, *supra* note 2, at 187-89; Holloway and Picciotto, *supra* note 106, at 3-10.

110. "Marx's point is that the enforced separation of state and civil society is an institutionalized illusion." MURRAY, *supra* note 3, at 32. On the separation of the political from the economic in capitalism, see Ellen Meiksins Wood, *The Separation of the Economic and Political in Capitalism*, *V127 NEW LEFT REV.* 66 (1981).

111. Horwitz, *supra* note 7, at 133. Cf. BOB JESSOP, *STATE THEORY: PUTTING THE CAPITALIST STATE IN ITS PLACE* 85-104 (1990) (summarizing Marxist debates about the relative autonomy of state and capital); Christopher Tomlins, *How Autonomous Is Law?*, 3 *ANN. REV. L. SOC. SCI.* 45 (2007) (exploring the ramifications of the distinction between law and society posited by arguments for law's autonomy).

capitalism. In a frequently cited passage, Klare argued that any such view imposes a “preformed theoretical structure” on inquiry into law, suggesting that any conclusions derived from such a view are unfalsifiable and circular. “A particularly embarrassing case of circularity is the ease with which we are told that legal outcomes and processes derive from the underlying relations of production or property ownership, as though production relations or property ownership could meaningfully be defined without reference to legal rules.”<sup>112</sup>

Insisting as they did on law’s independent capacity for the “social construction of reality,”<sup>113</sup> the critics were impelled by the momentum of their antiformalist critique to bend the stick too far. It is indeed the case that the constitution of capitalist social relations is legal and political as well as economic; law, state, and economy are all moments in the totality of social relations. Attentiveness to social form is not formalism.<sup>114</sup> The former does not impose an anterior metaphysics upon social reality. This is clear, for example, from the attention that Marx paid to the juridical dimensions of the commodity form and to the processes through which maximum-hour legislation was pursued and enacted.<sup>115</sup> The specification and manifestation of economic relations are necessarily political and legal processes. The identification of the state with the political form of the class struggle<sup>116</sup> does not produce the proposition that the state is subservient to or an instrument of capital. It is an entailment of the apprehension of social relations in their complex (and contradictory) totality—relations that give rise to determinate and historically-specific social forms.

Marx’s critique of political economy is not, by itself, a sufficient critique of law.<sup>117</sup> Kennedy argued that Marx “defetishized commodities . . . but only partially defetishized law itself.”<sup>118</sup> But the tentative and gestural character of Marx’s scattered statements about law does not entail the proposition that the Marxian critique of political economy only permits us to conceive of law “as a single coherent block” or as a mere “embroidery on the surface of the essential structure” of capitalist production relations.<sup>119</sup> Continued elaboration upon and debate over Marx’s critique of capital can illuminate the centrality of legal and political relations to the constitution of capitalism as an inverted totality of social relations.

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112. Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 61, 67 (David Kairys ed., 1982). *But see* CLARKE, *supra* note 3, at 67.

113. Klare, *supra* note 112, at 68.

114. *See* MURRAY, *supra* note, at 54.

115. Steinberg, *supra* note 76, at 177-80.

116. Simon Clarke, *State, Class Struggle, and the Reproduction of Capital*, in *THE STATE DEBATE* 183, 194 (Simon Clarke ed., 1991).

117. Steinberg, *supra* note 76, at 178-80.

118. Kennedy, *supra* note 36, at 995-96.

119. *Id.* at 995.

#### IV. THE THEORETICAL CONSEQUENCES OF AN INADEQUATE CONCEPTION OF CAPITAL

The persistence of contradiction and conflict in capitalist societies does not negate the proposition that social forms substantially determine the content of social relations. Rather, such contingency and conflict demonstrate the variability—indeed, the radical-yet-bounded indeterminacy—of the content of political and legal relations under capitalism.<sup>120</sup> As the philosopher Tony Smith has recently argued, normative social theories that fail to attend to the determinations of the form of value will inevitably fail to fully comprehend the causes and character of capitalist unfreedom.<sup>121</sup>

Of course, many prominent contemporary normative social theories do not uncritically celebrate capitalism. They may understand it as the necessary generator of the wealth that can underwrite a satisfactorily redistributive social state. But they also regard it as a significant source of injustice, inequality, and waste.<sup>122</sup> Smith argues that the left-liberal egalitarian theorists who offer such claims share an adherence to two propositions. First, capitalism produces significant externalities that threaten the realization of liberal values and commitments like meaningful individual freedom and adequate social equality;<sup>123</sup> but, second, such externalities may be mitigated through the right combination of reform, redistribution, and institutional design. “[T]he dominant version of left liberal theory is defined by the following ‘core thesis’: A capitalist market society is compatible with the institutionalization of [moral equality among individuals] so long as the systematic tendencies of markets to generate results incompatible with that principle are put out of play by effective political regulation.”<sup>124</sup> This core thesis is untenable. The valorization imperative will ultimately undermine attempts to reform, regulate, or ameliorate the negative social consequences that attend capitalism.

Smith emphasizes capitalism's inverted social world, in which capital and labor are enmeshed in a looping relationship of mutual antagonism and dependence. Workers must sell their capacity to work in order to reproduce themselves, just as capitalists must exploit workers in order to accumulate ever more value—or else risk being out-competed by other capitalists. The continuous unfolding of the capital relation has utterly subordinated social reproduction as such. The reproduction of the capital relation is not

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120. SMITH, *supra* note 2, at 190-91. See also HEINRICH, *supra* note 94, at 211 (arguing that “[s]tate policies are in no way completely determined by the economic situation, but they are also not an open process in which anything is possible.”).

121. SMITH, *supra* note 2.

122. *Id.* at 219-29.

123. *Id.* at xi.

124. *Id.* at xii.

foreordained, of course. “The reproduction of capitalist social relations of production is only achieved through a class struggle in which their reproduction is always in doubt” even if the tendency is for such reproduction to continue apace.<sup>125</sup> But the owners of capital can no more afford to abandon the pursuit of accumulation than the non-owners of capital can afford to absent themselves from markets for their labor. “Gaining access to money is not an option to be taken at one’s convenience. It is an absolute necessity.”<sup>126</sup>

The fact that the reproduction of the capital relation appears unperturbed by the expulsion of vast numbers of people from waged work (and hence the prospects for decent living conditions) illustrates vividly what left-liberal egalitarians are reluctant to acknowledge: human wants and needs do not cause capital accumulation; in fact, they are subordinated to it. Their satisfaction is predicated on the valorization of capital. Capital thwarts such wants and needs whenever and wherever they present a hindrance to its expansion. Even the most determined social democratic governments find that capitalists’ concerns about profitability and the conditions for continued accumulation become their own.

Left-liberal egalitarians are not a naïve bunch when it comes to contemporary unfreedom. They “have not jumped on the neoliberal bandwagon of market triumphalism.”<sup>127</sup> Many are strong critics of severe material inequality precisely because it threatens individuals’ chances for participation in public life as well as the social bases of self-respect.<sup>128</sup> Nevertheless, by failing to offer a critique of capital, left-liberal egalitarians’ accounts of contemporary injustice are incomplete. The social pathologies that they identify cannot be indefinitely mitigated within the crisis-ridden dynamics of capitalism, whose reproduction only obtains through the constantly accelerating accumulation of value. Any failure of the reproduction of capitalism results in the massive destruction of value and the catastrophically violent disruption of social relations.

The crits were consummate critics of legal liberalism, and they were even less vulnerable to the accusation of being naïfs with respect to domination and unfreedom than left-liberals are. Nevertheless, CLS’s relationship with political economy mirrors that of left-liberal egalitarianism. Both CLS and left-liberal egalitarianism view political institutions and legal norms as the products of politics (power struggles in the case of CLS; interest-aggregation or deliberation in the case of left-liberal egalitarianism). But in both accounts, the political is too often restricted to social relations outside

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125. Simon Clarke, *The State Debate*, in *THE STATE DEBATE* 1, 63 (Simon Clarke ed., 1991). Compare *id.* with Kennedy, *supra* note 26, at 599 (denying tendential movement within the social totality).

126. SMITH, *supra* note 2, at 121.

127. *Id.* at 36.

128. *Id.* at 10-15. On self-respect see JOHN RAWLS, *A THEORY OF JUSTICE* 386-91, 477-80 (rev. ed. 1999).

of production. The latter is inherently political, acquiring specificity through struggle. Left-liberals have tended to regard the production and circulation of commodities as spheres of technique or instrumental reason—as inevitable, even natural aspects of human societies of given levels of complexity and organization.<sup>129</sup> But neither generalized commodity production nor other categories specific to capitalist society have trans-historical validity.

The crits argued that law is an indeterminate array of substantially contingent political outcomes. They stressed the indeterminacy of legal and political relations and registered their skepticism regarding the existence of persistent social structures. But from the vantage point of the Marxian critique, such skepticism is misdirected. Law and the state are constitutive moments in the struggle over the reproduction of capitalist social relations. It may be objected that the crits' foregrounding of the interpenetration of law and politics demonstrates a sensitivity to the ways in which struggle conditions legal relations. But they stressed the indeterminacy and unpredictability of the political, whereas the Marxian critique approaches political struggle as both the cause of, and response to, capitalist domination.

The first wave of CLS could be located to the left, not only of legal liberalism, but also of the contemporary left-liberal egalitarians that are of interest to Smith. Smith's critique is nevertheless applicable to CLS. Much like left-liberal egalitarians, the crits of the first wave lacked an adequate conception of capital. Left-liberal egalitarians tend to naturalize the separation of the economic and the political—or to celebrate its depoliticizing tendencies as constitutive of liberty. The crits disavowed the immanent critique of political economy on the grounds that it was determinist and economistic, thereby arriving at a very similar position. But the shop floor, the call-center cubicle, the retail counter, and the street are sites of (inherently political) struggle, even in the absence of active state intervention or coercion. The legal constitution of those sites ought to be of urgent interest to anyone pursuing an emancipatory critique of law.

#### CONCLUSION

Any rigorous attempt to engage in critical legal inquiry today must draw upon the experience and memory of CLS. I have only offered a glimpse at the breadth of the crits' contributions to legal scholarship. Related currents—such as critical legal history, critical feminist theory, and critical race theory—continue to thrive and inform scholarly inquiry into the legal production of difference and domination. The crits' legacy is salutary and

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129. See generally CLARKE, *supra* note 3, especially at 126-32 (contrasting liberal social theory's naturalization of capitalism with Marx's critique of capitalism's historically-specific social forms).

instructive. Their legacy and commitments, however contradictory, can be recovered and incorporated into emancipatory theory through renewed attention to the mutual constitution of capital, law, and the state.

That legacy is an inadequate basis for the critique of law's role in the constitution of the domination and unfreedom that pervade our society, however. I have argued that the crits guarded their left flank carefully. Most crits were either hostile to or unsatisfied with Marxist conceptions of law and state. As a result, CLS was predicated on an inadequate critique of political economy. But the critique of law is not separable from the critique of political economy. Critical legal inquiry must engage with Marx's critique rather than ignore or dismiss it.