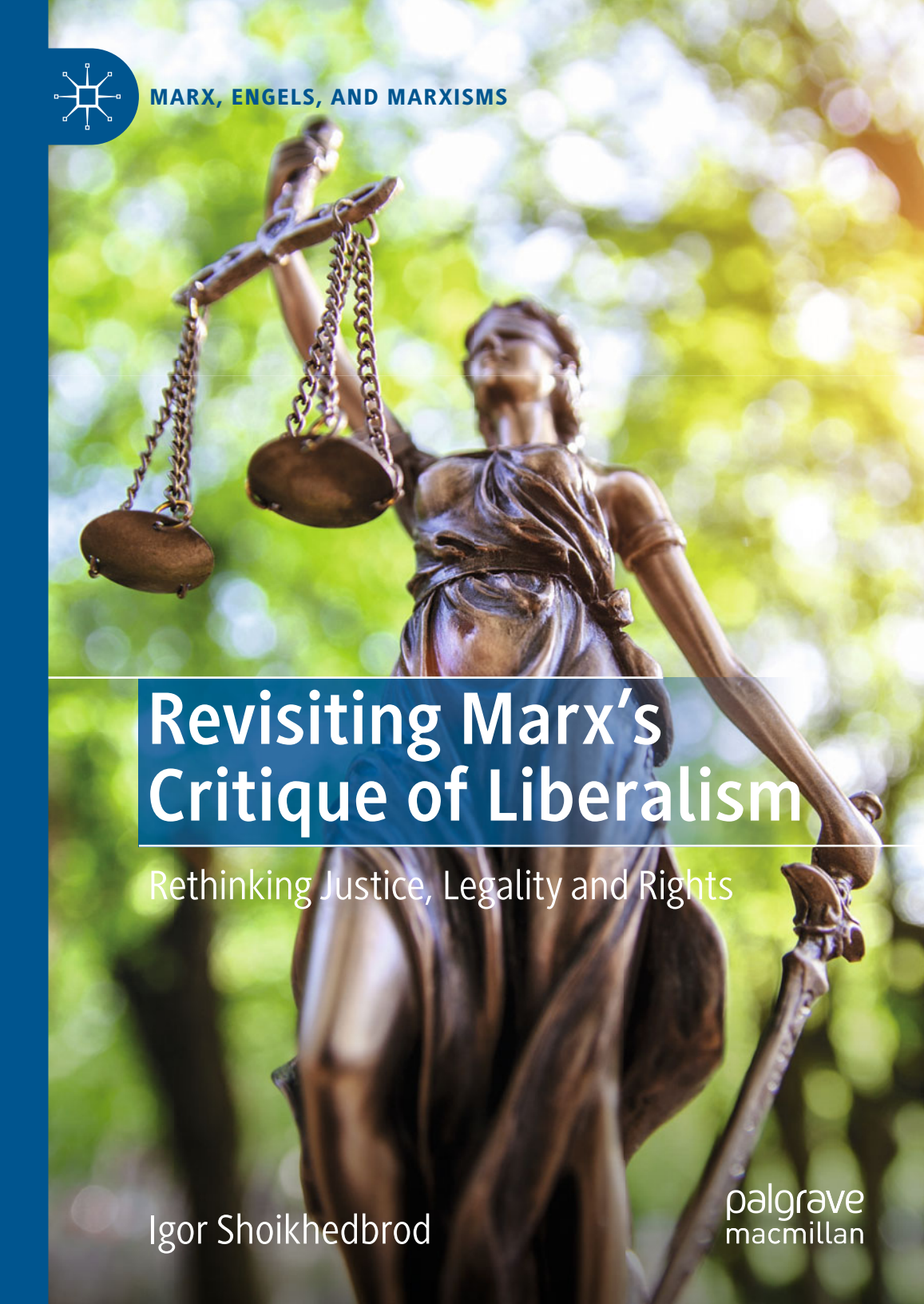
MARX, ENGELS, AND MARXISMS
Revisiting Marx's Critique of Liberalism
Rethinking Justice, Legality and Rights
Igor Shoikhedbrod
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Marx, Engels, and Marxisms

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Series Editors' Foreword

The Marx Revival

The Marx renaissance is underway on a global scale. Whether the puzzle is the economic boom in China or the economic bust in 'the West', there is no doubt that Marx appears regularly in the media nowadays as a guru, and not a threat, as he used to be. The literature dealing with Marxism, which all but dried up twenty-five years ago, is reviving in the global context. Academic and popular journals and even newspapers and online journalism are increasingly open to contributions on Marxism, just as there are now many international conferences, university courses, and seminars on related themes. In all parts of the world, leading daily and weekly papers are featuring the contemporary relevance of Marx's thought. From Latin America to Europe, and wherever the critique to capitalism is remerging, there is an intellectual and political demand for a new critical encounter with Marxism.

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Praise for *Revisiting Marx's Critique of Liberalism*

"Igor Shoikhedbrod's book offers a masterful analysis of the role of rights in the thinking of Karl Marx and an original defense of Marx's commitment to rights and the rule of law. To my knowledge, there is no comparable extended treatment of Marx's conception of right in the existing literature, at least from a sympathetic point of view."

—Carol C. Gould, *Distinguished Professor of Philosophy, City University of New York, USA*

"This is an important and timely work. It gives a detailed and wide-ranging account of Marx's ideas on justice and rights—the best that I know of—and engages critically with recent discussions of them in philosophy, politics and legal theory. It develops a Hegelian and Marxist theory of justice and challenges a number of widely held views. It is a pleasure to read. It makes a major original contribution in this area and will become central to the discussion of these topics."

—Sean Sayers, *Emeritus Professor of Philosophy, the University of Kent, UK*

Contents

CHAPTER 1

Introduction

> *No man combats freedom; at most he combats the freedom of others. Hence every kind of freedom has always existed, only at one time as a special privilege, at another as a universal right.*[1]

The language of right, or the "morality of *Recht*,"[2] occupies a central place in the liberal philosophical tradition. As a political philosophy, liberalism lends itself to a range of perspectives that share an underlying normative commitment to the freedom and equality of individuals, whose dignity and moral worth are secured primarily through the device of rights.[3] Whereas the classical liberalism of the eighteenth and nineteenth centuries aimed at promoting unfettered market exchange and protecting private property within the bounds of a minimal state, modern or social liberalism is oriented towards securing individual rights within the parameters of a redistributive social state. Differences notwithstanding, it is commonplace to view Karl Marx's critique of liberalism through his dismissal of rights as the manifestation of the estranged and egoistic individual of bourgeois society. According to an interpretation that is now widespread, Marx rejects the liberal conception of justice and sees rights only as a barrier to a richer conception of human freedom. This book challenges this prevailing orthodoxy concerning Marx's treatment of right and reaffirms the relevance of his critique of liberal justice in a global political-economic context that is

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characterized by substantive inequities in the ownership and distribution of social wealth.

1.1 The Theoretical Background: Then and Now

It should be noted from the outset that the German word *Recht*[4] can refer simultaneously to a system of law, a legal or moral right, and a standard of rightness or justice. Consequently, one should bear in mind the multiple meanings that *Recht* has in German and the challenges that this can pose for Anglo-American interpreters. I have intentionally opted to translate *Recht* as "right" because the concept carries an important normative dimension that is not captured by the ordinary sense of positively enacted law. The difference between a system of law and statutory laws corresponds to the distinction in German between *Recht* and *Gesetz*. A subsidiary distinction is made between *Recht* (a system of law/justice) and *Rechte* (rights). Notwithstanding difficulties of translation, the context should make it clear when Marx is referring to positive law (e.g. censorship legislation, the Prussian wood theft law, and the English Factory Acts), when he has in mind a system of law or justice (e.g. "bourgeois right"), and when he is thinking of the rights possessed by individuals within a system of law.

Leading political philosophers and Marxologists have long argued that Marx's assessment of right and rights is consistently negative. This presumably explains why both would be abolished, along with capitalist private property and classes, when the ideal of human emancipation is realized in the future communist society.[5] While scholars typically point to "On the Jewish Question" and the *Critique of the Gotha Program* as evidence for Marx's antipathy towards juridical language, the prognosis that right will "wither away" received its most systematic elaboration in the work of the Soviet legal theorist Evgeny Pashukanis.[6] Drawing on Marx's analysis of the commodity form in *Capital*, Pashukanis argued that right is a distinctly capitalist phenomenon that originated in exchange relations between rival commodity owners in the market. Pashukanis concluded that the abolition of commodity exchange relations under communism would pave the way for the disappearance of right and the introduction of a purely technical form of regulation, the aim of which would be administrative efficiency.[7]

The negative depiction of right and its historical irrelevance in communist society was not confined to the Marxism of Evgeny Pashukanis. The ethical dimensions of Marx's thought generated considerable interest among Anglo-American philosophers in the 1970s and 1980s, although

much of the philosophical debate at the time centred on whether or not Marx considered capitalism unjust.[8] As regards the future of right in communist society, the dominant interpretation has been that of Allen Wood, who infers that the end of class antagonisms in communist society would mean the disappearance of the state along with the juridical concepts of right and justice.[9] Not long after Wood's intervention, Steven Lukes inquired whether Marxists can consistently endorse the idea of human rights, and the answer to his query was resoundingly negative.[10] The erudite ex-Marxist Leszek Kołakowski went further still by insisting that Marxist philosophy is inhospitable to the idea of human rights, because it is based on the view that human beings are social beings and that their value is not related to their personal lives but to their being members of a collective whole.[11] Kołakowski followed in the familiar footsteps of prominent liberal philosophers such as Isaiah Berlin by drawing a seemingly unavoidable link between Marxist philosophy and socialist totalitarianism.[12]

To be sure, the stifling of civil rights and freedoms in the former Soviet Union and other state socialist regimes did much to discredit the emancipatory claims of Marxist theory, just as it dealt a heavy blow to socialist political practice.[13] Since the collapse of state socialism, it has been fashionable to dismiss Marx's critique of liberalism on the grounds that any conceivable alternative to capitalist democracy would result in some form of totalitarianism, while the origin of this totalitarianism is typically traced back to Marx's contempt for liberal rights and the rule of law.[14] Instead of examining the merits and limitations of Marx's critique, the prevailing attitude among most of Marx's critics has been that the debate has long since been settled and that Marx's critique of liberalism was decisively discredited by the monstrous regimes that he helped inspire. The collapse of state socialism only emboldened champions of neoliberalism as they celebrated the "end of history."[15]

Much has changed in the intervening years, and the end-of-history thesis is not as compelling as it once was, especially as capitalist democracies continue to recover from the after-effects of the worst financial crisis since the Great Depression. It is because Marx's critique of liberalism has not been sufficiently theorized—either by its proponents or by its detractors—that the time is ripe for a reconsideration of his nuanced outlook on both right and rights. This task becomes all the more necessary as political theorists increasingly turn to the terrain of global justice and the discourse of socio-economic rights in confronting issues of poverty, economic inequality, and precariousness in a globalized political economy.[16]

In contrast to the time when Marxism was in disrepute and struggling to make itself relevant in academia, recent years have seen a resurgence of interest in Marx's work among political theorists.[17] Among Anglo-American philosophers, G.A. Cohen was arguably the most influential in shifting Marxist theory in the direction of normative political philosophy, replacing Marx's recourse to dialectics and his critique of political economy with an explicitly moral defence of socialist equality. In Cohen's view, the turn to normative philosophy was necessary because Marx's optimistic predictions about the inevitability of socialism were not borne out, which meant that socialist ideals required rigorous normative justification.[18] Some scholars have sought to overcome the ethical dearth that Cohen and like-minded critics associated with classical Marxism—as a result of its self-understanding as a scientific theory averse to any kind of moralizing—by unearthing a distinctly Marxist approach to ethics.[19] Other scholars, such as Jeffrey Reiman and Ian Hunt, have offered theoretical syntheses of Marx's critique of capitalism and John Rawls's theory of justice.[20] These theoretical models were preceded by earlier attempts at elaborating arguments in support of socialist versions of legality and rights; it should be noted, however, that such attempts were generally pursued outside of, and often in critical response to, Marx's theoretical framework, since it was assumed that his outlook did not leave room for juridical considerations in post-capitalist society.[21]

1.2 The Aims of this Book

While this book is framed in the spirit of bringing Marx to bear on the events of the twenty-first century, it does so by offering a reconstruction of Marx as a critic of liberalism whose social theory shows the movement beyond capitalism and the liberal conception of justice. Such a reconstruction should not be confused with an attempt to transform Marx into a conventional liberal or, for that matter, to interpret him as an early advocate of socialist egalitarianism.[22] While Marx recognized the value of various liberal ideals (in particular, the opposition to autocracy and feudal privilege), he was adamant that the capitalist mode of production, together with its narrow horizon of right, would be superseded. Nor does this book attempt to align Marx with a particular position in moral philosophy, largely because his historically informed and dynamic conception of right is distinct from, and in important respects hostile to, the abstract principles on which traditional moral theories (e.g. deontology and utilitarianism) are based.[23]

One of the main challenges of discerning Marx's outlook on right stems from the fact that, unlike his predecessors in German philosophy—in particular, Kant, Fichte, and Hegel—Marx did not write a comprehensive treatise on the topic. Moreover, his early *Critique of Hegel's Doctrine of the State* was intended primarily as a democratic critique of what was then considered the most developed account of the modern constitutional state (*Rechtsstaat*). The absence of a comprehensive theory of right in Marx's writings raises at least two issues of interpretation. First, it underscores the need for a cumulative reading of his reflections on right and rights, that is, one which takes into account Marx's work as a whole, since his understanding of right was built in fragments over his writing career and across different kinds of text. This is warranted because Marx wrote in different periods of his life as a philosopher, as a journalist, as a critic of political economy, and as a revolutionary involved in the International Workingmen's Association. Thus, it is from such disparate texts, written at different times and for different purposes, that Marx's reflections on right must be reconstructed.[24] Second, it is often assumed that the absence of a systematic theory of right in Marx's work attests to its conceptual insignificance and ideological function in sustaining capitalist class domination. However, textual evidence from the Preface to the *Economic and Philosophic Manuscripts of 1844* suggests that Marx planned to supplement his critique of political economy with an equally rigorous analysis of right, ethics, and politics, showing in the end that philosophically idealist treatments of these topics were deficient and misguided. Marx writes:

> I shall therefore issue the critique of law, ethics, politics, etc., in a series of distinct, independent pamphlets, and at the end try in a special work to present them again as a connected whole showing the interrelationship of the separate parts, and finally, shall make a critique of the speculative treatment of that material. For this reason it will be found that the interconnection between political economy and the state, law, ethics, civil life, etc., is touched on in the present work only to the extent to which political economy itself *ex professo* touches on these subjects.[25]

Marx did not follow through with his planned analysis of right, and this allowed Marxist theorists like Pashukanis to conclude that his critique of "bourgeois right" meant the supremacy of technical regulation and the withering away of right as such—in short, the prospect of legal nihilism in the communist society of the future. Contemporary commentators such as

Allen Wood interpret Marx's understanding of right as the product of the prevailing mode of production and the ideology of its ruling class, inferring that Marx's critique of capitalism was framed in terms of non-moral goods. On Wood's influential interpretation, Marx's argument for the free development of individuals was based instead on a non-moral claim about the well-being of the human species, much like Friedrich Nietzsche's valuation of health as a non-moral good.[26] However, Wood's position downplays the significance of normative language in Marx's writing and sidesteps his willingness to make value-laden judgements about higher and lower standards of right (which Wood nonetheless details in his work).

To be sure, the progressivist current underlying Marx's critique of liberal justice has not gone unnoticed by contemporary commentators. Wendy Brown, who provides an illuminating account of the paradoxical nature of rights in contemporary liberal democracies, explains that Marx saw the emancipatory value of liberal rights, even as he recognized the formal and contradictory character that these rights take under capitalism.[27] Brown's essential point is that Marx remained wedded to a progressivist dialectic in which the granting of equal rights was regarded as a step towards human emancipation. Notwithstanding Brown's theoretical reservations about such progressivism, the claim that liberal rights represent progress presupposes an evaluative standard that distinguishes between higher and lower standards of right. On this interpretation, which is developed in the first part of this book, bourgeois right represents an advance over feudal right, just as the future communist standard of right would be a higher form than bourgeois right—judged in terms of the growing expansion of human freedom and productive powers across history.

The first part of this book re-examines Marx's critique of liberalism by considering the limitations of "bourgeois" or liberal justice from the standpoint of Marx's new materialist conception of history. Taking "On the Jewish Question," the *Grundrisse*, and *Capital* as textual starting points for Marx's critique of liberalism, I show why Marx thinks that a liberal state that is committed to the equality of individuals as bearers of rights preserves the economic domination resulting from the unequal ownership of productive property under capitalism. While Marx's critique demonstrates that the liberal conception of justice abstracts from exploitation and class domination in civil society, he regards the attainment of liberal rights as a historical achievement and a necessary condition for the communist society of the future. At the heart of Marx's critique of liberalism, however, is the insight that liberalism cannot realize its own ideals of freedom and equality

because the political-economic context in which liberal rights are articulated is characterized by exploitation and class domination in the sphere of production. Although Marx criticized liberal rights for being atomistic, depoliticizing, and characteristically formal, he also saw them as stepping stones to a higher form of society. Whereas conventional readings of Marx's critique of liberalism interpret his argument as culminating with the "withering away" of right and rights—that is with them being transcended—Marx's new materialist outlook allows for an alternative conclusion, one in which the revolutionary transformation of capitalism leads to the development of a *communist* conception of right and a structure of rights that would be appropriate to the needs of socialized (as opposed to atomized) individuals under a communist mode of production. Such a conclusion is fully in keeping with Marx's broader view that a transformation in the material conditions of life gives rise to different legal relations between individuals.

In addition to offering a textual analysis of Marx's reflections on right, beginning with his early journalistic writing, I draw on the Hegelian concept of *Aufhebung* (usually translated into English as "sublation") to account for how the content of rights would be transformed in the transition from capitalism to communism. This approach differs from conventional readings that interpret Marx's critical reflections on rights through the fixed and ahistorical prism of the "circumstances of justice," those being material scarcity and limited benevolence.[28] A Hegelian rereading of Marx's work offers a theoretical lens through which to consider the future of rights in post-capitalist society while retaining Marx's epistemological and democratic reservations about sketching the future in advance. This approach can also shed light on a puzzle that has perplexed leading commentators, who have difficulties in making sense of why Marx would praise the emancipatory value of certain liberal rights while concluding that none of these rights rises above the atomism and egoism of bourgeois society.[29] In addition to offering a reconstruction of Marx's views on right, this book advances a normative argument for communist legality that is rooted in Marx's commitment to the free development of individuals. An expansion of human freedom broadens the range of choices that are available to individuals, but it also increases the need to choose among competing alternatives. A classless communist society would still need a system of legal justice that would mediate among the diverse and potentially conflicting projects pursued by socialized individuals. Communist legality is normatively warranted because it would enable the free development of

each individual in a way that is consistent with the free development of all individuals, while raising the normative threshold of recognition from relations of mutual indifference to relations of mutual concern.

In the second part of this book, I aim to bring Marx to bear on twenty-first-century developments by considering how his critique of liberal justice has been approached by contemporary theorists in the face of global financial capitalism and the ideological hegemony of neoliberalism. Rising levels of economic inequality within and between countries, the growing concentration of wealth in fewer hands, and the general retrenchment of the welfare state in the wealthiest capitalist countries have led contemporary theorists to revisit Marx's critique of liberalism, especially as it concerns the tension between democratic lawmaking and the inequality of wealth generated by capitalism's imperative to accumulate.

Although Marx's critique of liberalism has been approached in different ways by contemporary theorists such as John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser, each of these theorists has recognized the dangers that the growing concentration of wealth poses for democratic decision-making and the equality of bearers of rights. The most influential contemporary theorist to take up Marx's critique of liberalism was arguably John Rawls, and it is telling that his later work evinces a growing concern with the structure of property relations in capitalist democracies. Rawls was familiar with Marx's charge that capitalist production concentrates productive property in the hands of a wealthy minority, enabling this minority to skew legislation in favour of their own interests and thereby to undermine the substance of equal political liberties. In response to Marx's challenge, Rawls proposed a hypothetical regime of property-owning democracy in which the dispersal of productive property and capital over time would prevent the control of the economy and the domination of political life by an elite.[30] At the same time, Rawls continued to frame his theoretical model on the basis of a closed or insular state, leading him to underestimate the extent to which the tension between democratic lawmaking and capitalist accumulative imperatives is exacerbated under global financial capitalism, in which capital is highly mobile and multinational corporations exert unprecedented influence over state and transnational policies.

Jürgen Habermas has also engaged with Marx's critique of liberalism. Although Habermas has acknowledged the potential of a money-steered economy to colonize the sphere of democratically enacted law, he saw the consolidation of the welfare state and the expansion of socio-economic rights in the twentieth century as having pacified class struggle and deflected

the force of Marx's critique of liberal justice. The recent rollback of the welfare state and the economic instability facing the European Monetary Union has prompted Habermas to revisit the uneasy relationship between financial markets and democratically enacted law. His proposal for tackling this relationship has involved a call for expanding democracy at the supranational level with the goal of taming financial markets in accordance with popular demands for social justice.[31] Yet he has also been reluctant to decouple the steering function of the market from the existing structure of property relations in capitalist democracies, leaving him with few theoretical resources for critiquing the incursion of corporate power and financial interests into the sphere reserved for democratic will-formation.

Axel Honneth and Nancy Fraser—representatives of the third generation of critical theory—have also grappled with Marx's critique of liberalism, with the result that Honneth has moved increasingly in the direction of moral economy while Fraser has sought to renew crisis theory in an era of neoliberal financialized capitalism. Honneth takes up Marx's critique of liberalism while proposing a normative reconstruction of contemporary liberal democratic ethical life.[32] As part of his normative reconstruction, he suggests that the modern capitalist market is undergirded by an ethic of solidarity that enables different market actors to engage in mutually beneficial transactions. Anticipating the Marxist charge that capitalist production gives way to exploitation and structural domination, Honneth maintains that the market remains an indispensable sphere of social freedom, even if its current neoliberal form represents a deviation from liberalism's promise of equal legal freedom. Honneth argues that social freedom—by which he means the idea that the freedom of each is reciprocally bound up with the freedom of others—would find its fullest realization in a market socialist society, in which asymmetries between market participants would be either abolished or severely curtailed. Nevertheless, his recourse to normative reconstruction bars him from elaborating the political trajectory of market socialism, rendering his most recent attempt at updating the idea of socialism more akin to a regulative ideal than to a practical prescription.

Nancy Fraser's engagement with Marx's critique differs from those offered by Rawls, Habermas, and Honneth in that it aims at supplementing Marx's analysis of systemic crisis by elaborating capitalism's background preconditions—namely the environment, social reproduction, and political power. For Fraser, the distinctive feature of financialized capitalism is that existing political institutions can no longer handle the social and ecological issues generated by capitalist accumulation, while the traditional

levers of democratic power are increasingly held captive by corporate power and financial interests. Fraser sees these developments as contributing to administrative crises; however, these crises have not yet been accompanied by crises of legitimation, which is what would be necessary for financialized capitalism to undergo a radical transformation.[33]

The present political and economic context makes Marx's critique of liberal justice all the timelier, but it can also serve as an occasion to rethink the attitude of contemporary Marxists to another central liberal pillar—namely the rule of law. While the rule of law has a largely negative reputation in the Marxist tradition, the widening gap between liberal ideals and capitalist economic realities provides an opportune moment for recasting the legal sphere as an arena of contestation for asymmetrically positioned groups, especially as economic inequality expands and the scope of rights in capitalist democracies is curtailed. A contemporary Marxist approach to jurisprudence cannot afford to take either a dismissive attitude to law or a fetishistic one. Although legal strategies are aimed at reforming the existing order rather than revolutionizing it, the rule of law—as an institutional device and as an ideal—offers asymmetrically situated groups protections against arbitrary encroachments by states and corporations, and this has some bearing on the status of labour and socio-economic rights in capitalist democracies. To be sure, Marx's enduring insight is that the capitalist mode of production cannot be radically transformed by recourse to the rule of law and the discourse of rights. Transformative struggles against financialized capitalism, as well as renewed efforts at realizing a democratic vision of socialism in the twenty-first century, will continue to be waged on the *terra firma* of politics. However, a re-evaluation of Marx's critique of liberalism offers resources for exploring the ways in which law and constitutionalism can also serve as vehicles for progressive change within the constraints of contemporary global financial capitalism.

A reconstruction of Marx's work along the lines developed in this book offers a theoretical basis for reconsidering the place of right in Marx's social theory while rescuing his critique of liberal justice from misguided charges of totalitarianism. Marx has routinely been read as a critic of right, and his scorn for liberal rights has been interpreted as evidence that he did not appreciate the significance of securing space for individual freedom, whether under capitalist or post-capitalist conditions. As we will see, however, this conventional interpretation goes against textual evidence that Marx defended principles of legality and expressed himself as an advocate of civil and political rights precisely when the fate of these rights was in

jeopardy—as, for example, after the March Revolution of 1848. A reconstruction of Marx's views allows for a more nuanced outlook, according to which Marx recognized the value of rights in protecting individuals against direct forms of domination but one which also demonstrates how class domination and objective dependence continue to inhibit the free development of individuals under contemporary capitalism.

The Marx that emerges from this theoretical reconstruction is a thoroughly modern thinker, whose critical insights shed valuable light on the challenges confronting contemporary liberal democracies, particularly in the aftermath of the 2008 global financial crisis and the ongoing Eurozone crisis. Among these challenges is the issue of increasing concentration of wealth and the conversion of economic power into political influence, both of which undermine democratic sovereignty and compromise the ideal of the rule of law. This reconstruction of Marx also lends itself to a more constructive dialogue between Marxism and liberalism on the obstacles confronting human freedom under financialized capitalism.

1.3 Summary of Chapters

Chapter 2 of this book provides an overview of Marx's terminology concerning right, justice, rights, and positive law. After situating Marx in the German civil law tradition, it considers Marx's earliest reflections on *Recht*, beginning with his youthful journalistic writings for the *Rheinische Zeitung*. These early writings show Marx's reliance on a version of Hegelian natural law theory in which positive law is evaluated against the demands of rational law. Here, he employs rational law as the basis for his critique of censorship and his condemnation of legislation criminalizing the collection of fallen forest wood by impoverished peasants. In opposition to Prussian legislation, Marx championed freedom of the press and defended the customary rights of the poor by drawing on the transhistorical standards prescribed by rational law.

However, Marx's recourse to rational law waned after he realized that the Prussian state cannot be adequately explained or criticized through the prism of rational law. In later work, Marx traces the origin of legal relations to historically specific relations of production. He abandoned the transhistorical standpoint of rational law and replaced it with a historically situated and dynamic conception of right in which every mode of production is seen as giving rise to its own legal relations. However, Marx did not succumb to ethical relativism by adopting a historically situated conception of

right. The expansion of human freedom continued to provide Marx with a transhistorical normative basis by which to judge different standards of right. His new materialist outlook also enabled him to criticize legislation that did not accord with a newly achieved level of social development, as is evidenced by his largely neglected political trial speeches following the 1848 revolution across Prussia. The chapter closes with a functional argument for communist legality that is reformulated on the basis of Marx's new materialist outlook.

Chapter 3 builds on the theoretical reconstruction elaborated in Chapter 2 in order to re-examine Marx's critique of liberalism and the fate of rights in post-capitalist society. It begins by outlining Marx's early account of the contradiction between the formal equality of individuals in the liberal state and the material inequalities and antagonisms that prevail in civil society. While Marx sees the granting of equal rights as an advance in freedom, he demonstrates that the liberal conception of justice abstracts from the economic inequality and domination that pervade civil society. In the *Grundrisse* and *Capital*, he demonstrates how the liberal ideals of freedom and equality that characterize the process of exchange give way to exploitation and class domination in the sphere of production.

Against the usual reading of Marx's critique of liberalism as culminating in the negation or transcendence of rights, this chapter draws on the Hegelian concept of *Aufhebung* to argue for an interpretation according to which rights in communist society will not simply be rendered superfluous but will instead be transformed. A close reading of Marx's texts shows that he regarded the granting of civil and political rights as a precondition for the communist society of the future. Furthermore, when viewed through the lens of *Aufhebung*, Marx's scattered remarks about post-capitalist society lend support to the view that "bourgeois" or liberal rights will be superseded rather than annihilated after the revolutionary transformation of capitalism. Although much has been written about Marx's critical reflections on rights, leading commentators have usually neglected the dialectical method that informs Marx's understanding of the material foundation and transformation of rights.

Chapter 4 develops a normative argument for the continued existence of legality in a future communist society in which classes have been abolished along with production on the basis of commodity exchange. The chapter begins by challenging the commodity exchange theory of law developed by Evgeny Pashukanis. Whereas Pashukanis sees legal relations as bound up with commodity exchange, Marx traces the origin of legal relations to

historically specific relations of production. Pashukanis's inability to make sense of non-capitalist forms of law prompted his dubious conclusion that the abolition of commodity exchange will result in the disappearance of law and rights. In contrast to Pashukanis, Marx's new materialist outlook commits him to the more consistent view that the post-revolutionary transformation of capitalist society will give rise to a version of legality that is reflective of the changed material circumstances and social needs in a future communist society.

After refuting Pashukanis's influential theory, the chapter discusses the forms of mutual recognition that distinguish production on the basis of commodity exchange from Marx's future-oriented account of associated production. The former relies on a thin notion of cold respect among commodity owners while the latter is predicated on mutual concern among socialized individuals. Yet any mutual concern among socialized individuals would presuppose respect for personhood as such (according to a post-capitalist conception of "person") and thus a capacity for rights. Drawing on Georg Lukács's *Ontology of Social Being*, I make a normative case for a specifically communist version of legality that would mediate between the diverse and potentially conflicting projects pursued by socialized individuals under associated production. This argument is rooted in Marx's claim that law should reflect the common interests and needs of society, rather than the arbitrary will of individuals. Communist legality would thus serve as a form of mediation, enabling the free development of each individual to be realized in a way that is consistent with the free development of all individuals.

Chapter 5 examines how leading contemporary theorists—namely John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser—have responded to Marx's critique of liberal justice in the light of the challenges posed by global financial capitalism. The last thirty years have seen increased levels of wealth inequality within and between countries, as well as the retrenchment of the welfare state in the wealthiest capitalist countries. The shifting political-economic landscape has led contemporary theorists to reassess Marx's critique of liberalism. The late work of John Rawls shows an attempt to address Marx's challenge by recourse to a hypothetical property-owning democracy in which productive property and capital assets are dispersed. Jürgen Habermas has returned to the problem of systemic colonization with the aim of protecting democratic will-formation in an increasingly unstable and technocratic European Monetary Union. Axel Honneth, for his part, has developed an account of social freedom

in which the market is undergirded by a pre-contractual sense of solidarity that finds its fullest realization in a market socialist society. Finally, Nancy Fraser has revived crisis theory with the aim of problematizing the relationship between the formal political arena and the depoliticized sphere of the economy. These different theoretical responses reaffirm the tension between democratically enacted law and capitalist accumulative imperatives, and underscore the importance of restructuring property arrangements under global financial capitalism.

Chapter 6 reconsiders the relationship between Marxism and the rule of law against the background of the present neoliberal hegemony. Marxists have generally been hostile to the idea of the rule of law, considering it an ideological veil that serves to hide class domination. E.P. Thompson's view of the rule of law as both a bulwark against arbitrary power and a medium for social contestation is an important dissenting position in the Marxist tradition. After outlining Thompson's view, the chapter surveys Marx's reflections on the struggle for a legally limited working day and explains why he valued the rule of law, especially with regard to labour's struggle against capital. Marx acknowledged that the rule of law supplies the working class with tools for contestation within the juridical constraints of capitalist society. A contemporary Marxist approach to the rule of law and constitutionalism has good reasons for recognizing that legal victories matter for asymmetrically situated groups, without forgetting that robust social change depends on the contestation of economic power by means of political mobilization and resistance. Such a view allows Marxist theorists to employ the juridical framework of liberal justice—with all of its limitations—while struggling for the expansion of freedom in the social, political, and economic domains and thus remaining committed to the broader goal of human emancipation.

Notes

1. Karl Marx, "Debates on Freedom of the Press," in *Marx/Engels Collected Works* [hereafter abbreviated as MECW], 50 vols. (New York: International Publishers, 1975–2004), 1: 154.
2. Steven Lukes, "Marxism and Morals Today," *New Labour Forum* 24, no. 3 (2014): 57.
3. These typically include moral, classical (libertarian), social, and neoliberal (sometimes characterized as neo-conservative) variants of liberalism. Although liberal thought has undoubtedly lent itself to historical forms of exclusion, dispossession, and imperialism, liberalism is approached in this

book strictly in view of its normative commitment to honouring the freedom and equality of individuals as abstract bearers of rights.

4. The first chapter provides a conceptual breakdown of *Recht*.
5. See Robert Tucker, *The Marxian Revolutionary Idea* (New York: Norton, 1969); Allen Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (1972): 244–282; Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism* (Totowa: Rowman & Littlefield, 1982).
6. Pashukanis uses the Russian word *Право* (Pravo), which is the equivalent of *Recht* in German. *Право* in Russian is to *Закон* (specific law or body of laws) what *Recht* is to *Gesetz* in German.
7. Evgeny Pashukanis, *Law and Marxism: A General Theory*, trans. Barbara Einhorn (London: InkLinks, 1978), 61.
8. Among the contributors to this debate, Allen Wood maintained that Marx did not advance a moral critique of capitalism and concluded that his conception of justice was functionally relative to the prevailing mode of production. Against this view, Ziyad Husami, G.A. Cohen, Kai Nielsen, and other scholars identified passages in Marx's work that likened capitalist production to robbery. See the essays published in Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds. *Marx, Justice and History* (Princeton: Princeton University Press, 1980). Norman Geras provides a good overview of this debate along with an interpretation of Marx as offering a moral critique of capitalism; see Norman Geras, "The Controversy About Marx and Justice," *New Left Review* 150 (1985): 47–85.
9. Allen Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (1972): 271. Wood has recently restated this view in *The Free Development of Each* (Oxford: Oxford University Press, 2014), 9–10.
10. Steven Lukes, "Can a Marxist Believe in Human Rights?," *Praxis International* 4 (1982): 81–92.
11. Leszek Kolakowski, "Marxism and Human Rights," *Daedalus* 112, no. 4 (1983): 92.
12. See Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118–172. While the present book is not focused on the topic of Soviet totalitarianism, it aims at refuting reductionist views that trace the development of totalitarianism back to Marx's critique of liberalism and his supposed contempt for individual rights.
13. This is not to disregard some of the positive accomplishments of state socialism. Despite its catastrophic failings, the Russian Revolution introduced major gains for women, workers, and the peasantry, including rights to abortion, employment, health care, education, housing, and nutrition, some of which were not seen in capitalist democracies until after the Second World War and only following protracted struggles. These historical achievements are not invoked to excuse or whitewash the darker chapters of state socialism. For a balanced assessment of the Soviet legacy in the fields of law and

socio-economic rights, see John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007).

14. See, for example, Martin Krygier, "Marxism and the Rule of Law: Reflections After the Collapse of Communism," *Law & Social Inquiry* 15, no. 4 (1990): 633–663.
15. The view was popularized by Francis Fukuyama in *The End of History and the Last Man* (New York: Penguin, 1993).
16. Samuel Moyn has called for a more demanding imaginary of human rights, one that could wrest the mantle of human rights from neoliberal monopoly and extend the purview of distributive justice from sufficiency to equality. See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018). Paul O'Connell has shown the extent to which socio-economic rights have been undermined in favour of negative rights and market freedoms. See Paul O'Connell, "The Death of Socio-Economic Rights," *The Modern Law Review* 74, no. 4 (2011): 532–554.
17. For excellent collections of recent work by leading political theorists and philosophers from around the world, see Jan Kandiyali, ed., *Reassessing Marx's Social and Political Philosophy* (New York: Routledge, 2018); Rahel Jaeggi and Daniel Loick, eds. *Nach Marx* (Berlin: Suhrkamp, 2013). See also Costas Douzinas and Slavoj Žižek, eds. *The Idea of Communism* (London: Verso, 2010).
18. For a good discussion of Cohen's methodological transition from Marxism to normative political philosophy, see G.A. Cohen, *If You're an Egalitarian, How Come You're so Rich?* (Cambridge, MA: Harvard University Press, 2000), 101–115.
19. See Michael J. Thompson, ed. *Constructing Marxist Ethics* (Leiden: Brill, 2015); Norman Fischer and Asher Millbauer, *Marxist Ethics Within Western Political Theory* (New York: Palgrave, 2015).
20. Ian Hunt, *Liberal Socialism* (Lanham: Lexington, 2015); Jeffrey Reiman, *As Free and as Just as Possible: The Theory of Marxian Liberalism* (Chichester: Wiley-Blackwell, 2012).
21. See Christine Sypnowich, *The Socialist Concept of Law* (Oxford: Oxford University Press, 1990); Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (New York: Routledge & Kegan Paul, 1983). Sypnowich's book is an important case in point because it develops the thesis, directed against Marxists in particular, that a transformed account of legality and rights would be necessary for any defensible version of post-capitalist society.
22. The standpoint of socialist egalitarianism has been articulated most forcefully by G.A. Cohen in his critique of John Rawls; see G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

23. Others have interpreted Marx through the lens of specific moral theories. For an interpretation of Marx as a mixed deontologist, see Rodney G. Peffer, *Marxism, Morality, and Social Justice* (Princeton: Princeton University Press, 1990). For an interpretation of Marx as a utilitarian, see Derek P.H. Allen, "The Utilitarianism of Marx and Engels," *American Philosophical Quarterly* 10, no. 3 (1973): 189–199.
24. In insisting upon a cumulative reading of Marx, I argue against interpretations that create a seemingly unbridgeable gap between Marx's early writings and his mature writings. Louis Althusser, for example, famously argued that there was an "epistemological break" separating Marx's early (pre-1845) writings from his later writings. See Louis Althusser, *For Marx*, trans. Ben Brewster (New York: Vintage, 1970), 33–35. Notwithstanding the intellectual evolution of his thought, however, I maintain that there is a consistent thread that runs through all of Marx's work that poses challenges to the view that the early Marx was committed to humanism and right, while the mature Marx rejected both in favour of both a scientistic and economically reductionist social theory.
25. Karl Marx, "Economic and Philosophic Manuscripts of 1844," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 67.
26. Allen Wood, *Karl Marx*, 2nd ed. (New York: Routledge, 2004), 152. For a helpful comparison of Marx and Nietzsche, see Nancy Love, *Marx, Nietzsche, and Modernity* (New York: Columbia University Press, 1986).
27. Brown writes: "Yet it is telling that the language carrying the fatality of paradox occurs in the temporality of a progressive historiography. [...] Might the political potential of paradox appear greater when it is situated in a nonprogressive historiography, one in which, rather than a linear or even dialectical transformation, strategies of displacement, confoundment and disruption are operative?" See Wendy Brown, "Suffering the Paradoxes of Rights," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 432.
28. See, for example, Buchanan, *Marx and Justice*.
29. See, for example, Jeremy Waldron, "Karl Marx's 'On the Jewish Question,'" in *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron (New York: Methuen, 1987), 119–136. A similar ambivalence in Marx's reflection on the rights of man has been noted by Frederick Neuhouser, "Marx and Hegel on the Value of 'Bourgeois' Ideals," in *Reassessing Marx's Social and Political Philosophy*, ed. Jan Kandiyali (New York: Routledge, 2018), 149–162.
30. John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 139.
31. Jürgen Habermas, *The Lure of Technocracy* (London: Polity, 2014), 88–89.
32. Axel Honneth, *Freedom's Right*, trans. Joseph Ganahl (New York: Columbia University Press 2014), 5.

33. Nancy Fraser, "Legitimation Crisis? On the Political Contradictions of Financialized Capitalism," *Critical Historical Studies* 2, no. 2 (2015): 157–189.

PART I

Rethinking Justice, Legality, and Rights

CHAPTER 2

Situating Marx with Respect to Justice and Right

If the state, even in a single respect, stoops so low as to act in the manner of private property instead of in its own way, the immediate consequence is that it has to adapt itself in the form of its means to the narrow limits of private property.[1]

The aim of this chapter is to show that, although Marx replaces his early understanding of rational law with a historically grounded and *new* materialist theory, his mature outlook retains a functional and normative place for justice and right. Marx's attempt to transpose Hegel's idealist philosophy of right into a materialist theory did not lead him to abandon right, nor did it prompt him to renounce the humanistic aspirations of his early writings. What Marx abandons in his mature work is an abstract and transhistorical view of rational law that is detached from historically specific relations of production. Rather than rejecting right and justice as such, Marx's materialist conception of history sees right as undergoing transformations as the material conditions of life change. This theoretical framework will enable Marx to invoke principles of legality whenever positive law is at loggerheads with the juridical standard that is prescribed by the prevailing mode of production. Thus, while the language of transhistorical rational law fades in Marx's mature work, right and justice are given a new materialist basis that retain their significance throughout his writings. Marx will also distinguish between different standards of right based on the degree

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
https://doi.org/10.1007/978-3-030-30195-8_2

to which human freedom is realized or hindered across different modes of production. After providing a conceptual breakdown of *Recht*, I examine the evolution of Marx's reflections on right, beginning with the influence of Hegelian rational law on his early journalistic writings, followed by the events that led to the development of his new materialist theory of right.

2.1 Conceptualizing *Recht*

Before embarking on a theoretical exposition of Marx's understanding of right, it is essential that the concept of *Recht* be defined specifically in the context of German civil law. This task poses some challenges because the German language does not exhibit the clear distinction between *law* and *right* that is customarily observed in Anglo-American jurisprudence. Paradigmatic references to the concept of right in Anglo-American jurisprudence have presented their own challenges. W.N. Hohfeld famously critiqued the practice of assigning different meanings to the concept of right, which he saw as leading to conceptual equivocation and obfuscation. Conceptual clarity is no less important in the case of German civil law, in which the word *Recht* can mean "law," "the right," and "*a* right."[2] Marx's reflections on right developed through his formative engagement with Hegelian jurisprudence, and his references to *Recht* are in keeping with its usage in the German civil law tradition. German civil law originated from Roman law; thus, in broaching the nuanced topic of *Recht*, legal scholars use terms such as *ius* and *lex*, as well as "objective right" and "subjective right." The conceptual analysis I offer in this chapter will be familiar to legal theorists. *Recht* will be divided into objective right (justice) and subjective right (rights), while the Latin terms *ius* (natural law) and *lex* (positive law) will be used to capture the nuanced differences between *Recht* and *Gesetz* in German. This conceptual breakdown of *Recht* will be helpful for understanding Marx's early Hegelian jurisprudence, his critique of liberal justice (which will be explored in the next chapter), as well as the place of right more generally in Marx's new materialist conception of history.

I begin the conceptual breakdown of *Recht* with the term "objective right." This refers to a system of law that is based on a standard of rightness that informs legal relations between individuals in a particular society or, to use Marx's terminology, a historically specific mode of production. The German jurist and historian Otto Gierke defined *Recht* as "a system of law existing objectively as an external norm for persons," and (b) "a system

of rights enjoyed by those persons, as 'Subjects' or owners of rights, under and by virtue of that norm."[3] Focusing on the first part of Gierke's formulation, the closest English rendition of *Recht* would be "objective right" or "justice," understood here in the broad sense rather than referring to a concrete set of laws or a body of legislation. Although Marx's usage of right is nowhere as expansive as G.W.F. Hegel's formulation in the *Philosophy of Right*, which encompasses civil right, morality, ethical life, and world history,[4] his account extends beyond positive legislation; this will have important implications for the contrast he draws between rational law and positive law. The terms "objective right" and "justice" will be used interchangeably throughout this chapter.

While objective right is defined by a standard of rightness that informs legal relations between individuals, subjective right refers to the rights possessed by individuals in virtue of the prevailing standard of rightness. "Subjective right" captures the second part of Gierke's formulation of *Recht*, which focuses on the structure of rights and duties possessed by individuals within a system of law. Subjective right is synonymous with the notion of *rights*, which, following W.N. Hohfeld, are understood here as claims that impose correlative duties upon the state and other individuals.[5] Marx sees subjective right emerging most clearly following the "bourgeois" or liberal revolutions of the seventeenth and especially the eighteenth centuries. Subjective right will therefore be viewed as part of the catalogue of liberal rights that were famously articulated in the revolutionary Declaration of the Rights of Man and of the Citizen. These liberal rights included the right to life, liberty, and security of the person, to private property, to equality before the law, and to freedom of conscience, expression, movement, and political participation, as well as rights against arbitrary detention and coercion. Drawing from Marx's work as a whole, the prospects for these "negative" rights will be considered alongside "positive" rights in capitalist and post-capitalist society (all of which will be taken up in Chapter 3).

There remains a further distinction between *ius* and *lex* that is central to Marx's understanding of positive law and its relationship to justice. Following Hegel, Marx draws on the distinction between *Recht* and *Gesetz* throughout his writings, where *Recht* is seen as providing the normative standard for evaluating and, where necessary, criticizing *Gesetz*. The Latin term *ius* is more closely aligned with the German word *Recht*, which is concerned with justice or rightness, while *lex*, signifying statutory law or decree, has much the same meaning as the German *Gesetz*. To take a famous example, Hegel argues in his *Philosophy of Right* that right (*Recht*) becomes

concrete when it is posited in the legal code or constitution of a concrete nation state.[6] However, Hegel was well aware that positive law can contradict the *idea* of rational right, whose essence is human freedom. Thus, while Hegel begins the section on "Abstract Right" in his *Philosophy of Right* with the concept of the juridical person inspired by Roman legal theory, Roman law itself viewed children as the private property of their fathers; this violated the right of personality and led Hegel to conclude that the concept of the *pater familias* is in contradiction to rational right.[7]

The young Marx similarly viewed positive law as the concrete expression of rational right, and like Hegel, he maintained that positive law does not always realize the essential purpose of rational right, which is the realization of human freedom. Rational law provided the young Marx with an external standard by which to evaluate positive law. His propensity to distinguish between rational law and positive law has been lucidly elaborated by Olufemi Taiwo, who writes:

> Marx's essentialist methodology in law led him to posit a legal dualism: rational law and positive law. In this dualism, rational law is ultimate, being the essence of positive law. This means that for Marx the two elements of this dualism are not of equal importance, nor is one collapsible into the other. This is not a way of thinking that Marx abandoned as he progressed as a thinker. On the contrary, whereas the components of the dualism altered later on, the dualistic account of law did not change in Marx's thought.[8]

To be sure, the reliance on rational law would wane in Marx's later work, in which the historical mode of production and the social needs stemming from it become the benchmarks for evaluating and, where necessary, criticizing positive law.[9] This Hegelian account of the dual nature of law will have important implications for Marx's new materialist conception of right, because it will allow him to criticize unjust positive laws that contradict the objective standard of right of a given mode of production without falling into ethical relativism or legal nihilism. However, before turning to Marx's new materialist theory of right, it is necessary to examine the relevance of his early reflections on right and the powerful influence exerted on his work by what Taiwo has poignantly called Hegelian "legal rationalism."[10]

2.2 The Influence of Hegelian Rational Law

Although Marx undertook legal studies for only a brief period at the University of Berlin—choosing instead to defend his doctoral dissertation on

The Difference Between the Democritean and Epicurean Philosophy of Nature at the University of Jena—his earliest engagement with juridical matters is evidenced in his journalistic writings in 1842 and 1843. It became clear early on that a professorship in philosophy was closed to Marx, due in no small part to his association with the Young Hegelians and their opposition to organized religion. Following the advice of his mentor and fellow Left Hegelian Bruno Bauer, Marx turned to journalism and eventually became the lead editor of the *Rheinische Zeitung*, a radical liberal periodical that took a critical stance towards Prussian absolutism. Marx contributed a series of influential articles that dealt with the leading political issues of the time.[11] One of his earliest contributions was a critique of censorship legislation that was directed against those who sought to embrace Friedrich Wilhelm IV's censorship instructions by keeping the proceedings of the Prussian Assembly of Estates secret.[12] The issue of censorship would play a decisive role in the eventual suppression of the *Rheinische Zeitung* and Marx's resignation as editor.

In his early reflections on the "Debates on the Freedom of the Press," written in 1842, Marx employs the essentialist methodology that has already been alluded to by Olufemi Taiwo. Marx's first step is to consider the essence or underlining purpose of a press and contrast this with the essence of censorship. Using avowedly Hegelian language, Marx writes:

> From the standpoint of the *idea*, it is self-evident that freedom of the press has a justification quite different from that of censorship because it is itself an embodiment of the idea, an embodiment of freedom, a positive good, whereas censorship is an embodiment of unfreedom, the polemic of a world outlook of semblance against the world outlook of essence; it has a merely negative nature.[13]

Marx maintains that a free press is a positive realization of human freedom, whereas a censored press, negative by its very nature, only acts to curtail freedom even while claiming to promote it. Building on this argument, Marx argues that a good press is one that corresponds to its idea or fundamental essence—a venue for the free expression of ideas and an indispensable source of information for the public—whereas the essence of a bad press is a combination of deference and hypocrisy. Marx writes:

> A free press that is bad does not correspond to its essence. The censored press with its hypocrisy, its lack of character, its eunuch's language, its dog-like tail-wagging, merely realises the inner conditions of its essential nature. The essence of the free press is the characterful, rational, moral essence of freedom.[14]

In the same vein, Marx takes issue with market-based arguments that reduce the essence of the press to a profit-making trade that should be freed from government regulation.

What is most important in this context is that Marx grounds his critique of censorship by invoking the inherent rationality of law. Marx writes:

> Laws are rather the positive, clear, universal norms in which freedom has acquired an impersonal, theoretical existence independent of the arbitrariness of the individual. A statute-book is a people's bible of freedom. […] Therefore the press law is the legal recognition of freedom of the press. It constitutes right (*Recht*), because it is the positive existence of freedom. It must therefore exist, even if it is never put into application, as in North America, whereas censorship, like slavery, can never become lawful, even if it exists a thousand times over as a law.[15]

Marx appeals here to the normative underpinnings of legality that are characterized by such features as clarity, generality, predictability, and equity. These positive pronouncements may appear striking when compared with Marx's subsequent suspicion of, and, on most conventional readings, downright contempt for the idea of the rule of law. However, it is important to note that the passage in question attests to the influence of Hegelian rational law on Marx's early work, in which legislation is evaluated against rational law, the essence or underlying purpose of which is human freedom.

Marx uses the rationality of law to critique existing positive law such as censorship legislation, which he likens in this article to legally sanctioned slavery. In both instances, Marx sees the existing positive law as contradicting the inherent rationality of law. Marx argues that freedom of the press constitutes rational law insofar as it is the positive realization of freedom. Censorship, on the other hand, subverts freedom because it degrades the free press by subjecting it to the arbitrary privilege of the state censor, thus perverting the very essence of the free press. Marx writes:

> Freedom is so much the essence of man that even its opponents [i.e., the state censor] implement it while combating its reality; they want to appropriate

> for themselves as a most precious ornament what they have rejected as an ornament of human nature. No man combats freedom; at most he combats the freedom of others. Hence every kind of freedom has always existed, only at one time as a special privilege, at another as a universal right.[16]

What follows from Marx's argument is that freedom of the press follows from rational law, the violation of which can never be rendered legitimate, even if censorship legislation is passed "a thousand times" into law by the Prussian state. While Marx does not deny that legislation enabling press censorship has the status of law, he is convinced that censorship legislation violates rational law. The justificatory force behind Marx's critique of positive law, then, is grounded in the inherent rationality of the law, the underlying essence of which is human freedom.

Marx's appeal to the rationality of law was not confined to his criticism of censorship legislation. He employs the same method to critique the so-called Historical School of Law. The Historical School of Law was a school of jurisprudence that came to prominence in Germany in the late eighteenth century under the influence of Karl von Savigny and Gustav Hugo.[17] Its central tenet was that law is best understood not as the embodiment of reason or the Idea, but as the underlying spirit of a people. The task of the jurist was therefore to unearth the history of this spirit in order to make sense of the law. In his short polemic against the Historical School, Marx takes issue with Hugo, who published an influential manifesto in which he argued that the ultimate basis of legal validity is tradition. After presenting Hugo's argument, Marx concludes that the manifesto amounted to a reactionary justification of feudal privileges that was reminiscent of the Ancien Régime. Opposing rational law to tradition, Marx states:

> Hugo *misinterprets* his teacher *Kant* by supposing that because we cannot know what is *true,* we consequently allow the *untrue,* if it *exists* at all, to pass as *fully valid*. He is a *sceptic* as regards the *necessary essence* of things, so as to be a *courtier* as regards their *accidental appearance*. Therefore, he by no means tries to prove that the *positive* is *rational;* he tries to prove that the *positive* is *irrational*. With self-satisfied zeal he adduces arguments from everywhere to provide additional evidence that no rational necessity is inherent in the positive institutions, e.g., property, the state constitution, marriage, etc., that they are even *contrary* to reason, and at most allow of idle *chatter* for and against.[18]

Marx criticizes Hugo for attempting to derive the source of legal validity from tradition rather than from rational law, which leads Hugo to treat freedom-enabling institutions as contingent and dispensable rather than necessary. Marx thus invokes the inherent rationality of law in order to refute the traditionalism of the Historical School.

Marx's appeal to rational law has led some to situate these early journalistic writings in the natural law tradition, but such an interpretation faces the problem that principles of natural law are usually derived from God or from nature.[19] However, Marx's references to rational law are thoroughly secular and humanistic in character. Of course, one can also interpret rational law more generically as deriving its basis from the nature of human beings as rational beings who freely author ends in the world. In this case, principles of natural law would not rest on divine grace or on a notion of justice that is readily available in nature. While there is considerable variation among natural law theories, Marx's early understanding of rational law cannot easily be compartmentalized into ancient, medieval, or classical liberal formulations of natural law. Although Marx agrees with Aristotle that human beings strive to perfect their essential capacities in the world, he does not derive this argument from the nature of the universe or from the hierarchical ordering of the rational human soul. Nor, for that matter, does Marx think that God provides the standard by which human nature and conduct should be evaluated. This leaves the classical liberal formulation of natural law, which was shared in different ways by representatives of the social contract tradition, Thomas Hobbes, John Locke, and Immanuel Kant in particular. The classical liberal understanding of natural law usually takes as its starting point an ahistorical and pre-political state in which human beings are seen as inherently rational and independent agents who already possess natural rights of some kind.

The classical liberal view of a pre-political state, consisting of isolated individuals, was already rejected by Hegel, who argued that law and rights are instantiated only in the context of a political community. Hegel famously criticized the classical liberal postulate that saw law as originating in the state of nature, in which individuals were assumed to possess "natural" or inborn rights.[20] In opposition to this view, Hegel insisted that law is predicated on "free personality alone," which can only be realized in the context of a "social state." Hegel affirms:

> The phrase "Law of Nature," or Natural Right, in use for the philosophy of law involves the ambiguity that it may mean either right as something existing

> ready-formed in nature, or right as governed by the nature of things, i.e. by the notion. The former used to be the common meaning, accompanied with the fiction of a *state of nature*, in which the law of nature should hold sway; whereas the social and political state rather required and implied a restriction of liberty and a sacrifice of natural rights. The real fact is that the whole law and its every article are based on free personality alone—on self-determination or autonomy, which is the very contrary of determination by nature. *The law of nature* —strictly so called—is for that reason the predominance of the strong and the reign of force, and a state of nature a state of violence and wrong, of which nothing truer can be said than that one ought to depart from it. The social state, on the other hand, is the condition in which alone right has its actuality.[21]

Marx follows Hegel in locating the basis of right in the progressive realization of human freedom—"free personality alone"—which, however, can only be realized in the context of a social state, rather than in the pre-political state hypothesized by classical liberal theorists.[22] Thus, in his 1842 supplement to the *Rheinische Zeitung*, Marx endorses Hegel's view of the constitutional state as the quintessential institutional sphere in which moral, political, and legal freedom is realized and made actual:

> Whereas the earlier philosophers of constitutional law proceeded in their account of the formation of the state from the instincts, either of ambition or gregariousness, or even from reason, though not social reason, but the reason of the individual [Here Marx is referring to Kant], the more ideal and profound view of recent philosophy proceeds from the idea of the whole. It looks on the state as the great organism, in which legal, moral, and political freedom must be realized, and in which the individual citizen in obeying the laws of the state only obeys the laws of his own reason, of human reason.[23]

Marx's position at this stage of his intellectual development is thus best described as a version of Hegelian rational law, which proceeds by inquiring whether the legislation of an existing state adheres to or contradicts the essence of rational right.

Marx's earliest doubts concerning the rationality of positive law is evidenced in his reflections on the "Debates on the Law on Thefts of Wood," regarding a Prussian law by which the customary practice among poor peasants of gathering fallen forest wood was criminalized as an instance of property theft. Marx's first step in this article is to employ yet another essentialist argument to distinguish fallen wood from living trees. Marx

writes: "The gatherer of fallen wood only carries out a sentence already pronounced by the very nature of the property, for the owner possesses only the tree, but the tree no longer possesses the branches that have fallen from it."[24] While the landowner has a right to the living tree, he does not have a corresponding right to the fallen branches, which have historically been a source of livelihood for the poor. Marx insists that the positive law should be evaluated against rational law. He writes:

> The legal nature of things cannot be regulated according to the law; on the contrary, the law must be regulated according to the legal nature of things. But if the law applies the term theft to an action that is scarcely even a violation of forest regulations, then the law lies, and the poor are sacrificed to a legal lie.[25]

This insight leads Marx to defend the customary right of the poor to gather fallen wood, for it is the impoverished state of the peasants that compels them to do so. Marx writes:

> We demand for the poor a customary right, and indeed one which is not of a local character but is a customary right of the poor in all countries. We go still further and maintain that a customary right by its very nature can only be a right of this lowest, propertyless and elemental mass.[26]

Although Marx invokes a customary right to advance his argument, his spirited defence rests upon appeal to rational law.

Marx is also careful to contrast the customary rights of the landed aristocracy, which he takes to contradict rational law, with the customary rights of the poor, which he thinks are at loggerheads with existing positive law. Marx maintains:

> Whereas these customary rights of the aristocracy are customs which are contrary to the conception of rational right, the customary rights of the poor are rights which are contrary to the customs of positive law. Their content does not conflict with legal form, but rather with its own lack of form.[27]

The law on thefts of wood demonstrates for Marx that positive law has not assumed the form of rational law, but that it ought to. Aside from identifying the contradiction between existing law and rational law, Marx also discerns the defects of formal justice, under which the law remains indifferent to substantive inequalities between concrete individuals. With

the dissolution of medieval or feudal law, formally prescribed privileges in favour of landed private property were abolished along with obligations to the poor because civil law began to view rich and poor as equals. Much as he does in his later reflections on the liberal constitutional state in "On the Jewish Question," Marx explains that the privileges of the landed aristocracy were not abolished by constitutional law; instead, they assumed a private character. Marx argues that despite this change, the internal logic of civil law still obliges legislators to take into consideration the equal rights of owners and non-owners of private property. Marx writes:

> The legislative mind considered it was the more justified in abolishing the obligations of this indeterminate property towards the class of the very poor, because it also abolished the state privileges of property. It forgot, however, that even from the standpoint of civil law a twofold private right was present here: a private right of the owner and a private right of the non-owner; and this apart from the fact that no legislation abolishes the privileges of property under constitutional law, but merely divests them of their strange character and gives them a civil character.[28]

The trouble with the law on the theft of fallen wood, then, is that it criminalizes the customary right of poor peasants to gather fallen wood, which was a necessity, while bending the scales of justice in favour of the economic interests of the landed aristocracy—that is, the forest owners—who would profit directly from the labour and fines exacted from poor peasants. However, when a law-governed state (*Rechtsstaat*) becomes subservient to the narrow economic interests of property owners, its essence and claims to universality are invalidated, leading Marx to insist:

> If the state, even in a single respect, stoops so low as to act in the manner of private property instead of in its own way, the immediate consequence is that it has to adapt itself in the form of its means to the narrow limits of private property. […] As a result of this, apart from the complete degradation of the state, we have the reverse effect that the most irrational and illegal means are put into operation against the accused [i.e. the poor]; for supreme concern for the interests of limited private property necessarily turns into unlimited lack of concern for the interests of the accused.[29]

Although Marx holds that law is degraded once it becomes subservient to the economic interests of property owners, he appeals to the inherent rationality of the law to critique legislation criminalizing the gathering of

fallen forest wood. Marx argues that instead of criminalizing the actions of the poor, the "wise legislator" should raise the poor to a higher sphere of right so that they will be in a position to exercise their rights:

> The wise legislator will prevent crime in order not to have to punish it, but he will do so not by obstructing the sphere of right, but by doing away with the negative aspect of every instinct of right, giving the latter a positive sphere of action. He will not confine himself to removing the impossibility for members of one class to belong to a higher sphere of right, but will raise this class itself to the real possibility of enjoying its rights.[30]

One could argue that the "Debates on the Law on Thefts of Wood" is the earliest instance of class analysis in Marx's work. It is important to note, however, that Marx here is criticizing state legislation because it contradicts the rationality of right, while his reflections concerning the proceedings of the Assembly of Estates are still framed in a very abstract and indeterminate manner. Marx's underlying inference is that once law comes to express the narrow economic interests of property owners, it reduces the poor to the status of serfs, who are then obliged to pay fines to wealthy forest owners. If the state were to proceed in this manner, its actions would undermine the reason and immortality that are constitutive of rational right or law. Marx concludes his reflections with a normative argument about the essence of law. He writes:

> If, however, the state wanted to make the criminal your temporary serf, it would be sacrificing the immortality of the law to your finite private interests. It would prove thereby to the criminal [i.e., the gatherer of fallen wood] the mortality of the law, whereas by punishment it ought to prove to him its immortality.[31]

The moral of Marx's argument is that legislation ought to reflect the inherent rationality of the law.

While Marx's support for the customary rights of the poor questioned the validity of existing legislation in Prussia, his sympathetic reflections on the plight of the vinegrowers of the Mosel region reaffirmed the limits of using rational law as a basis for criticizing positive law. The relentless pressures of the state censor were of personal significance for Marx, as he was struggling to invent new ways of evading the Prussian censors. Chronicling the plight of the Mosel vinegrowers took Marx, in January 1843, back to his earlier critique of censorship legislation.[32] At the time, the vinegrowers

of Mosel were trying desperately to bring their economic distress to public light, while the Prussian authorities, whose policies adversely affected the vinegrowers, sought to dismiss their concerns on the grounds that these were the frustrations of insolent and uneducated workers. Marx uses the distressed situation of the vinegrowers as yet another occasion to argue in favour of a free press. This time, he presents the free press as serving the function of mediating between state officials and the people, placing the people on equal footing with officials when it comes to expressing social concerns and criticizing existing policies. Marx holds that only a free press could make the particular situation of the Mosel region the subject of general concern and sympathy across the nation. Marx writes:

> In the realm of a free press, rulers and ruled alike have an opportunity for criticizing their principles and demands, and no longer in a relation of subordination, but on terms of equality as *citizens of the state*; no longer as individuals, but as intellectual *forces*, as exponents of reason. […] It [i.e., the free press] alone can make a particular interest a general one, it alone can make the *distressed state* of the Mosel region an object of general attention and general sympathy on the part of the Fatherland.[33]

Despite Marx's best efforts at evading the Prussian censors, his writings on the situation in Mosel would count among his last before the Prussian king ordered the suppression of the *Rheinische Zeitung*. Marx soon resigned as the editor of the periodical on the grounds that it had become impossible to write honestly about the political situation in Prussia.[34] However, Marx's disillusionment with the *Rheinische Zeitung* was not simply the outcome of a relentless censorship campaign by the Prussian authorities. His journalistic writings also revealed to him the limits of criticizing the Prussian state and its legislation on the basis of rational law. Marx realized that the laws and institutions of the Prussian state were not mere deviations from the rationality of the law; rather, they represented concrete forms of political life that were themselves rooted in "civil society" and the material conditions of life.

2.3 From Rational Law to the New Materialist Conception of Right

After resigning from the *Rheinische Zeitung*, Marx immersed himself in private study in Bad Kreuznach and eventually moved to Paris, where he

encountered French socialism, the study of political economy, and reunited with Frederick Engels, who became his lifelong collaborator and friend. The period between 1843 and 1845 was a significant turning point in Marx's intellectual and political development. In addition to the powerful influence of Ludwig Feuerbach's transformational criticism of Hegel in *The Essence of Christianity*,[35] the experience of witnessing the material plight of the Mosel vinegrowers taught Marx that rational *Recht* cannot be conceived in abstraction from "civil society" and the material conditions confronting individuals. Marx's move away from rational law is already evident in his *Contribution to the Critique of Hegel's Philosophy of Right*, also written in 1843. Although this work is often read through the lens of Marx's subject–predicate critique and his democratic opposition to Hegel's conception of constitutional monarchy, the essential turning point consisted in uncovering the contradictions between the modern constitutional state and the material needs of civil society. The following quote from Marx's *Critique* is itself quite telling: "He [Hegel] wants […] the political state, not to be determined by civil society, but, on the contrary, to determine the latter."[36] The antinomy between the modern constitutional state and the needs of civil society would reappear more forcefully in Marx's subsequent writings, particularly in "On the Jewish Question" and *The Holy Family* (co-written with Engels), before becoming a major premise in the development of the materialist theory of history, and with it, the *new* materialist conception of right.

Marx would later reflect on the events that led him to the development of the materialist theory of history and his new-found interest in political economy. More specifically, he would stress how his early critique of Hegel's philosophy of right led him to the conclusion that legal and political categories find their origin in "civil society." In other words, Marx sought the origin of legal relations in the material conditions of life, but seeking the basis of right in "civil society" did not mean that he abandoned right as such. Marx recounts:

> I was taking up law, which discipline, however, I only pursued as a subordinate subject along with philosophy and history. In the years 1842–44, as editor of the *Rheinische Zeitung*, I experienced for the first time the embarrassment of having to take part in discussions on so-called material interests. […] The first work which I undertook for a solution of the doubts which assailed me was a critical review of the Hegelian philosophy of right, a work the introduction to which appeared in 1844 in the *Deutsch–Französische Jahrbücher*, published in

> Paris. My investigation led to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which Hegel, following the example of the Englishmen and Frenchmen of the eighteenth century, combines under the name of "civil society," that, however, the anatomy of civil society is to be sought in political economy.[37]

While Marx still employs essentialist arguments to formulate the concept of species-being and the critique of alienated labour in the *Economic and Philosophic Manuscripts of 1844*, he no longer evokes the inherent rationality of law to criticize existing legislation because legal relations are increasingly viewed as the product of deeper relations of production that are operative within civil society. Whereas the starting point of Marx's formative work was an abstract and transhistorical *idea* of rational law—against which legislation was evaluated—the starting point for his materialist conception of right is the interchange between human beings and nature through the praxis of labour, which gives rise to historically specific but dynamic legal relations. While Marx's early journalistic writings were anchored in a transhistorical and philosophically idealist standard of rational law, his new materialist conception is historically situated and is based on the view that different standards of right apply in different modes of production.

The development of the materialist conception of history was just as much a transition point in Marx's politics. His early journalistic writings betray the views of a radical liberal thinker who criticizes existing laws for deviating from their inherent rationality. To be sure, Marx will still criticize bourgeois right and political institutions for failing to deliver on professed ideals in later writings, but his critique will be based on the view that only a transformation in the material conditions of life could bring about social and political freedom.

After collaborating on their first polemical work against the Young Hegelians in *The Holy Family*, Marx and Engels sought to settle accounts with their erstwhile Feuerbachian views in *The German Ideology*. Although *The German Ideology* is an incomplete text, it provides a glimpse into the first attempt by Marx and Engels to outline their new-found materialist conception of history.[38] References to *Recht* appear throughout *The German Ideology*, sometimes polemically against Max Stirner and at other times more methodically within the broader context of the materialist conception of history. Marx and Engels make it clear that the starting point of their

analysis is the material production and reproduction of human life. However, they stress that the material production and reproduction of human life *should not* be reduced to a state of physical existence among individuals, as was the case with "old materialism." Marx and Engels conceive the mode of production instead as a broader window into how human beings reproduce themselves in the world through their labour and the way in which their labour is expressed in philosophical, juridical, and aesthetic terms at different points of historical development. They write:

> This mode of production must not be considered simply as being the reproduction of the physical existence of individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite *mode of life* on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both of *what* they produce and *how* they produce.[39]

This new materialist approach was already a considerable departure from the views of the Young Hegelians, Ludwig Feuerbach included. Although Feuerbach's analysis of the religious essence as an inverted projection of the human essence was an important move towards philosophical materialism, his response to the phenomenon of religious alienation was ultimately a call to embrace secular humanism. The basis of criticism for the Young Hegelians was a philosophical critique of existing ideas, which left the social basis underpinning these ideas unexamined. Thus, Marx and Engels argue that "this demand to change consciousness amounts to a demand to interpret reality in another way, i.e. to replace it by means of another interpretation. The Young-Hegelian ideologists, in spite of their allegedly 'world shattering statements', are the staunchest conservatives."[40] It is against this philosophical background that Marx and Engels sought to provide a *new* materialist basis for legal, political, and philosophical ideas in *The German Ideology*.

One of the themes discussed in *The German Ideology* concerns the basis of right (*Recht*). Marx's early journalistic writings pointed to freedom-enabling reason as the basis of right. In this collaborative work, Marx and Engels oppose attempts to present the will as the basis of right:

> In actual history, those theoreticians who regard *might* as the basis of right were in direct contradiction to those who looked on *will* as the basis of right. […] If power is taken as the basis of right, as Hobbes does, then right, law,

> etc., are merely the symptom, the expression of *other relations* upon which the state rests. The material life of individuals, which by no means depends merely on their "will"—this is the real basis of the state. […] These actual relations are in no way created by the state power; on the contrary they are the power creating it.[41]

Marx and Engels thus present the mode of production as the decisive basis of right. This leads them to infer that for every historical mode of production, there is a specific form of the state, of morality, and of right, as well as a specific structure of rights and duties.

The main reason why Marx and Engels are at such pains to stress the economic foundation of society is because they oppose prevailing views among philosophers and historians who claim that the will of individuals—or for that matter, the power wielded by great statesmen—is what accounts for legal and political transformation. Against this view, Marx and Engels maintain that transformations in the material condition of life account for epochal social change:

> The same visionaries who see in right and law the domination of some independently existing general will can see in crime the mere violation of right and law. Hence the state does not exist owing to the dominant will, but the state, which arises from the material mode of life of individuals has also the form of a dominant will. If the latter loses its domination, it means that not only the will has changed but also the material existence and life of the individuals, and only for that reason has their will changed.[42]

In contrast to his early journalistic writings, which were based on a transhistorical idea of rational law, Marx now sees right as changing historically with the material conditions of life. Thus, Marx and Engels argue:

> The history of right shows that in the earliest, most primitive epochs these individual, factual relations in their crudest form directly constituted right. With the development of civil society, hence with the development of private interests into class interests, the *relations of right underwent changes* and acquired a civilised form.[43]

In 1845, when *The German Ideology* was written, Marx expressed himself a revolutionary democrat, a communist theoretician, and a partisan of the working class. However, while the starting point of Marx's analysis is now the material conditions of life, a revolutionary transformation in the

material circumstances is not simply the product of a mechanical contradiction between the forces and relations of production.[44] For this and other reasons, it pays to distinguish Marx's version of *new* materialism from previous forms of materialism, which, as he himself noted in the first thesis on Feuerbach, ignored the sensuous dimension of human life and the centrality of practical activity in the transformation of consciousness. Thinking and being are deeply interwoven for Marx, and practical activity is what brings them together.

The struggle between classes, which would occupy Marx for the rest of his life, was also a legal and political struggle—a battle of opposing ideas and forms of political consciousness. In *The German Ideology*, Marx and Engels acknowledge that the workers "arrive at this unity [i.e., revolutionary class consciousness] only through a long process of development in which the appeal to their right (*Recht*) also plays a part."[45] Although Marx abandons the transhistorical framework of rational law in *The German Ideology*, the new-found materialist outlook did not signal an "epistemological break" in which his formative concerns with human freedom and right were rejected in favour of a scientific and economistic social theory.[46] Frederick Engels, for his part, would later acknowledge that the overwhelming emphasis that he and Marx put on "economic facts" meant that the formal analysis of right was left underdeveloped, which resulted in misinterpretations and distortions of their new materialist views. Engels wrote:

> Otherwise only one point has been omitted, a point which, however, was never given sufficient weight by Marx and myself in our work, and in regard to which we are all equally at fault […] By placing the main emphasis on the *derivation* of political, legal and other ideological conceptions, as of the actions induced by those conceptions, from economic fundamentals […] we neglected […] the formal in favour of the substantial aspect, i.e. the manner in which the said conceptions, etc., arise. This provided our opponents with a welcome pretext for misinterpretation, not to say distortion.[47]

Although Marx adopts a novel materialist point of view with respect to the origin of legal relations, it is not the case that right loses its significance and becomes synonymous with class domination. To be sure, one can find passages in Marx's work that invite a class-instrumentalist and reductionist interpretation of right. For instance, when referring to the bourgeoisie in the *Manifesto of the Communist Party*, Marx and Engels assert: "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 a law for all."[48] Elsewhere, Marx argues that "law is only the official recognition of fact,"[49] which leaves the impression that law is simply the objective recognition of class domination. However, even when these passages are read out of context (as is normally the case), they speak to Marx's polemical treatment of positive law and the extent to which legislation ends up serving the interests of the ruling class. An instrumentalist interpretation cannot account for Marx's simultaneous willingness to criticize positive law whenever it contradicts the juridical standard that corresponds to a given mode of production, nor can it explain the relative autonomy and generality that Marx continues to associate with the law in later writings.

While Marx no longer conceived of right as a transhistorical idea that stands outside the historical mode of production, it retains functional and normative significance. Right is functionally significant because it demarcates the property relations and structure of rights possessed by individuals within a historically specific mode of production, the content of which varies from one mode of production to another. In the absence of a legal framework, a mode of production simply could not function, nor would it be possible to distinguish between a system of law and sheer arbitrariness. Marx elaborates on the functional significance of legality in *Capital*:

> It is furthermore clear that here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. And such regulation and order are themselves *indispensable elements of any mode of production*, if it is to assume social stability and independence from mere chance and arbitrariness. These are precisely the form of its social stability and therefore its relative freedom from mere arbitrariness and mere chance. Under backward conditions of the production process as well as the corresponding social relations, it achieves this form by mere repetition of their very reproduction. If this has continued on for some time, it entrenches itself as custom and tradition and is finally sanctioned as an explicit law.[50]

It is worth emphasizing that in *Capital*, his most systematic work, Marx contrasts legal regulation with "mere chance and arbitrariness." Although

the law is exploited by ruling classes to advance their material interests, it must nevertheless exhibit a degree of autonomy and independence from the arbitrary will of ruling classes to assume the *form* of law. In this respect, Marx's mature writings continue to uphold the criteria that legal theorists typically attribute to legality—namely clarity, generality, publicity, and predictability—except that Marx traces the origin of *Recht* and its transformation to changes in the material conditions of life. These material conditions of life, as we have seen, should never be reduced to a one-way causal relationship between the forces and relations of production on the one hand and forms of consciousness on the other.

Right is also essential for Marx in a normative sense because it prescribes how human beings are to be treated under existing political-economic arrangements. This creates a benchmark for evaluating whether existing legislation adheres to or contradicts the standard of justice of a given mode of production. Although Marx's early conception of rational law loses its transhistorical and one-sidedly "idealist" character, the distinction between *Recht* (objective right/justice) and *Gesetz* (positive law) remains central in Marx's later writings. This theoretical framework will enable Marx to criticize legislation whenever it contradicts the standard of right of a given mode of production, without succumbing to ethical relativism or legal nihilism.

2.4 A New Materialist Basis for Right

The place of right in Marx's thought is spelled out most clearly in speeches that he gave before a Cologne jury court when he and collaborators from the *Neue Rheinische Zeitung* were arraigned in the aftermath of a reactionary wave that followed the 1848 revolution across Prussia. Marx later edited and published these speeches in the *Neue Rheinische Zeitung*. The 1848 revolutions that swept through much of the European continent were marked by fierce struggles against absolute monarchy by segments of the working and middle classes, which undoubtedly had competing visions of social change. The political context of Marx's trial is worth highlighting because he questions the legitimacy of laws that were passed by the Rhine District United Provincial Diet after the March Revolution of 1848. In the first trial, Marx and his collaborators were charged with insulting the chief public prosecutor and calumniating police officers in articles that they had published in the *Neue Rheinische Zeitung*. Marx used the first political trial as an occasion to explain why the authors were justified in condemning the

actions of public officials, who sought to abolish newly acquired "bourgeois" rights, such as freedom of expression, assembly, and association, all of which were won as a result of the March Revolution. Marx argues that charging journalists for condemning the lawless actions of state officials amounted to nullifying freedom of the press, which had already received constitutional recognition:

> In general, gentlemen of the jury, if you want to apply to the press Article 367 on calumny as interpreted by the public prosecution, then you abolish freedom of the press by means of the Penal Code, whereas you have recognised this freedom by a Constitution and won it by a revolution. […] *If existing laws enter into open contradiction to a newly achieved stage of social development, then it is up to you, gentlemen of the jury, to come between the dead behests of the law and the living demands of society.* It is up to you then to anticipate legislation until it knows how to comply with social needs. […] In the present case, gentlemen, this task is facilitated for you by the letter of the law itself. You have only to interpret it in the sense of our time, our political rights, and our social needs.[51]

Marx's broader point is that the revolution of 1848 signalled a change in the material conditions of life, such that feudal relations of production were beginning to be replaced with "bourgeois" or capitalist relations of production. The struggle against feudal absolutism introduced glimpses of new property relations, a different standard of right, and a structure of rights and duties that corresponded to a nascent capitalist mode of production. A revolutionary change in the material conditions of life ushered in new laws and rights that included freedom of contract, due process, and rights to free expression, movement, and association.[52] While Marx welcomed these limited developments, he was being charged as if these revolutionary changes had not taken place.

In the second trial of the *Neue Rheinische Zeitung*, known as the "Trial of the Rhenish District Committee of Democrats," Marx and his collaborators were charged with inciting revolution in connection with a political refusal to pay taxes. Marx's first step was to argue that the laws of April 6 and 8, 1848 could not be used by the Crown to charge opponents of the regime after the Crown had annulled these laws by means of revolution. Marx insists:

> The Crown has made a revolution, it has overthrown the existing legal system, it cannot appeal to the laws it has itself so scandalously annulled. […] After

> a revolution or counter-revolution has been consummated the invalidated laws cannot be used against the defenders of these laws.[53]

After pointing out that the Crown had contradicted the letter of the law, Marx asks on what legal basis the representatives of the dying feudal society could promulgate laws that were in open contradiction with the material basis of the newly forming capitalist society. Marx saw the March Revolution of 1848 as a struggle between two modes of production, feudal and capitalist, which rest on different material foundations and are characterized by different standards of right. As Marx puts it:

> The new bourgeois society, grounded on an entirely different foundation, on a changed mode of production, was bound to seize also political power, which had to be wrenched from the hands of those who represented the interests of a declining society, a political power, whose whole structure had been built up on the soil of entirely different material conditions of society.[54]

Feudal society was based predominantly on landed property, agricultural production, and forced labour (*corvée*), whereas capitalist society presupposes industrial property, the availability of "free labour," contractual exchange, and equality before the law. Marx viewed the March Revolution of 1848 as a political struggle against absolute monarchy and feudal relations of production. Marx submits:

> The revolution was consequently directed as much against the absolute monarchy, the supreme political expression of the old society, as against the representatives of the estates, who stood for a social system that had been long ago destroyed by modern industry. […] How then was the idea conceived to allow the United Provincial Diet, the representative of the old society, to dictate laws to the new society which asserted its rights through the revolution?[55]

A recurring theme in Marx's trial speeches concerns the contradiction between the legislation passed by the United Provincial Diet and the juridical standard corresponding to the nascent capitalist mode of production. This theme is reminiscent of the contradiction between rational law and positive law that oriented Marx's formative writings.[56] Marx criticizes existing positive law on the ground that it no longer corresponds to the changed material conditions and needs of individuals. Marx appeals in his trial to the juridical standard of the capitalist mode of production in order to condemn

existing law (*Gesetz*) as unjust. Central to his new materialist conception of right is his insight that the mode of production gives rise to historically specific legal relations, including a structure of rights and duties that is characteristic of that mode of production. While Marx no longer conceived of right as a freestanding and transhistorical idea, it continues to occupy an important role in his understanding of political-economic formations and social transformation. Marx's speech to the Cologne jurors concludes with a concise recapitulation of his understanding of law and its relationship to society:

> Society is not founded upon the law; this is a legal fiction. On the contrary, the law must be founded upon society, it must express the common interests and needs of society—*as distinct from the caprice of the individuals*—which arise from the material mode of production prevailing at the given time. This Code Napoléon, which I am holding in my hand, has not created modern bourgeois society. On the contrary, bourgeois society, which emerged in the eighteenth century and developed further in the nineteenth, merely finds its legal expression in this Code. As soon as it ceases to fit the social conditions, it [i.e., positive law] becomes simply a bundle of paper. You cannot make the old laws the foundation of the new social development, any more than these old laws created the old social conditions.[57]

To be sure, critics will charge that Marx's reflections on *Recht* in these political trials cannot be taken seriously because of the context in which they took place. It was in Marx's strategic interest to appeal to principles of legality in order to secure an acquittal (and indeed, Marx and his collaborators were later acquitted). While such scepticism may be warranted, it assumes without reservation that Marx dispensed with his new materialist reflections on right once the political trials came to a successful conclusion. However, the tenor of these reflections reoccurs in *Capital* when Marx takes issue with the economic historian James William Gilbart, who argued that profit made from interest payments was a matter of natural justice. In opposition to Gilbart's invocation of natural justice, Marx defines justice as that which is in keeping with the historical mode of production. This conclusion should not come as a surprise, since Marx views the mode of production as the ultimate foundation for right. Marx argues:

> To speak here of natural justice, as Gilbart does […] is nonsense. The justice of the transactions between agents of production rests on the fact that these arise as natural consequences out of the production relationships. The

> juristic forms in which these economic transactions appear as wilful acts of the parties concerned, as expressions of their common will and as contracts that may be enforced by law against some individual party, cannot, being mere forms, determine this content. They merely express it. This content is just whenever it corresponds, is appropriate, to the mode of production. It is unjust whenever it contradicts that mode. Slavery on the basis of capitalist production is unjust; likewise fraud in the quality of commodities.[58]

While Marx opposes abstract and transhistorical conceptions of natural law, he maintains that every mode of production is characterized by a standard of right or justice that corresponds to the needs of individuals at that point in their historical development.[59]

Here it would be helpful to recapitulate Otto Gierke's formulation of *Recht* specifically in Marx's terms. Every mode of production gives rise to a system of law and a set of objective norms that regulate legal relations between individuals. The standard of right that prevails in a given mode of production prescribes the structure of rights and duties possessed by individuals within this mode of production. When Marx claims that slavery and fraud are "unjust" on the basis of capitalist production, he is not appealing to an abstract and transhistorical standard that is prescribed by natural law. Instead, Marx is suggesting that forced labour and fraud in the process of exchange contradict the standard of justice that is characteristic of the capitalist mode of production. Marx thinks this is the case because capitalist societies are based on the availability of "free" labour, the exchange of commodities of equal value in the market, and the doctrine of equal rights. Any legislation (*Gesetz*) that contradicts this standard is deemed unjust on Marx's account. Recall that Marx criticized the United Diet's attempts to give force to retroactively enacted feudal laws in the context of a newly emerging capitalist society. On the same conceptual basis, Marx also condemned slavery in the United States[60] and the violation of treaties by capitalist Britain in its aggression against "feudal" China during the Second Opium War.[61] These reflections attest to Marx's consistent adherence to a new materialist understanding of right.

Marx's critique of traditional natural law theories might leave one with the impression that he endorses some version of ethical relativism. After all, if right is simply that which accords with the existing mode production, then it would seem that Marx does not have any normative basis for criticizing social practices that are in keeping with the capitalist mode of

production but which he finds morally objectionable, such as the exploitation of labour. Nor could Marx claim, without being mired in contradiction and confusion, that capitalist society is a historical advance over feudalism or that communist society would represent a "higher" form of society than capitalism. The charge of relativism is relevant for Marx because he does not refrain from making value-laden judgements about higher and lower standards of right.[62] Nor does he abandon the idea of historical progress. Marx's understanding of historical progress relies on a transhistorical standard of evaluation. However, Marx does not derive this standard from an abstract and timeless account of natural law. Here, it would also be helpful to consider his later position in the *Critique of the Gotha Program*, where he discusses the immediate post-revolutionary transition to a communist society. There he submits that "Right (*Recht*) can never be higher than the economic structure of society and its cultural development conditioned thereby."[63]

Marx's reference here to a "higher" standard of right is clearly an appeal to a transhistorical standard of evaluation, but this standard is based on *the degree to which human freedom is realized or hindered across various modes of production*. Thus, while the exploitation of labour might be characterized as unjust according to a future communist mode of production and its standard of right, the historical development of freedom that is made possible by changing material conditions is what enables Marx to make transhistorical judgements about higher and lower standards of right. This theoretical insight is also evidenced in Marx's value-laden claim in *Capital* about the nature of human freedom. There Marx writes:

> Freedom […] can only consist in socialized man, the associated producers, rationally regulating their interchange with Nature, bringing it under their common control, instead of being ruled by it as by the blind forces of Nature; and achieving this with the least expenditure of energy and under conditions most favourable to, and worthy of, their human nature.[64]

These and similar remarks have led Carol Gould to argue persuasively that Marx assigns transhistorical value to the development of human freedom. Gould writes:

> Marx values freedom as a fundamental value which has its basis in the very nature of human activity. As the capacity for self-transcendence, it characterizes all individuals in all historical periods, though it is realized to varying

> degrees in different forms of society. Furthermore, this value of freedom provides the ground for Marx's critique of the different social forms in terms of the degree to which they realize this value.[65]

Consequently, while Marx is opposed to transhistorical accounts of right, he attributes transhistorical value to the realization of human freedom, which is what allows him to claim that capitalist society is a historical advance over feudalism and that the future communist society will be a "higher" form of society than capitalism,[66] without falling prey to the charge of ethical relativism.

A closely related charge is that Marx disavowed the use of juridical language after 1843.[67] However, what Marx gave up after 1843 was not the use of juridical language as such, but a philosophically idealist treatment of rational law that is abstracted from historically situated relations of production. Recall that Marx's critique of Hegel's *Philosophy of Right* led him to conclude that "legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life."[68]

Marx's philosophical shift from "idealism" to "historical materialism" has also led Jürgen Habermas to argue that the new materialist inversion of Hegel's philosophy of history resulted in Marx's abandonment of legality altogether. Habermas submits that Marx's insistence on the revolutionary transformation of the material conditions of life eliminated legality from the philosophical horizons of Marxism. Habermas writes:

> In this, of course, it was no longer a question of positivizing Natural Law; instead, the revolution relies on carrying out a justice extracted dialectically from natural history. […] Marx, with his critique of ideology applied to the bourgeois constitutional state and with his sociological resolution on the basis of natural rights, went beyond Hegel to discredit so enduringly for Marxism both the idea of legality itself and the intention of Natural Law as such that ever since the link between Natural Law and revolution has been dissolved. The parties of the internationalized civil war have divided this heritage between themselves with fateful ambiguity: the one side has taken up the heritage of revolution, the other the ideology of Natural Law.[69]

However, revolution and legality are not mutually exclusive phenomena on Marx's account, as Habermas's interpretation would seem to suggest.[70]

While revolutions are invariably characterized by initial periods of extralegality, the thrust of Marx's new materialist conception of right is that a revolutionary transformation in the material circumstances of life introduces new standards of right that reflect changed social and political needs. As I have tried to demonstrate, the continued functional and normative significance of *Recht* in Marx's thought is evidenced throughout *The German Ideology*, in his speeches following the March Revolution in Rhenish Prussia, and in *Capital*, where Marx claims that legal regulation is an "indispensable" element in any mode of production if it is to be stable and distinguished from mere chance or arbitrariness.[71] To be sure, Marx eschews transhistorical formulations of natural law, but this move does not entail the adoption of legal nihilism, unless legal theory is itself limited to a fixed theory of natural law. Marx's new materialist conception of right is not confined to a choice between eschewing legality in favour of revolution and relapsing into a transhistorical account of natural law. While revolutions are radically transformative events that do away with many laws and rights, new laws and rights are also introduced as a consequence of revolutionary transformation. Marx's trial speeches following the 1848 revolution are important cases in point.

2.5 Conclusion

Although Marx gave up the transhistorical treatment of rational law that oriented his early journalistic writings, *Recht* retains normative and functional significance in his new materialist outlook. While the prevailing interpretation is that Marx abandoned legality in his later writings, the interpretation offered in this chapter points to an alternative conclusion. In particular, Marx developed a novel materialist theory of right that sees the standard of right as undergoing transformation when material conditions change. In this regard, the burden of proof lies equally on those who reject the significance of right in Marx's mature writings. At the very least, the textual evidence presented in this chapter should cast preliminary doubt on the view that Marx abandoned juridical considerations after adopting a materialist outlook. Working with the theoretical presuppositions of Marx's theory of right that are outlined in this chapter, the next chapter will make the case for a transformed understanding of rights that goes beyond the "narrow horizon" of liberal justice. The historical reference point for Marx's critique of liberalism and the "bourgeois" constitutional state is the revolutionary Declaration of the Rights of Man and of the Citizen, which introduced

a catalogue of "bourgeois" rights within the concept of a constitutional state that considered individuals to be free and equal bearers of rights, in abstraction from their concrete material circumstances and life chances.

Notes

1. Karl Marx, "Debates on the Law on Thefts of Wood," MECW 1: 241.
2. W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23, no. 1 (1913): 33.
3. Otto Gierke, cited in Steven Lukes, "Can a Marxist Believe in Human Rights?," *Praxis International* 4 (1982): 341. See Otto Gierke, *Natural Law and the Theory of Society, 1500–1800*, trans. Ernest Barker (Boston: Beacon Press, 1957).
4. See William Conklin, *Hegel's Laws* (Stanford: Stanford University Press, 2008), 44.
5. Hohfeld, "Some Fundamental Legal Conceptions," 31. These correlative duties can be construed negatively to mean duties of non-interference, or they can be construed positively to denote specific entitlements that are owed by the state to members of a political community.
6. G.W.F. Hegel, *Outlines of the Philosophy of Right*, trans. T.M. Knox (New York: Oxford University Press, 2008), 20.
7. In the remark to section 43 of the *Philosophy of Right*, Hegel writes: "It was an unjustifiable and unethical proviso of Roman law that children were from their father's point of view 'things.' Hence he was legally the owner of his children, though, of course, he still also stood to them in the ethical relation of love." While Hegel does not deny the legal status of the *pater familias*, he nonetheless condemns it as unjust. Alan Brudner provides a fruitful exposition on the relationship between positive law and justice in Hegel's political thought, explaining how Hegel is able to reconcile political authority and justice; see Alan Brudner, "Hegel on the Relation Between Law and Justice," in *Hegel's Philosophy of Right: Essays on Ethics, Politics, and Law*, ed. Thom Brooks (Malden: Wiley-Blackwell, 2012), 182.
8. Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Ithaca: Cornell University Press, 1996), 20. My interpretation in this chapter of Marx's conception of right is indebted to Taiwo's pioneering work, particularly his discussion of legal rationalism and the distinction between positive law and rational law. However, my interpretation differs from Taiwo's on two fundamental points: first, I do not situate Marx's new materialist theory of right in the natural law theory tradition, and second, I argue that a coherent account of Marx's conception of right does not lead to the conclusion that right and rights would "wither away" in communist society, as Taiwo's account seems to suggest.
9. Ibid., 32.

10. Ibid., 28. A case can be made (and indeed has been made) that Marx's formative references to natural or rational law were essentially transitory, intended as a last-ditch effort to overcome the notorious heavy hand of the Prussian censors. But even if this is true, such claims do not explain the peculiar consistency with which Marx invokes rational law as a standard of normative evaluation in his early writings. To be sure, seeing the plight of the poor forced Marx to come to grips with the inherent limits of Hegelian-style rational law and eventually to develop a distinctive practical-theoretical outlook, but this scarcely undermines the sincerity of his earlier views or the need to take these views seriously.
11. While Hans Lubasz is correct in emphasizing the importance that Marx's earliest journalistic writings had for the subsequent development of his distinctive social and political theory, he is at pains to downplay the Hegelian-inspired language invoked by Marx in these early journalistic articles to criticize Prussian law. It is true, as Lubasz contends, that by the time Marx was editor-in-chief of the *Rheinische Zeitung*, his radical politics went well beyond anything resembling Hegel's defence of constitutional monarchy and concern with modern poverty. That said, Marx's use of Hegelian language did not thwart his radical politics; if anything, his journalistic experiences demonstrated the limits of that language for confronting the irrationalities of the Prussian state and eventually inspired his critique of Hegel's *Philosophy of Right*. This, at any rate, is the interpretation that I advance throughout this book, which is consistent with Marx's biographical sketch in his Preface to *A Contribution to the Critique of Political Economy*. See Heinz Lubasz, "Marx's Initial Problematic: The Problem of Poverty," *Political Studies* 24, no. 1 (1976): 24–42. Marx's political disagreements with Hegel and their significance for the rule of law and constitutionalism will be explored in Chapter 6.
12. Marx, "Comments on the Latest Prussian Censorship Instruction," MECW 1: 109 (my emphasis). Marx insists that the legislation passed in the Assembly of Estates should be made accessible to the public. In other words, legislation must fulfil a basic requirement of publicity.
13. Marx, "Debates on Freedom of the Press," MECW 1: 154.
14. Ibid., 174.
15. Ibid., 162.
16. Ibid., 155.
17. Marx attended Savigny's lectures on jurisprudence while he was a student at the University of Berlin. For a good contextual reading of Marx's early jurisprudence, see Donald Kelley, "The Metaphysics of Law: An Essay on the Very Young Marx," *American Historical Review* 83, no. 2 (1978): 350–367.
18. Marx, "The Philosophical Manifesto of the Historical School of Law," MECW 1: 204.

19. Corey Brettschneider argues that Marx's position is a version of Kant's natural law theory because Marx uses "universal reason" as a basis for political critique; see Corey Brettschneider, "From Liberalism to the End of Juridical Language: An Examination of Marx's Early Jurisprudence," *Studies in Law, Politics and Society* 18 (1998): 179. The main difficulty with Brettschneider's position is that it ignores the extent to which Hegelian philosophy had already resolved Marx's dissatisfaction with Kant's transcendental idealism. Marx emphasized the profound influence that Hegelian philosophy had on his thinking in a letter to his father written in 1837: "A curtain had fallen, my holies of holies were rent asunder, and new gods had to be installed. From the idealism which, by the way, I had compared and nourished with the idealism of Kant and Fichte, I arrived at the point of seeking the idea in reality itself. If previously the gods had dwelt above the earth, now they became its centre" (Marx, "Letter from Marx to His Father in Trier," MECW 1: 19).
20. Brudner, "Hegel on the Relation Between Law and Justice," 186.
21. G.W.F. Hegel, *Philosophy of Mind*, trans. W. Wallace and A.V. Miller (Oxford: Clarendon Press, 1971), §502, p. 248 (my emphasis).
22. Marx goes further than Hegel in rejecting the idea of a hypothetical state of nature because of the ontological primacy that he assigns to the social individual. Marx's ontology of the social individual is considered in Chapter 4, where it is contrasted with collectivist and atomistic ontologies.
23. Marx, "The Leading Article in No. 179 of the *Kölnische Zeitung*," MECW 1: 202.
24. Marx, "Debates on the Law on Thefts of Wood," MECW 1: 227.
25. Ibid., 227.
26. Ibid., 230.
27. Ibid., 230.
28. Ibid., 233.
29. Ibid., 241.
30. Ibid., 235.
31. Ibid., 257. In a footnote, Marx also cites Montesquieu, echoing the latter's view that human beings can be corrupted by bad or unjust laws.
32. Marx, "Justification of the Correspondent from the Mosel," MECW 1: 332.
33. Ibid., 349.
34. Marx, "Announcement," MECW 1: 376.
35. See Ludwig Feuerbach, *The Essence of Christianity*, trans. George Eliot (New York: Harper & Row, 1957).
36. Marx, "*Contribution to the Critique of Hegel's Philosophy of Right*," MECW 3: 90.
37. Marx, "Marx on the History of His Opinions," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 3–4.
38. For a contextual history, see Terrell Carver, "The German Ideology Never Took Place," *History of Political Thought* 31, no. 1 (2010): 107–227.

39. Marx and Engels, *The German Ideology*, MECW 5: 31.
40. Ibid., 30.
41. Ibid., 329.
42. Ibid., 330.
43. Ibid., 342 (my emphasis).
44. In its classical formulation, the *forces of production* are the raw materials, labour power, and technology that are used for the production of surplus, while *relations of production* constitute the manner in which the production process is organized, that is to say, they have to do with how surplus is extracted from the producers and the ways in which this surplus is distributed in society. The forces and relations of production form a material base that gives rise to a corresponding legal and political superstructure. Marx refers to the totality of these configurations as the *mode of production*. It is important to note that the base-superstructure metaphor was not intended as an exhaustive explanatory model of Marx's new materialistic outlook; see Marx, "Preface to *A Contribution to the Critique of Political Economy*," *Marx-Engels Reader*, 4–5.
45. Marx and Engels, *The German Ideology*, MECW 5: 323. To be sure, one can find passages in *The German Ideology* that, if taken out of context, reinforce the polar opposite view, namely that Marx and Engels were decisively opposed to right and rights. For instance, in their attempt to refute Max Stirner's charge that communists are mere preachers of "the eternal rights of man," Marx and Engels submit: "As far as law is concerned, we with many others have stressed the opposition of communism to law, both political and private, as also in its most general form as the rights of man" (ibid., 209). The passage that follows the one cited above references the authors' critiques of the form that law and rights take in a "bourgeois society" that is driven by competition and marked by substantive inequalities in wealth. In general, the presence of such conflicting passages in Marx's work attests to the incompleteness of *The German Ideology* as a text and reaffirms my earlier point about the importance of considering Marx's reflections on right and rights as a whole, particularly in political contexts where their respective fates were critically at stake.
46. Louis Althusser argues that *The German Ideology* marks an "an unequivocal epistemological break" in Marx's work, where the "bourgeois" humanism of Marx's youthful writings was rejected in favour of a scientific social theory. He also argues that Marx was never a Hegelian: see Louis Althusser, *For Marx*, trans. Ben Brewster (New York: Vintage, 1970), 33–35. For two important interpretations that stress the continuity of Marx's writings along with his Hegelian heritage, see Georg Lukács, *Ontology of Social Being, Volume 2: Marx's Basic Ontological Principles*, trans. David Fernbach (London: Merlin, 1978), 11; Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1969), 40.

47. Engels, "Letter to Mehring July 14, 1893," MECW 50: 164.
48. Marx and Engels, "Manifesto of the Communist Party," *Marx-Engels Reader*, 487.
49. Marx, *The Poverty of Philosophy*, MECW 6: 150.
50. Marx, *Capital Volume 3*, MECW 37: 779–780 (my emphasis).
51. Marx, "The First Trial of the *Neue Rheinische Zeitung*," MECW 8: 314 (my emphasis).
52. It should be noted that historically the Rhine District came under the early influence of the Napoleonic Code, which was politically imposed following Prussia's defeat in the Napoleonic Wars. Marx always held the view that the Napoleonic Code was a "higher" law than Prussian law because it corresponded more adequately to the ideals of the nascent bourgeois society and the capitalist mode of production.
53. Marx, "The Trial of the Rhenish District Committee of Democrats," MECW 8: 324.
54. Ibid., 327.
55. Ibid.
56. Taiwo, *Legal Naturalism*, 77–78. Taiwo argues that Marx adopts a natural law perspective in the "Tax-Refusal Trial," but he acknowledges that there is no explicit reference to natural or rational law terminology in Marx's defence speech. Taiwo's attempt to interpret Marx's trial speech through the prism of natural law theory runs into the difficulty of having to explain why standards of right are historically variable and subject to transformation in the first place.
57. Marx, "The Trial of the Rhenish District Committee of Democrats," 327–328 (my emphasis).
58. Marx, *Capital Volume 3*, 337–338. Marx made similar criticisms of Pierre-Joseph Proudhon for invoking the concept of "eternal justice"; see Marx, *Capital Volume 1*, 84 (note 2).
59. Marx's historically informed conception of "modes of production" mirrors Hegel's account of "Ethical Life," that is, the view of society as a historically concrete normative order. For an excellent discussion of the social historicity that sets Marx's account of justice and right apart from rival liberal and especially natural law accounts, see Sean Sayers, "Marx as a Critic of Liberalism," in *Constructing Marxist Ethics*, ed. Michael J. Thompson (Leiden: Brill, 2015), 144–164. Sayers shows the extent to which Marx's historical account of justice and right was influenced by Hegel but also identifies the ways in which Marx goes beyond Hegel. Allen Wood emphasizes Hegel's influence on Marx's historically situated account of justice and right but does not allow for the applicability of these concepts in the communist society of the future. See Allen Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (1972): 257.

60. Marx drafted an address to Abraham Lincoln in 1864 on behalf of the International Workingmen's Association, congratulating Lincoln on his re-election and determination to end slavery in America. In the same address, Marx praised America's political achievements and acknowledged that is the country where, "hardly a century ago the idea of one great Democratic Republic had first sprung up, whence the first Declaration of the Rights of Man was issued, and the first impulse given to the European revolution of the eighteenth century" (Marx, "Address of the International Workingmen's Association to Abraham Lincoln," MECW 20: 19).
61. Marx referred to the Second Opium War as "this most unrighteous war" (Marx, "English Atrocities in China," MECW 15: 234).
62. In this regard, Allen Wood has difficulties explaining Marx's willingness to make normative judgements with reference to any standard of right. See Allen Wood, *Karl Marx*, 2nd ed. (New York: Routledge, 2004), 152.
63. Marx, "Critique of the Gotha Program," *Marx-Engels Reader*, 531.
64. Marx, *Capital Volume 3*, 807.
65. Carol Gould, *Marx's Social Ontology* (Cambridge, MA: MIT Press, 1980), 169.
66. Karl Marx, *Capital Volume 3*, 806.
67. Brettschneider, "From Liberalism to the End of Juridical Language," 203.
68. Karl Marx, Preface to *A Contribution to the Critique of Political Economy*, *Marx-Engels Reader*, 3–4.
69. Jürgen Habermas, "Natural Law and Revolution," in *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973), 112–113. See also Habermas's most recent reassertion of his position in *Between Facts and Norms*, trans. William Rehg (Cambridge: Polity Press, 1996), xli.
70. I consider Marx's critique of liberalism, class ideology, and "bourgeois rights" in the next chapter.
71. Karl Marx, *Capital Volume 3*, 779–780.

CHAPTER 3

Marx's Radical Critique of Liberalism and the Supersession of Bourgeois Rights

Right can never be higher than the economic structure of society and its cultural development conditioned thereby.[1]

Whereas Chapter 2 sought to extrapolate a theory of right from Marx's work as a whole, the present chapter is concerned with his understanding of individual rights and their legal expression in capitalist society. In keeping with the terminology that was adopted in the previous chapter, individual or "bourgeois" rights will be considered as falling in the category of subjective right, that is, legal claims possessed by individuals within a system of law. After outlining Marx's treatment of rights, beginning with his formative reflections in "On the Jewish Question," I situate his account of rights in the broader context of his new materialist social theory. Although Marx remains a radical critic of liberalism, and of certain liberal rights in particular, his critique is directed primarily against the right to capitalist private property because this right facilitates class domination and hinders the free development of individuals. Contrary to conventional interpretations, Marx took the recognition of equal rights as the starting point for his assessment of modern freedom. Although he shows the contradictions and limitations of rights in capitalist society, he sees these rights as preconditions for communist society. After entertaining prominent objections to this view, I draw on the historical experience of the Paris Commune and

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
https://doi.org/10.1007/978-3-030-30195-8_3

the neglected relevance of Marx's dialectical method in order to explain why a transformed account of rights is presupposed in Marx's account of communist society.

Karl Marx continues to be regarded as one of the most powerful critics of liberalism in the history of Western political thought. Liberalism is of course a broad term that usually encompasses a diversity of political outlooks and movements, but it will be understood here according to its commitment to the freedom and equality of individuals, whose dignity and moral worth are secured primarily through the device of rights. Classical liberalism champions free trade, private ownership of the means of production, and unregulated market exchange between mutually disinterested commodity owners as the most natural and desirable model of political-economic organization. These institutional configurations also form the basis for Marx's critique of bourgeois political economy in *Capital*. As difficult as it is to decouple the ideology of classical liberalism from the historical development of capitalism in the eighteenth and nineteenth centuries, my approach to liberalism focuses on its philosophical cornerstone, namely its commitment to the freedom of individuals as bearers of equal rights. A host of prominent liberal philosophers and economists have argued that private ownership of the means of production and unfettered exchange, including the buying and selling of labour power, are indispensable institutional features of any kind of liberalism.[2] However, such a myopic rendering of liberalism remains firmly rooted in the property-oriented account of freedom that C.B. Macpherson poignantly termed "possessive individualism."[3] The primary objective of this chapter is to inquire into the fate of individual rights in Marx's social theory, within as well as beyond the horizon of capitalist society and bourgeois right, with the task of decoupling individual rights from the logic of possessive individualism to be explored in Chapter 4.

Marx views rights as part and parcel of a system of law that corresponds to a specific mode of production and its form of property relations. When discussing "bourgeois" or liberal rights, Marx is concerned with the particular entitlements possessed by individuals in the context of bourgeois or capitalist society. Marx saw liberal rights as the historical achievements of the seventeenth and especially eighteenth-century bourgeois revolutions, and he took the American and French revolutions as historical exemplars. Such liberal rights included the right to life, liberty, and security of the person, the right to own property, equality before the law, universal (male) suffrage, freedom of conscience, expression, and movement, due process, as well as rights against seizure of property and goods. Even if one accepts that

these liberal rights were the achievements of bourgeois revolutions against feudal economic arrangements and absolutist political regimes, it would be a mistake to conclude that rights have everywhere and always been the product of bourgeois revolutions. Feudalism, after all, also had a system of law and a corresponding structure of rights and duties, although these rights and duties could hardly be called equal in any meaningful sense, since feudalism was defined by privilege and direct domination. The decisive difference between feudalism and capitalism, for Marx, is that whereas the former was based on a hierarchy of privilege and on direct domination, the latter is characterized by legal equality and formal freedom. Both modes of production, however, exhibited their own forms of positive law. The inability to distinguish between the specific forms that rights take under different modes of production provided the impetus for the critique by Marx and Engels of Max Stirner in *The German Ideology*:

> Our Sancho [Max Stirner] first of all transforms the struggle over privilege and equal right into a struggle over the mere "*concepts*" privileged and equal. In this way he saves himself the trouble of having to know anything about the medieval [i.e., feudal] mode of production, the political expression of which was privilege, and the modern [i.e., capitalist] mode of production, of which *right* as such, *equal right*, is the expression, or about the relation of these two modes of production to the legal relations which correspond to them.[4]

Stirner was taken to task by Marx and Engels for his conceptual obfuscation and his failure to recognize the historicity of law and rights. The distinctive feature of capitalist society is that individuals are viewed as free and equal persons in abstraction from their concrete material circumstances. Marx's work exhibits a clear conceptual demarcation between the arbitrary privileges that characterized feudal society and the catalogue of equal rights that are presupposed in the context of a liberal capitalist society. Marx will, of course, make a point of exposing the class domination and exploitation that are concealed beneath liberal justice and its catalogue of rights, but he never loses sight of this important difference between a society that is based on privilege and direct domination and one in which individuals are viewed as free and equal rights bearers. In recent years, Jeremy Waldron has argued that liberal rights are best conceived as "aristocratic privileges" that were universalized over time as a result of egalitarian political movements.[5] Waldron's conclusion is rooted in the view that liberalism presupposes a

decentralized feudal heritage, one in which all rights bearers are conferred the status of aristocrats whose property becomes analogous to the castles and fortresses of the feudal era. Marx's formative essay, "On the Jewish Question," was written in a context in which a historically marginalized group—the Jewish community in Prussia—was petitioning for equal civil and political rights. It is to this formative and frequently cited essay that I now turn in order to assess its implications for Marx's attitude towards rights in general and to bourgeois rights in particular.

3.1 "On the Jewish Question": Marx's Selective Critique of Bourgeois Rights

Marx's earliest appraisal of the Declaration of the Rights of Man and of the Citizen, in "On the Jewish Question," is an appropriate starting point for an inquiry into the fate of individual rights because critics normally point to this work as the clearest evidence of Marx's disdain for rights. "On the Jewish Question" was written in 1843, at which point Marx was not yet well acquainted with political economy and the decisive role that class struggle played in revolutionary social transformation. Marx would recount in a letter to Arnold Ruge, co-editor of the *Deutsch–Französische Jahrbücher*, that he was approached by members of the Jewish community with a request to endorse a petition in favour of granting equal civil and political rights to Jews in Rhenish Prussia. In addition to opposing Bruno Bauer's argument against the political emancipation of Jews (more about which below), Marx makes it clear that "the point is to punch as many holes as possible in the Christian state and smuggle in *rational* views as much we can. That must at least be our aim—and the bitterness grows with each rejected petition."[6] Marx sympathized with the plight of the Jewish community, as their petitions were routinely rejected by the Prussian government. His personal aversion towards Judaism did not prevent him from interpreting the demand for equal rights by the Jewish community as a rational demand, meaning that he viewed the demand for equal civil and political rights as a freedom-enabling project.

In "On the Jewish Question," Marx takes issue with Bruno Bauer, his former mentor and fellow left Hegelian, who argued that Jews could not be granted equal civil and political rights unless they were willing to renounce their religious commitments to Judaism. Bauer's conclusion was based on the faulty assumption that Judaism stood as a practical obstacle to the granting of rights by a modern liberal state. On Bauer's account, the modern

state was already becoming secular and devoid of religion, yet the Jewish community sought the legal recognition of civil and political rights while clinging to an idiosyncratic and outdated faith. Bauer interpreted this demand on the part of the Jewish community as a yearning for a privileged status that was not afforded even to Christians. Marx would go on to demonstrate the underlying flaws in Bauer's argument while also revealing the limitations of "political" emancipation. Political emancipation, for Marx, refers to emancipation from formally inscribed privileges for religion and private property in the context of a liberal constitutional state. In the constitution of the liberal state, no privileged status is granted to any particular religion, while birth and property qualifications, which were the legal basis of feudal society, are no longer formal obstacles to political participation. Political emancipation also involves the state's recognition that individuals possess equal legal rights, and that these rights can be exercised against the state just as much as they can be exercised against other individuals. The bearer of equal rights is presented as the justificatory basis of the modern liberal state, which abstracts from empirical inequalities between individuals in civil society.[7]

It is important to note that Marx distinguishes between two categories of rights early in his essay, both of which fall ambiguously under the title of the rights of man. These rights include political rights, which can only be exercised in association with others, and the "so-called rights of man," which Marx views disparagingly as boundary markers that separate atomistic individuals in a broadly egoistic market society. Marx's distinction between political rights and the "so-called rights of man" plays on the Declaration's dual reference to the rights of the citizen and the rights of man. Marx writes:

> These rights of man are, in part, *political* rights, which can only be exercised if one is a member of a community. Their content is *participation* in the *political* life, in the political life of the community, the life of the state. They fall in the category of *political liberty*, of *civil rights,* which as we have seen do not at all presuppose the consistent and positive abolition of religion; nor, consequently, of Judaism.[8]

Marx regards the granting of political rights as one of the most progressive achievements of the bourgeois revolutions. His essay advances from an internal critique of Bauer's assertions against the political emancipation of

Jews to a sustained critique of the "so-called rights of man" as they operate in civil society, leaving the category of political rights unscathed.

In his attempt to refute Bauer's claim that the liberal constitutional state presupposes the renunciation of religion, Marx points to the United States as the only country where the state had been formally emancipated from the influence of religion.[9] However, religion was not abolished in the United States; instead, it was relegated to the private sphere—the sphere of civil society—where it continued to prevail. Marx writes:

> The incompatibility between religion and the rights of man is so little manifest in the concept of the rights of man that the *right to be religious*, in one's own fashion, and to practise one's own particular religion, is expressly included among the rights of man. The privilege of faith is a *universal* right of man.[10]

The enduring and vigorous influence of religion in America reveals the fundamental error in Bauer's assertion that Jews could not be granted equal rights so long as they maintained their religious convictions. The liberal state presupposes the constitutional protection of religious worship rather than its renunciation, so there could be no legitimate grounds for denying civil and political rights to Jews, any more than these rights could be denied to other citizens.[11] The internal juridical logic of political emancipation requires that Jews be granted these rights as free and equal citizens of the liberal state. Any liberal state that fails to secure equal civil and political rights for its citizens would thereby violate its own standard of right. It is worth noting that Bauer and Marx were both critics of organized religion, yet whereas Bauer saw religious faith as a practical obstacle to the granting of rights by the liberal state, Marx arrived at the opposite conclusion and supported the political emancipation of Jews.

After disputing Bauer's assertion that Jews must renounce their religious convictions before they could be granted equal rights, Marx makes the important observation that religious influence is relegated to civil society by the liberal state, along with the influence of private property and such arbitrary distinctions as inheritance, social status, education, and occupation. Marx notes that some states in America went so far as to abolish the property qualification for (male) democratic participation and representation, which he recognizes as a victory for the *demos* against propertied wealth.[12] In other words, Marx unambiguously endorses universal suffrage and the right to political participation. However, despite the avowed claims of the liberal state to treat all individuals as free and equal citizens before

the law,[13] Marx notes that "the state, none the less, allows private property, education, occupation, to act after their own fashion. […] Far from abolishing these effective differences, it only exists insofar as they are presupposed."[14] The liberal state claims its universality by pursuing the public good in abstraction from particular material interests. In practice, however, the liberal state does not eliminate any of these particular interests insofar as it presupposes their continued existence in civil society. This observation demonstrates for Marx, that while the state can formally emancipate itself from the influences of religion and private property, this does not mean that individuals have been emancipated from the power of religion and private property in their everyday lives. There remains a deep-seated contradiction between the free and equal status of citizens in the liberal state and their empirical existence as warring egoists in civil society, in which individuals are unequal and unfree insofar as they remain dependent on private property and the imperatives of the market.[15] Marx asserts that "the limits of political emancipation appear at once in the fact that the state can liberate itself from a constraint without man himself being really liberated; that a state may be a free state without man himself being a free man."[16] Marx's reference to "constraint" is especially instructive here because it demonstrates his concern with direct (personal) as well as indirect (impersonal) obstacles to the realization of human freedom. The distinction between direct and indirect constraints to human freedom also mirrors the nuanced relationship between political emancipation and human emancipation. It is in the context of distinguishing between political and human emancipation that Marx formulates his critique of the "so-called rights of man" as they operate in civil society. What is most striking about Marx's critical assessment of the rights of man, however, is his decision to focus exclusively on the inalienable rights of equality, liberty, security, and property in the Declaration of the Rights of Man and of the Citizen.[17] These inalienable rights of man, taken together with the political rights that Marx leaves unscathed in the opening parts of his essay, were historical achievements of the American and French revolutions. Bearing this in mind, Marx shows that these "so-called rights of man" are characterized by the limitations that necessarily befall bourgeois society. Aside from referring to the constitutional protection of religious conscience in America to refute Bauer's arguments against the political emancipation of Jews, the "inalienable" rights of equality, liberty, security, and property form the crux of Marx's critique in "On the Jewish Question" and for good reason. At no point does Marx argue against the right to a free press,[18] freedom of conscience,

due process, association, movement, or freedom from arbitrary detention and oppression, nor does he oppose the rights of citizens to democratically administer their own political affairs. Marx's chief complaint is that the scope of democratic citizenship and political rights becomes subservient to the "rights of man," that is, the interests of private property and freedom of contract. Marx writes: "The political liberators reduce citizenship, the *political community*, to a *mere* means for preserving these so-called rights of man; and consequently [...] the citizen is declared to be the servant of egoistic man."[19] We will see that Marx takes political rights, together with the "so-called rights of man," for granted in modern societies that have discarded the vestiges of arbitrary privilege and direct domination. It is the content of these rights that will change in the communist society of the future.

Marx goes on to show that the inalienable rights of liberty, equality, property, and security cannot rise above the contradictions and limitations of bourgeois civil society. The right to liberty, for example, amounts to little more than protection of the atomistic and competitive individual from physical harms done by other competing individuals in the market.[20] Liberty is thus conceived as a negative right and involves boundary-drawing against competing individuals, such that each views the other as a potential obstacle and threat. The right to equality is depoliticized inasmuch as it does not extend beyond the formal protection of the atomistic individual from external impediments and constraints imposed by law. Liberal constitutionalism regards rich and poor alike as equals insofar as it abstracts from the empirical inequalities that prevail in civil society. The right to property authorizes individuals to amass and exchange private property without concern for the welfare of others. Security is also framed in terms of the legal protection of private property and the enforcement of egoistic claims against rival property owners.[21] Given the serious limitations that he identifies with this category of rights, Marx concludes:

> None of the supposed rights of man, therefore, *go beyond* the egoistic man, man as he is, as a member of civil society (*Bürgergesellschaft*), that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private caprice.[22]

Most commentators jump to the conclusion that these remarks prove, beyond a reasonable doubt, that Marx saw no positive value in rights. To cite one prominent example, Allen Buchanan infers from this passage that

"the implication is that in communism, where the concept of the egoistic, isolated individual is no longer applicable, the correlative concept of man as citizen along with the notion of rights of the citizen will also no longer apply."[23] While it is highly doubtful that Marx had a theoretically worked-out account of communism when he wrote "On the Jewish Question," the main problem with Buchanan's interpretation is that it collapses Marx's nuanced distinction between political rights and the "so-called rights of man," while overlooking Marx's declaration that political emancipation (the granting of equal rights as such) constitutes a progressive step in the struggle for human emancipation. Marx writes: "*Political* emancipation certainly represents a great progress. It is not, indeed, the final form of human emancipation, but it is the final form of human emancipation *within* the framework of the prevailing social order."[24] The obstacle to human emancipation consists not in the granting of equal rights by the liberal state, which represents great progress, but in the continued influence of religion and private property within civil society. Why would Marx praise political emancipation as a progressive achievement if he sees no value in rights? One could rephrase the question by asking: What reasons would Marx have for supporting a petition in favour of equal civil and political rights for the Jewish community if he sees rights as obstacles to a fuller version of human emancipation? "On the Jewish Question" was written with the express intention of supporting the political emancipation of Jews against the likes of Bruno Bauer, who argued that Jews could not be granted equal rights unless they were willing to renounce their faith.

Although the ideals of liberty and equality are undermined by the persistence of inequality and dependence in civil society, the recognition of legal personhood and the protection of individual rights before the law constitute major victories over the arbitrary will of the feudal lord and the direct relations of domination that preceded bourgeois society and its legal relations.[25] Political emancipation is limited, however, since the liberal state, in emancipating itself from formally inscribed privileges for religion and private property, does not resolve any of these contradictions in civil society. Bourgeois society, however, cannot resolve these contradictions, leading Marx to argue that the "the *political* revolution [i.e., political emancipation] dissolves civil society into its elements without *revolutionizing* these elements themselves or subjecting them to criticism."[26]

At this point in his intellectual development, influenced as it was by Ludwig Feuerbach's transformative criticism of Hegel, Marx insists that the contradictions of political emancipation will be superseded when the

private individual retrieves his or her individual powers as social powers rather than projecting these powers onto the *external* state.[27] The act of retrieving one's social powers in everyday life would mark the end of the individual's estranged and contradictory existence as a moral person in the sphere of politics and as an egotist in the sphere of civil society.[28] However, the act of retrieving one's abstract powers as genuine social powers—what Marx would later refer to as self-determination in the context of community—does not preclude the recognition of one's rights as a member of a community or an association. Far from dispensing with rights, Marx takes for granted the idea that equal legal rights[29] are a precondition for modern freedom, a point that is borne out by his subsequent writings. The historic achievement of political emancipation consists in the recognition that all individuals residing in a liberal constitutional state are entitled to equal rights. The decisive lesson of "On the Jewish Question," therefore, is that political emancipation represents a *necessary* condition for human emancipation, though not a *sufficient* one.

Marx revisited the so-called Jewish Question in *The Holy Family*, a polemic jointly written with Frederick Engels against Bruno Bauer and his fellow Young Hegelians. It is important to note that Marx's position on the subject of Jewish emancipation remained unchanged. Notwithstanding his troubling equation of Judaism with the commercial ethos of bourgeois society, Marx maintains that the emancipation of Jews accords with the broader task of emancipating human beings from the "money system." His call for the human emancipation of Jews is not a demand for the abolition either of individual rights[30] or of Judaism, as some commentators have wrongly suggested.[31] Marx's rhetorical conflation of Judaism with commercial activity should not be taken as an occasion for misinterpreting his arguments out of context. Marx writes:

> The emancipation of the Jews into human beings, or the human emancipation of Jewry, was therefore not conceived, as by Herr Bauer, as the special task of the Jews, but as a general practical task of the present-day world, which is *Jewish* to the core. It was proved that the task of abolishing the essence of Jewry is actually the task of abolishing the *Jewish character of civil society*, abolishing the inhumanity of the present-day practice of life, the most extreme expression of which is the *money system*.[32]

Marx recapitulates his position on human emancipation by stressing that in a number of liberal states Jews and Christians have already been politically

emancipated, meaning that they have already been granted equal civil and political rights. While political emancipation represents great progress in this respect, it does not amount to human emancipation. The abolition of formal constraints at the level of the liberal state, the most important of these being private property and the "money system," does not amount to the abolition of these same constraints in civil society. While political emancipation falls short of human emancipation, it is conceived of by Marx as a necessary step for human emancipation.

It is precisely this progressivist line of reasoning that informs Marx's subsequent inference that states that have yet to emancipate Jews *politically* should be ranked as comparatively "underdeveloped." Marx writes:

> The Jews (like the Christians) are fully politically emancipated in various states. Both Jews and Christians are far from being humanly emancipated. Hence there must be a difference between political and human emancipation. The essence of political emancipation, i.e., of the developed, modern state, must therefore be studied. On the other hand, states which cannot yet politically emancipate the Jews must be rated by comparison with the perfected political state and shown to be under-developed states.[33]

Aside from viewing political emancipation as a precondition for human emancipation, Marx takes the side of Jewish commentators against Bauer on the question of Jewish emancipation. Marx notes that political emancipation and recognition of the "rights of man" go hand in hand. It follows that the Jewish community's plea for the recognition of their rights to property, freedom of contract, employment, and movement must also be respected without exception. Although Marx continues to view these "so-called rights of man" as boundary markers in an egotistic market society, this is the legal expression of capitalist society, and Jews are just as much entitled to the enjoyment of these rights as Christians:

> As it was the product of civil society driven beyond the old political [i.e., feudal] bonds by its own development, the modern state, for its part, now recognised the womb from which it sprang and its basis by the declaration of the rights of man. Hence, the political emancipation of the Jews and the granting to them of the "rights of man" is an act the two sides of which are mutually dependent. Herr Riesser correctly expresses the meaning of the Jews' desire for recognition of their free humanity when he demands, among other things, the freedom of movement, sojourn, travel, earning one's living,

> etc. These manifestations of "free humanity" are explicitly recognised as such in the French Declaration of the Rights of Man.[34]

At no point does Marx's critique of these "so-called rights of man" and their limitations in bourgeois society undermine his unequivocal support for the emancipation of Jews. In this respect, Shlomo Avineri is correct in insisting:

> Marx's criticism of bourgeois society and of the role the Jews play in it, according to his view, does not prevent him from demanding full civil and political rights for the Jews; not because Jewish emancipation signifies the journey's end, but because those rights are in accordance with the [juridical] premises of bourgeois society itself.[35]

Notwithstanding this prescient observation, however, Avineri leaves readers with a somewhat ambiguous conclusion regarding the fate of rights in Marx's early writings. Avineri writes that "'The Rights of Man' (i.e., 'political emancipation'), have first of all to be achieved in order to be transcended."[36] This conclusion is doubly confusing because it does not disentangle Marx's treatment of political rights from his treatment of the "so-called rights of man." Moreover, Avineri's use of the word "transcended" implies that rights will be left behind as a matter of course, which raises the question of why they would need to be achieved in the first place. To be sure, much hinges on what is meant by the word "transcended." Avineri has gone to far greater lengths than most scholars to emphasize the extent to which Marx's thought was indebted to Hegel's dialectical philosophy, particularly in its use of *Aufhebung*.[37] However, it remains unclear on Avineri's account whether rights are "superseded" or "transcended" in Marx's early writings.[38]

What is clear from Marx's early reflections on civil and political rights is that liberalism has reached its apex in bourgeois or capitalist society. However, the contradictions of capitalist society cannot be resolved within its narrow juridical horizon. The chief issue for Marx, then, is not that liberalism has gone too far with its declaration of equal rights (in this regard, Marx refers to liberal thinkers ironically as "political liberators"); rather, it has not gone nearly far enough in achieving human emancipation. One of the shortcomings of these early reflections on rights is that Marx is unable to specify how human emancipation can be realized and what this would entail at an institutional level. This lacuna can be explained in part by the

absence of a historically grounded theory of revolutionary change in Marx's writings between 1843 and 1845. Human emancipation, which Marx will associate in later writings with the free development of individuals, requires a revolutionary change in the material conditions of life. If Marx is right, then a revolutionary transformation of this sort would lead to the development of a new standard of right and a corresponding structure of rights for individuals in communist society. In keeping with Marx's new materialistic conception of right, rights would undergo a dialectical transformation in communist society. However, before this contention can be elaborated and defended, Marx's mature reflections on formal bourgeois rights must be surveyed.

3.2 Marx's Assessment of Rights in the *Grundrisse* and in *Capital*

Marx's preliminary outline of *Capital* was published posthumously as the *Grundrisse*. The *Grundrisse* is an important work in part because it revisits the central themes of estrangement and emancipation that animated Marx's formative writings. The major difference between the *Grundrisse* and Marx's earlier reflections on rights is that his treatment of rights is now grounded in a careful historical analysis of different modes of production. He contrasts legal relations under capitalism with direct relations of domination that prevailed under slavery and feudalism, and in the patriarchal community and traces the historical emergence of the juridical person (i.e. the abstract bearer of formal rights) to the development of exchange relations and the concomitant expansion of formal freedom.[39]

The starting point of Marx's analysis of capitalist society is the individual producer conceived of as a juridical person, a starting point that differs in important ways from all other modes of production, in which human beings were relegated to the status of objects or things. Marx writes:

> The first presupposition, to begin with, is that the relation of slavery or serfdom has been suspended. Living labour capacity belongs to itself, and has disposition over the expenditure of its forces, through exchange. Both sides confront each other as persons. *Formally,* their relation has the equality and freedom of exchange as such. As far as concerns the legal relation, the fact that this form is a mere *semblance,* and a *deceptive semblance,* appears as an *external* matter. […] Nevertheless, *in this way everything touching on the individual, real person leaves him a wide field of choice, of arbitrary will, and*

> *hence of formal freedom*. In the slave relation, he belongs to the *individual, particular* owner, and is his labouring machine. As a totality of force-expenditure, as labour capacity, he is a thing (*Sache*) belonging to another, and hence does not relate as subject to his particular expenditure of force, nor to the act of living labour. In the serf relation he appears as a moment of property in land itself, is an appendage of the soil, exactly like draught-cattle.[40]

Although Marx here maintains that formal rights are actually a "deceptive semblance" under capitalist production, he assumes without any reservation that the recognition of juridical personhood rules out direct relations of domination, which characterized all preceding modes of production. There are thus two dimensions or strands to Marx's assessment of formal or legal rights. On the one hand, Marx sees the recognition of formal rights as a necessary historical advance over pre-capitalist modes of production, in which human beings were personally subjugated to other individuals. On the other hand, he suggests that formal rights also serve an ideological function in capitalist society because they conceal exploitative relations of production in a society in which individuals are deemed free and equal. Although Marx will identify the exploitative basis of capitalist production, it is a mistake to conclude that he views formal rights merely as semblances or facades. Similarly, while his analysis of commodity fetishism[41] will demonstrate that a social relation between persons is transformed into a relation between things, his point here is that capitalist production endows commodities with independent and fetish-like characteristics, while reducing the status of persons to that of things, that is, to beings which do not exercise control over the products of their labour and are therefore not in a position to consciously determine their own lives. Nowhere does Marx suggest that formal rights are to be undone. This becomes all the more evident with the contrast that he repeatedly draws between capitalist society and preceding modes of production, which relied on direct domination, beginning with antiquity and its most representative thinker, namely Aristotle.

Scholars tend to overlook the significance of Marx's discussion in Chapter 1 of *Capital* concerning Aristotle's inability to arrive at a unifying concept of value. Despite Aristotle's insight that value requires some standard or measure of equality, his analysis came to a halt as soon he chanced upon two qualitatively distinct commodities (houses and beds) that could nonetheless be exchanged. Marx explains that Aristotle could not conceive

of human labour as the equalizing measure of value because he lived in a society that was defined by slavery and therefore by inequalities between individuals and between their respective labour powers. The ancient world lacked the concept of juridical personhood, since slaves, women, and children were all viewed by positive law, albeit in different ways, as the property of their masters or fathers. Marx writes:

> There was, however, an important fact which prevented Aristotle from seeing that, to attribute value to commodities, is merely a mode of expressing all labour as equal human labour, and consequently as labour of equal quality. Greek society was founded upon slavery, and had, therefore, for its natural basis, the inequality of men and of their labour powers. The secret of the expression of value, namely, that all kinds of labour are equal and equivalent, because, and so far as they are human labour in general, cannot be deciphered, until the notion of human equality has already acquired the fixity of a popular prejudice. This, however, is possible only in a society in which the great mass of the produce of labour takes the form of commodities, in which, consequently, the dominant relation between man and man, is that of owners of commodities.[42]

Marx acknowledges that juridical personhood constitutes a positive advance for the freedom of individuals, which is also why he takes abstract commodity producers as his starting point in *Capital*. He speaks of independent commodity producers, whose social relations are mediated through the exchange of commodities of equal value in the market.[43] Elsewhere, he cautions readers:

> In the form of society now under consideration, the behaviour of men in the social process of production is purely atomic. Hence their relations to each other in production assume a material character independent of their control and conscious individual action. These facts manifest themselves at first by products as a general rule taking the form of commodities.[44]

Marx's depiction of abstract commodity producers is reminiscent of Hegel's description of abstract persons as bearers of formal rights in the *Philosophy of Right*. Hegel subsequently demonstrates that the logical presupposition of abstract personhood is, in fact, the institutionalization of equal formal rights. Marx builds upon Hegel's (Kantian-inspired) formulation of the person to describe the exchange of commodities on the market:

> In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognise in each other the rights of private proprietors.[45]

The exchange of commodities assumes that agents enter into voluntary contractual relations and respect each other's rights as proprietors—that is, as owners—of their person and of their property.

Marx extends his analysis of exchange to describe the formal contractual relation between wage-labourers and capitalists on the market. As soon as labour power becomes a commodity for sale on the market, it is assumed that buyers and sellers of labour power meet as equals and that the worker maintains sovereignty over his person; that is, the worker cannot sell his labour power indefinitely to the capitalist, for this would make him into the private property of another individual. Marx observes:

> In order that our owner of money may be able to find labour-power offered for sale as a commodity, various conditions must first be fulfilled. *The exchange of commodities of itself implies no other relations of dependence than those which result from its own nature*. On this assumption, labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it, as a commodity. *In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity for labour, i.e., of his person. He and the owner of money meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law.* The continuance of this relation demands that the owner of the labour-power should sell it only for a definite period, for if he were to sell it rump and stump, once for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity.[46]

In a footnote to this passage, Marx approvingly cites section 67 of *The Philosophy of Right*, where Hegel recognizes that the achievement of abstract right consists in the recognition of personhood; this rules out the possibility of regarding persons as things, just as it prohibits the alienation of labour power for an indefinite period of time. Once again, Marx acknowledges the concept of juridical person as a dialectical advance, that is, as something

that should be retained and raised to a higher level.[47] He will demonstrate, however, that the formal rights of persons are actively negated in the sphere of capitalist production—as distinct from the sphere of exchange between independent commodity producers—because in capitalist production the *capitalist class* dominates and exploits *the class of wage-labourers*. Far from dispensing with the idea of formal rights, however, Marx will demonstrate how liberalism's celebrated ideals of freedom and equality turn into their opposites in the sphere of capitalist production.

Marx's attempt to uncover the exploitative nature of capitalist production begins with his characterization of the sellers of labour power as free in two senses. Marx writes:

> For the conversion of his money into capital, therefore, the owner of money must meet in the market with the free labourer, free in the double sense, that as a free man he can dispose of his labour-power as his own commodity, and that on the other hand he has no other commodity for sale.[48]

On the one hand, workers enjoy equal formal rights and have ownership of their labour power. On the other hand, short of starvation, these same workers are compelled to sell their labour power to capitalists because they are also "free" from owning and having access to the means of production. Marx also argues that the unequal relation between wage-labourers and capitalists is historically situated and is the product of social and economic circumstances rather than nature:

> This relation has no natural basis, neither is its social basis one that is common to all historical periods. It is clearly the result of a past historical development, the product of many economic revolutions, of the extinction of a whole series of older forms of social production.[49]

After outlining the immediate disparities between buyers and sellers of labour power, Marx calls attention to a shift in his analysis from the formal realm of exchange to the sphere of production, where capital actively exploits and dominates labour through the extraction of surplus value.[50] However, before he considers the sphere of production, Marx leaves readers with a satirical summary of the inalienable rights of man that underpin the sphere of exchange[51]:

> This sphere that we are deserting, within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself.[52]

These remarks mirror Marx's critique of the "so-called rights of man" in "On the Jewish Question" and in *The Holy Family*. Just as the move from the liberal state to civil society revealed the persistence of inequality and dependence in "On the Jewish Question," the shift from relations between independent commodity producers to capitalist relations of production exposes the substantive inequality and domination that characterize the latter. Marx draws attention to the profound change that is experienced by the worker upon entry into the sphere of capitalist production, referring to this transformation as "a change in the physiognomy of our [i.e., the proletariat's] dramatis personae."[53] Paying particular attention to the struggle of workers to limit the length of the working day, Marx demonstrates once again the normative limits of the "so-called rights of man" as they operate in capitalist society:

> It must be acknowledged that our labourer comes out of the process of production other than he entered. […] The contract by which he sold to the capitalist his labour-power proved, so to say, in black and white that he disposed of himself freely. The bargain concluded, it is discovered that he was no "free agent," that the time for which he is free to sell his labour-power is the time for which he is forced to sell it. […] For "protection" against "the serpent of their agonies," the labourers must put their heads together, and, as a class, compel the passing of a law, an all-powerful social barrier that shall prevent the very workers from selling, by voluntary contract with capital, themselves and their families into slavery and death. In place of the pompous catalogue of the "inalienable rights of man" comes the modest Magna Charta of a legally limited working-day.[54]

Instead of discarding formal rights, Marx goes to great lengths to show how the formal equality and freedom of workers are effectively undermined in capitalist production.[55] It is no accident that Marx frames the disjuncture

between commodity exchange and production in terms of the dialectical reversal of the worker's right to private property:

> It is evident that the laws of appropriation or of private property, laws that are based on the production and circulation of commodities, become by their own inner and inexorable dialectic changed into their very opposite. The exchange of equivalents, the original operation with which we started, has now become turned around in such a way that there is only *an apparent exchange*. […] At first sight, the rights of property seemed to us to be based on a man's own labour. At least, some such assumption was necessary since only commodity-owners with equal rights confronted each other, and the sole means by which a man could become possessed of the commodities of others, was by alienating his own commodities; and these could be replaced by labour alone. Now, however, property turns out to be the right on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to the impossibility, on the part of the labourer, of appropriating his own product. The separation of property from labour has become the necessary consequence of a law that apparently originated in their identity.[56]

Judged from this interpretive angle, Marx can be seen as challenging liberalism for failing to deliver on its own juridical promise. In capitalist society, the contractual right of capitalists to lengthen the working day collides with the contractual right of labourers to shorten it for reasons of health and personal integrity, leading to a protracted class struggle that will determine the length of the working day and the future of rights.

Marx's detailed references to factory legislation attest to his belief that class struggle has a powerful bearing on the future of law and rights.[57] Marx writes:

> There is here, therefore, an antinomy, right against right, both equally bearing the seal of the law of exchanges. Between equal rights force decides. Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, *i.e.,* the class of capitalists, and collective labour, *i.e.,* the working-class.[58]

To be sure, Marx's insistence on the centrality of class struggle points to the revolutionary transformation of capitalist society and its property relations. Marx's critique of the liberal constitutional state in both "On the Jewish Question" and *Capital* is based on the insight that liberal or bourgeois

right, although it is a major historical advance over *personal* relations of domination and dependence, remains blind to *impersonal* dependence and class domination. Bourgeois right abolishes formal privileges attendant on birth or rank and treats labourers and capitalists as equals before the law; however, by abstracting from asymmetries stemming from the ownership and control of productive property, the law of the liberal constitutional state remains blind to class domination and exploitative relations of production. It is precisely this contradiction that leads Marx to conclude in the *Grundrisse* that capitalist production is still based on domination:

> Every form of production creates its own legal relations, form of government, etc. *In bringing things which are organically related into an accidental relation*, into a merely reflective connection, they display their crudity and lack of conceptual understanding. All the bourgeois economists are aware of is that production can be carried on better under the modern police than e.g. on the principle of might makes right. They forget only that this principle is also a legal relation, and that the right of the stronger prevails in their "constitutional republics" as well, only in another form.[59]

Class domination prevails in capitalist societies despite the constitutional protection of equal formal rights, and it is this concealed form of domination that Marx sees as being negated under communist production, not formal rights as such.

3.3 Rights, Revolution, and Communist Society

So far I have only considered Marx's reflections on the limited and contradictory character of individual rights under capitalist production. It remains to be shown that Marx did not envision the disappearance of rights in the context of communist production. However, before this contention can be defended, there is the immediate question of whether rights can be secured at all during a period of social revolution. The straightforward response is that a social revolution is always marked by a temporary period of extralegality in which rights cannot be secured because a legitimate constitutional framework is no longer in place to secure them. Social revolutions are *revolutionary* because they come into open conflict with the existing legal order and the rights that are prescribed by that order. Between the twilight of the old legal order and the dawn of a new one, there is an intervening period that is best characterized as one of emergency law. The ensuing

political struggle between revolutionary and counter-revolutionary social forces cannot be adjudicated on the basis of an overthrown or outdated legality. Marx alludes to this problem in his 1849 trial speech, in which he notes:

> The struggle between these two political powers [i.e., the Crown and the National Assembly] lies neither within the sphere of civil law, nor within the sphere of criminal law. The question of who was in the right, the Crown or the National Assembly, is a matter for history.[60]

A new legality can come into being only *after* a social revolution has been consummated. A revolutionary process of this sort would involve a fundamental transformation of society's forces and relations of production, with the latter assuming the form of specific legal relations.[61] In his meticulous study of the political thought of Marx and Engels, Richard Hunt has argued:

> Between the collapse of the of the old legal structure and the erection of a new one there must inevitably be a period of several months' duration at least which forms the revolutionary *Provisorium* so crucial in Marx and Engels' political thinking.[62]

Hunt refers to Marx's concept of proletarian dictatorship to illustrate what is meant by such a revolutionary *Provisorium*, which he likens to a temporary period of emergency law rather than despotic rule.

During the course of this revolutionary *Provisorium*, the proletariat organizes itself politically as the ruling class by taking control of the state apparatus and the means of production, both of which were previously under the "dictatorship" of the bourgeoisie. Hunt's account accords with Marx's description of the phase immediately following a communist revolution. In the *Communist Manifesto*, Marx and Engels maintain that "the first step in the revolution by the working class is to raise the proletariat to the position of ruling class to win the battle of democracy."[63] This first step in the revolution is unjust from a juridical point of view because it involves expropriating the productive property of the ruling capitalist class so that ownership and control over production can pass over to the majority of propertyless labourers.[64] Notwithstanding his insistence on the expropriation of capital by labour, Marx acknowledges that this act of expropriation is unjust from the standpoint of bourgeois right—capital, after all, *legally*

belongs to the capitalist. Marx does not hesitate to express this point in normative terms: "Of course, in the beginning, this [revolutionary transformation] cannot be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production."[65] Revolutions, irrespective of how democratic they may be in their aims, are unjust insofar as they violate the prevailing standard of right in a given mode of production. Marx nonetheless remains a partisan of communist revolution because he sees it as abolishing class domination and creating the material basis for a society in which the free development of individuals would become possible.[66] Once the communist revolution is consolidated and the revolutionary *Provisorium* takes the form of a democratic worker's state, the introduction of communist production would give rise to own legal relations, including a set of constitutionally guaranteed rights. Marx views the development of communist society as a dialectical process within which a democratic worker's state must first be consolidated before classes can be abolished together with the *external* state apparatus.

Although it is impossible to spell out the precise content of communist rights, given Marx's epistemological and democratic reservations about "writing recipes for the cook-shops of the future,"[67] there is considerable textual evidence confirming that there is a place for rights in Marx's account of communist society. One way of approaching the fate of rights in communist society is by considering his analogous treatment of bourgeois rights before and after the March Revolution of 1848. Recall that Marx viewed the revolution of 1848 as a conflict between feudalism and capitalism that manifested itself as a political struggle between absolute monarchy and liberal constitutionalism. The short-lived achievements of the 1848 revolution included the introduction of a new constitution and the protection of newly acquired liberal rights. Before the outbreak of the 1848 revolution, Marx welcomed the demands for such rights as freedom of the press, freedom of association, equality before the law, trial by jury, and "true" representation, and he did so against sceptics who were all too willing to dismiss these demands as a ruse by the liberal bourgeoisie. Marx responded in 1847 to the authors of the *Rheinischer Beobachter* as follows:

> The proletariat was certainly incapable of showing any interest in the *Privileges of the Estates*. But a Diet demanding trial by jury, equality before the law, the abolition of the corvée system, freedom of the press, freedom of association and true representation, a Diet having once and for all broken with the past and *formulating its demands according to the needs of the present*

> *instead of according to the old laws*—such a Diet could count on the strongest support from the proletariat.[68]

It is worth noting that Marx did not call for the repudiation of these so-called bourgeois political rights after the 1848 revolution, as his trial would confirm the following year,[69] nor did he argue that the social *need* for these rights would become obsolete in communist society.[70] Nowhere does he suggest that freedom of expression, assembly, and association, equality before the law, and suffrage will be repudiated after a communist revolution, and this holds whether one considers his reflections on political rights as early as "On the Jewish Question" or as late as his *Critique of the Gotha Program*.

The real controversy concerns the fate of "the so-called rights of man"—liberty, equality, security, and property—the category of liberal rights that Marx repeatedly associated with the egoism of capitalist market society. The only way of determining the fate of these rights in communist society is by examining what Marx actually has to say about the rights to liberty, equality, property, and security after a revolutionary transformation. His writings after the March Revolution of 1848 and his assessment of the Paris Commune provide two different occasions for conducting such an inquiry. The March Revolution of 1848 introduced a series of liberal or "bourgeois" rights, but it also overturned previously existing feudal rights, such as the privileges conferred on the estates and the control over production by the landed aristocracy. Marx sees an analogous transformation taking place with respect to the bourgeois rights to liberty, equality, property, and security following a communist revolution. To be sure, the specific content of these rights would change as a matter of course under socialized production, but their freedom-enabling form would be preserved and elevated to a higher level with the abolition of class domination.[71]

While Marx calls for the abolition of private property in the *Communist Manifesto*, he refers specifically to the abolition of "bourgeois private property," by which he means private ownership of the means of production (ownership of factories and capital assets). Marx writes:

> The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property […] the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.[72]

He reiterates in the same context that the abolition of bourgeois private property should not be confused, as is typically case, with the abolition of individual or personal property. He writes: "When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property."[73] In *Capital*, Marx elaborates on the transformation of property relations in the context of communist production. While capitalist production negates the individual property of independent producers and artisans, communist production negates capitalist private property by socializing the means of production and raises individual property to a higher level.[74] Using Hegelian language, Marx refers to this transformation in property as the "negation of the negation":

> The capitalist mode of appropriation, the result of the capitalist mode of production, produces capitalist private property. This is the first negation of individual private property, as founded on the labor of the proprietor. But capitalist production begets, with the inexorability of a law of Nature, its own negation. It is the negation of negation. *This does not re-establish private property for the producer, but gives him individual property* [*das individuelle Eigentum*] *based on the acquisition of the capitalist era*: *i.e.*, on co-operation and the possession in common of the land and of the means of production.[75]

When Marx claims that communist production "gives [the producer] individual property based on the acquisition of the capitalist era," he is referring to one of two property rights that individuals will have in the context of communist production. While productive property and land would be owned communally or cooperatively by socialized individuals, articles of consumption would remain the personal or individual property of individuals. Marx's nuanced distinction between individual and productive property is based on the idea that the free development of individuals requires an exclusive right to individual property (conceived of as a share of the social product), along with the right *not to be excluded* from productive property.[76] While these property rights are negated for the vast majority of individuals in capitalist society, they would be vindicated in the context of communist society.

Marx's argument in favour of individual property is repeated in his reflection on "The Civil War in France," except that this time it is made in the historical aftermath of the Paris Commune, a short-lived worker's state. Despite the Commune's political shortcomings and bloody defeat at the

hands of the National Army, Marx and Engels saw in it the potential for a future communist society.[77] Marx commends the Commune's call for the abolition of "class property" and its attempt to realize "individual property" at a higher level:

> Yes, gentlemen, the Commune intended to abolish that class property which makes the labor of the many the wealth of the few. It aimed at the expropriation of the expropriators. *It wanted to make individual property a truth* by transforming the means of production, land, and capital, now chiefly the means of enslaving and exploiting labor, into mere instruments of free and associated labor.[78]

A close textual analysis of Marx's writings, beginning with his *Economic and Philosophic Manuscripts of 1844*[79] and extending all the way through *Capital* and the *Critique of the Gotha Program*, shows that the right to property is not repudiated in communist society, as is commonly assumed. Instead, property rights undergo a dialectical transformation in which the content of property changes, while its form is preserved and elevated to a higher level. In order for all individuals to have property in modern means of production (which are often not divisible—e.g. the factory), the assets would have to be owned by all individuals collectively—that is, the associated producers. More broadly, Marx thinks that property is a general feature of all forms of production, although its content varies across different modes of production.[80]

As regards the bourgeois right to equality, it is necessary to distinguish here between two such rights. First, there is legal equality, which is associated with impartial treatment before the law and procedural justice. Marx criticizes the formality of bourgeois right and the extent to which it remains blind to class domination and exploitation in the sphere of production, but he never repudiates legal equality and procedural justice. The Paris Commune serves again as a case in point. Marx refers favourably to the "Communal Constitution" of the Paris Commune in which magistrates and judges were to be "elective, responsible, and revocable."[81] Far from dispensing with procedural justice and legal equality, Marx supports the Commune's decision to leave the task of rendering justice to judges. The most that can be said in this respect is that Marx favoured a system of legal justice in communist society in which judges, like other responsible civil servants, would remain democratically accountable and revocable.[82]

The right to equality can also be understood in strictly *distributive* terms, as an equal distributive right to the full and undiminished proceeds of labour, which is how Marx confronts the issue of distributive equality in his *Critique of the Gotha Program*. Although he called for the abolition of classes, he was not an economic egalitarian in the sense of prescribing an equal distribution of goods among individuals.[83] He notes that the socialist programme's insistence on a full and undiminished distribution is misleading because even in the early stages of communist society, deductions will have to be made from the collective social fund to pay for the replacement of machinery and the common satisfaction of needs, such as education and health care, as well as support payments for those who are unable to work.[84] Universal access to education, health care, employment, and housing are examples of positive socio-economic rights that Marx sees as being conferred on individuals in the early stages of communist society. With respect to distribution of goods more generally, Marx suggests that the early stage of communist society would follow through with the bourgeois principle of "equivalent exchange," except that the form of exchange would no longer contradict its content in the absence of exploitative relations of production. Justice in distribution would therefore entail the individual producers receiving back from society a return proportional to what they supply in labour. Marx writes:

> But as far as the distribution of the latter [articles of consumption] among the individual producers is concerned, the same principle prevails as in the exchange of commodity equivalents: a given amount of labour in one form is exchanged for an equal amount of labour in another form. […] Hence, equal right here is still in principle *bourgeois right*, although principle and practice are no longer at loggerheads, while the exchange of equivalents in commodity exchange only exists on the average and not in the individual case.[85]

Although this transformed standard of distributive justice constitutes an advance, it remains defective in Marx's view because individuals would still be treated as equals in an abstract and one-sided manner. The application of an equal standard for differently situated individuals would inevitably result in distributive inequalities, which Marx regards in this context as normatively arbitrary.

As a way of remedying the defects flowing from an abstract standard of equality, Marx suggests that justice in distribution would have to be

conceived instead as an *unequal* right in the early stages of communist society:

> Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored. […] Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right instead of being equal would have to be unequal.[86]

Marx theorizes that the standard of distributive justice would change in developed communist society with concomitant changes in production.[87] Marx's outlook assumes that cooperative production would gradually generate conditions of relative abundance and therewith a new standard of distributive justice. Marx does not dismiss distributive justice as such; what he dismisses is a tendency among "vulgar" socialists to detach questions of distribution from the organization of production, as well as political attempts to realize communism through abstract appeals to justice. Marx argues in the very next paragraph of his *Critique* that "if the material conditions of production are the co-operative property of the workers themselves, then there likewise results a distribution of the means of consumption different from the present [capitalist] one."[88] This is further evidence that distributive justice would not become obsolete in communist society, but that a different distributive standard would prevail. Marx suggests that developments in production would make it possible for "the narrow horizon of bourgeois right [to be] crossed in its entirety and [for] society [to] inscribe upon its banner: From each according to his ability, to each according to his needs."[89] The inscription of a new "banner" is presented by Marx as a higher standard of distributive justice. However, insofar as neither abilities nor needs can be equalized, the standard of distributive justice corresponding to developed communism would be one where individuals voluntarily contribute according to their abilities and consume according to their needs. Allen Wood acknowledges that different standards of distributive justice and right would correspond to different stages of communist society (interpreting these standards descriptively rather than prescriptively) but concludes that the end of class society would mean the disappearance

of the state apparatus and therewith such concepts as justice and right. Wood writes:

> Marx points out that post-capitalist society itself will have different stages of development, to which different standards of right will apply. And in the long term, of course, Marx thinks that the end of class society will mean the end of the social need for the state mechanism and the juridical institutions within which concepts like "right" and "justice" have their place.[90]

Yet Wood's conclusion contradicts Marx's otherwise consistent claim that every mode of production creates its own legal relations, including a corresponding structure of rights and duties. While Marx eschews transhistorical accounts of justice and natural rights, it does not follow that developed communist society would be devoid of rights once classes are abolished along with the *external* state apparatus.

Among the "so-called rights of man," the fate of security figures as the most uncertain because it evokes the spectre of the *external* and repressive state apparatus that Marx sees as being abolished with the end of class domination. If classes are abolished together with the *external* state apparatus, does this mean that the rights of "socialized individuals" would not be secured under communism? The answer to this question is far from obvious. Marx provides the following response in the *Communist Manifesto*: "When, in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character."[91] Political power is defined by Marx as the "organized power of one class for oppressing another,"[92] while public power is associated with the self-determination of the vast association or community. Although the repressive and class character of the state will be abolished under communism, the rights of socialized individuals will still be protected by the public power. It is quite conceivable that individuals in such a society would find fewer occasions for pressing their rights against each other, but this does not mean that they would not have recourse to rights.

Although Marx affirms in his later writings that the external state will be abolished in a future communist society, he does not maintain that coercion will be entirely absent. Marx views the state's coercive functions as superimposed upon and external to society, serving historically as an expression of class domination. He theorizes that in the higher phase of communist society, public power (i.e. public authority) will lose its repressive character

and take the form of an association. Although he predicts that there will be greater solidarity between individuals and that labour will finally become life's prime want, there is no evidence that he believes that coercion will be eliminated entirely. Indeed, there are good reasons for thinking that his view is that the association will take the place of the *external* state as the objective guarantor of communist justice and rights. When discussing the Paris Commune, for example, Marx notes that "while the merely repressive organs of the old governmental power were to be amputated, its legitimate functions were to be wrested from an authority usurping pre-eminence over society itself, and restored to the responsible agents of society."[93] The tenor of these reflections is repeated in the *Critique of the Gotha Program*, in which Marx insists that "freedom consists in converting the state from an organ superimposed upon society into one completely subordinate to it."[94] Finally, in his response to the anarchist Mikhail Bakunin, Marx explains that "when class domination ends there will be no state in the present political sense of the word."[95] In all such instances, Marx points out that in communist society the *external* and coercive character of the state will be abolished, while the public power of the association will retain a legitimate function. Presumably this will include safeguarding the right of each individual to develop freely and without hindrance, which is the subject matter of liberty or freedom.

As far as the place of liberty is concerned, Marx's chief complaint about the "bourgeois" right to liberty is that its content is confined to free exchange, which gives rise to mutual indifference and class domination in the sphere of production. Marx and Engels affirm in *The German Ideology* that "this right to the undisturbed enjoyment, within certain conditions, of fortuity and chance has up till now been called personal freedom."[96] Capitalism is a system of production in which labour is structurally dominated by capital, while both remain subservient to the imperatives of an impersonal capitalist market. As we have seen, Marx acknowledges that capitalist production does away with the relations of personal dependence that subjugated individuals in the ancient and feudal modes of production. However, despite this advance in the expansion of human freedom, capitalism does not emancipate individuals from their objective dependence upon the imperatives of alien market forces. Marx writes: "In the developed system of exchange (and this semblance seduces the democrats), the ties of *personal dependence*, of distinctions of blood, education, etc., are in fact exploded, ripped up […] and individuals *seem* independent."[97] Individuals seem independent in capitalist society because they are no longer bound

by the arbitrary will of other individuals; however, they remain structurally dependent on external forces that lie beyond their conscious direction and control.

The right to freedom would also undergo transformation under communism in the sense that socialized individuals would be emancipated from direct (personal) as well as objective (impersonal) forms of dependence. In the first case, individuals would be emancipated from personal dependence, which assumes respect for elementary legal rights and freedom of expression, conscience,[98] assembly, association, and movement, as well as the right to participate in the administration of collective affairs. Moreover, individuals would also be in a position to consciously regulate production in accordance with self-chosen plans. As Marx puts it in *Capital*:

> Freedom in this field can only consist in socialized man, the associated producers, rationally regulating their interchange with Nature, bringing it under their common control, instead of being ruled by it as by the blind forces of Nature; and achieving this with the least expenditure of energy and under conditions most favourable to, and worthy of, their human nature.[99]

Freedom would thus assume a richer content under communism than under capitalism, such that the free development of each becomes the condition for the free development of all.[100] The unhindered development of human freedom presupposes that each individual will be in a position to realize his or her capacities in accordance with self-chosen ends. In other words, the right to freedom under communism requires both the negative right of freedom from external domination and the positive right to realize one's capacities in accordance with self-chosen ends—not a choice between the two.[101]

3.4 The Supersession of Rights and the Conceptual Relevance of *Aufhebung*

The dominant interpretation among liberal commentators on Marx is that communist society would not repudiate rights so much as it would make them redundant. John Rawls, for example, following David Hume, notes that the circumstances of justice arise whenever a society is characterized by material scarcity and the presence of interpersonal conflict between individuals.[102] If communism is characterized by material abundance and relations of cooperative solidarity between individuals, then it will have transcended

the social needs for rights.[103] To the extent that Rawls sees communism as a society beyond justice, he also hints that a truly communist society would be one made up of saints.[104]

Incidentally, the accusation that communism rests upon universal benevolence had already been levelled against Marx and Engels by Max Stirner. Marx and Engels took Stirner's challenge seriously, and they refuted him by historicizing the conditions for the free development of individuals, which, they argued, would not be based upon universal love or upon egoism. Marx and Engels did think that communist society would be characterized by greater solidarity among socialized individuals, such that the instruments of coercion could be reduced to a minimum, which is why the *external* character of the state can be abolished. However, this increased solidarity between individuals does not imply universal benevolence and the suppression of individual self-assertion. Below are two passages from the *German Ideology* that attest to this point:

> The communists do not preach *morality* at all, as Stirner does so extensively. They do not put to people the moral demand: love one another, do not be egoists, etc.; on the contrary, they are very well aware that egoism, just as much as selflessness, *is* in definite circumstances a necessary form of the self-assertion of individuals. Hence, the communists by no means want, as Saint Max believes […] to do away with the "private individual" for the sake of the "general," selfless man.[105]

And, again:

> Within communist society, *the only society in which the genuine and free development of individuals ceases to be a mere phrase*, this development is determined precisely by the connection of individuals, a connection which consists partly in the economic prerequisites and partly in the necessary solidarity of the free development of all, and, finally, in the universal character of the activity of individuals on the basis of the existing productive forces. […] The individuals' consciousness of their mutual relations will, of course, likewise be completely changed, and, therefore, will no more be the "principle of love" or *dévoûment* than it will be egoism.[106]

According to Marx's new materialist conception of right, different modes of production give rise to different legal relations. Thus to argue, as Marx does in the *Critique of the Gotha Program*, that "*right can never be higher than the economic structure of society* and its cultural development

conditioned thereby"[107] is not to conclude that a system of rights would be superfluous in communist society. On the contrary, rights would assume a richer content in communism than under the "narrow horizon" of bourgeois right and the capitalist mode of production that gave rise to it.[108] As we have seen, Marx's criterion for distinguishing between higher and lower standards of rights is the degree to which human freedom is realized under different modes of production. In this regard, the historical development of human freedom provides Marx with an evaluative standard for judging between different modes of production and the standards of right corresponding to them.

The transformation of rights under communism makes better sense when viewed through the prism of the dialectical method that Marx inherited from Hegel. The concept of *Aufhebung* is of particular relevance in this respect. Hegel refers to *Aufhebung* in his *Science of Logic* to describe a simultaneous process of negation, preservation, and supersession. Hegel explains:

> To "sublate" has a twofold meaning in the [German] language: on the one hand it means to preserve, to maintain, and equally it also means to cause to cease, to put an end to. […] Thus what is sublated is at the same time preserved; it has only lost its immediacy but is not on that account annihilated.[109]

Insofar as *Aufhebung* is a dialectical concept, it captures the movement beyond Abstract Being through Becoming: Being is not eliminated through Becoming. Hegel demonstrates how a similar process unfolds in the *Philosophy of Right* from abstract right to morality, and from morality to ethical life, in which right is objectively institutionalized in the modern constitutional state.[110]

While a number of commentators have noted the significance of *Aufhebung* for Marx's social theory as a whole, its relevance for his assessment of rights has not been examined in comparable depth.[111] Whereas Hegel focuses on the logical progression from Abstract Right to Objective Spirit, Marx begins with the interchange between human beings and nature through productive activity. Every historical mode of production gives rise to specific legal relations, and these legal relations remain in effect until a period of social revolution ensues. A revolutionary transformation is characterized by a dialectical process in which elements of the preceding mode of production are simultaneously negated, preserved, and raised to a higher

level, as was noted in Marx's reflections on the March Revolution of 1848 and with the experience of the Paris Commune. These are instances of historical *Aufhebung*.

The failure to understand the transformation of rights in communist society stems from a misapprehension of the Hegelian meaning of *Aufhebung* in Marx's work. As a result of this misapprehension, the significance of bourgeois rights for communist society has been overlooked by most of Marx's commentators. Yet, in the *Critique of the Gotha Program*, Marx reiterates:

> What we have to deal with here is a communist society, not as it has *developed* on its own foundations, but, on the contrary, just as it *emerges* from capitalist society; *which is thus in every respect, economically, morally and intellectually, still stamped with the birth marks of the old society from whose womb it emerges.*[112]

Marx makes similar statements in *Capital* about the "civilizing" aspects of capitalism that create the material foundation for "a new and higher form" of society.[113] It is therefore a mistake to conclude that the historical achievements of capitalism, including the granting of formal legal rights, would be annihilated under communism. Abolishing elementary formal rights would mean reverting to pre-capitalist social relations, in which the direct domination of the master, lord, or patriarchal community actively inhibited the free development of individuals. Marx did not wish to return to the ruins of the past; rather, he maintained that some elements of the past would be preserved in a superseded form, as evidenced by the transformation of property, equality, liberty, and security that Marx sketches in his scattered descriptions of communist society. The more plausible interpretation concerning the fate of the so-called rights of man, then, is that they would take on a higher and more adequate form under communism.[114]

Communist society negates the exploitative relations of production that characterize capitalist society while raising the rights of socialized individuals to a higher level. Marx's conception of the historical progress of rights—judged in terms of the normative expansion and deepening of human freedom—can be summarized in the form of a thesis, its negation, and a negation of the negation (i.e. a determinate negation) which both supersedes and preserves the rational kernel of the previous historical "moments" or modes of production. Marx sketches out this dialectical transformation in the *Grundrisse* as follows:

> Relations of personal dependence (entirely spontaneous at the outset) are the first social forms, in which human productive capacity develops only to a slight extent and at isolated points. Personal independence founded on *objective* dependence is the second great form [i.e., capitalism], in which a system of general social metabolism, of universal relations, of all-round needs and universal capacities is formed for the first time. Free individuality, based on the universal development of individuals and on their subordination of their communal, social productivity as their social wealth, is the third stage [i.e., communism]. The second stage creates the conditions for the third.[115]

Pre-capitalist social-economic formations were characterized by direct forms of dependence and domination, while individuals were thoroughly embedded in their community. Capitalist society is defined by legal relations between formally free and equal individuals that are disaggregated from the community. Communist society restores the community's control over production while building upon the formal rights that are introduced by capitalist production.

3.5 Conclusion

Rather than forecasting the "transcendence" of rights in communist society, Marx's new materialist theory points to the possibility of superseding the narrow horizon of bourgeois rights. Only a dialectical reading of Marx's social theory can account for why bourgeois rights must first be achieved before they can be superseded under communism. If one interprets Marx's materialist conception of right on its own terms, rights can be transformed but they cannot be "transcended," if by that is meant that they will simply be abolished because they will cease to have a function under communism.

Notes

1. Marx, "Critique of the Gotha Program," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 531.
2. This view is rehearsed in Friedrich Hayek's *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960); Robert Nozick's *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
3. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962). Drawing on Marx's "On the Jewish Question," Edward Andrew argues that rights are "necessary evils" that result from

competition for resources in societies that are characterized by private ownership in the means of production and unequal entitlement to things. He insists that rights are best conceived as individual properties that run contrary to the collective pursuit of justice, right, or law as *Recht*. Andrew's view suggests that a society without interpersonal conflict over resources, whether material or "symbolic," would have no social need for rights—a view that I challenge explicitly in Chapter 4. See Edward Andrew, *Shylock's Rights: A Grammar of Lockean Claims* (Toronto: University of Toronto Press, 1988), 17.

4. Marx and Engels, "The German Ideology," MECW 5: 327.
5. See Jeremy Waldron, "Dignity and Rank," in *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012).
6. Marx, cited in David McLellan, *Karl Marx: A Biography*, 4th ed. (New York: Palgrave Macmillan, 2006), 79 (my emphasis). See Marx, "Letter to Ruge, March 13 1843," MECW 1: 400.
7. Marx makes it clear that his reference to "civil society" draws on Hegel's development of that concept in the *Philosophy of Right*, where civil society is described as that distinctly modern sphere in which individuals are free to pursue their economic interests through the market. However, Hegel had a far more integrative conception of the market than did Adam Smith or David Ricardo. See Karl Marx, "On the Jewish Question," *Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 35.
8. Ibid., 41.
9. Prussia was officially a Christian state, while in France, despite its constitutional character, the Christian religion remained dominant. In this respect, neither Prussia nor France was politically emancipated from the influence of religion.
10. Ibid., 40.
11. Ibid.
12. Ibid., 33.
13. It should be noted that legally sanctioned slavery in the American South stood as a direct violation of political emancipation when Marx was writing "On the Jewish Question," which is why he refers to the "progressive" states of America.
14. Ibid.
15. Ibid.
16. Ibid., 32.
17. Ibid., 42.
18. On the contrary, Marx points out (ibid., 44) that the liberal rights to security and unlimited freedom of expression are compromised in practice through violations of privacy and the stifling of free expression as soon as these rights are deemed to conflict with "public liberty" and "political life."

19. Ibid., 43.
20. Ibid., 42.
21. Ibid., 43.
22. Ibid. (my emphasis).
23. Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism* (Totowa, NJ: Rowman & Littlefield, 1982), 65.
24. Marx, "On the Jewish Question," 35. It is worth noting that even in this formative work, Marx maintains that the rights of man do not constitute the ultimate form of human emancipation; rather, they constitute "the final form of human emancipation *within* the framework of prevailing social order." The prevailing social order is none other than bourgeois or capitalist society. In later writings, Marx refers to prevailing social orders as "modes of production."
25. Ibid., 45. This point is reiterated throughout Marx's mature writings, especially in the *Grundrisse*.
26. Ibid., 46.
27. Ibid.
28. Ibid.
29. The significance of the egalitarian supplement to conventional rights doctrine (i.e. the emphasis on "equal" rights) consists in the historical recognition that individuals—to the extent that they possessed rights at all—were not conceived as bearers of equal legal rights.
30. Unless by "individual rights" is meant the freedom to accumulate capital at the expense of labour.
31. Some commentators have gone so far as to conclude that Marx envisaged the annihilation of Jewry. See Dagobert D. Runes's "Introduction," in Karl Marx, *A World Without Jews* (New York: Philosophical Library, 1959), xi.
32. Marx and Engels, "The Holy Family," MECW 4: 109–110.
33. Ibid., 110.
34. Ibid., 113.
35. Shlomo Avineri, "Marx and Jewish Emancipation," *Journal of the History of Ideas* 25, no. 3 (1964): 448. In his most recent exposition on this topic, Avineri reaffirms Marx's lifelong commitment to the political emancipation of Jews while also reiterating Marx's support for constitutionalism and civil liberties during the 1848–1849 revolutions. See Shlomo Avineri, *Karl Marx: Philosophy and Revolution* (New Haven: Yale University Press, 2019), 54.
36. Ibid., Avineri, "Marx and Jewish Emancipation."
37. See Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1968), 84.
38. The conceptual significance of *Aufhebung* in Marx's materialist thought and its implications for justice and rights is explored in the final section of the chapter. The "transcendence" of rights implies a one-sided negation,

whereas *Aufhebung* simultaneously incorporates the negation, preservation, and supersession (or raising to a higher level) of rights.

39. Karl Marx, *Grundrisse*, trans. Martin Nicolaus (Middlesex: Penguin, 1973), 464.
40. Ibid., 464–465 (my emphasis).
41. See Karl Marx, *Capital Volume 1*, ed. Frederick Engels (New York: International Publishers, 1967), 72–73.
42. Ibid., 59–60.
43. Ibid., 72–73.
44. Ibid., 92–93.
45. Ibid., 84.
46. Ibid., 168 (my emphases).
47. It is a *dialectical* advance in the sense that ancient and feudal hierarchies are historically negated in capitalist society, while personhood is respected at the level of the law.
48. Marx, *Capital Volume 1*, 169.
49. Ibid.
50. Ibid., 176.
51. Marx puts "the inalienable rights of man" in quotation marks.
52. Ibid., 176.
53. Ibid.
54. Ibid., 301–302.
55. Marx, *Grundrisse*, 247. Marx's differentiation between the sphere of exchange and that of production lends support to the interpretive claim that he regarded capitalism as unjust. See Carol Gould, *Marx's Social Ontology* (Cambridge: MIT Press, 1980), 158–159; Philip Kain, "Marx, Justice, and the Dialectic Method," *Journal of the History of Philosophy* 24 (1986): 523–546. While the sphere of exchange or circulation is based on freedom and equality, the sphere of production is characterized instead by exploitation and structural coercion. Notice that this view remains consistent with Marx's historically situated conception of justice and right. Marx is criticizing capitalism for failing to deliver on its own juridical standard.
56. Marx, *Capital Volume 1*, 235 (my emphasis).
57. This will be explored in more detail in Chapter 6.
58. Ibid.
59. Marx, *Grundrisse*, 88 (my emphasis).
60. Marx, "The Trial of the Rhenish District Committee of Democrats," MECW 8: 325.
61. H.B. Acton, a notable critic of the materialist theory of history, argued that Marx's position is inconsistent because he conflates productive relations with legal relations in his famous 1859 Preface to A *Contribution to the Critique of Political Economy*, and in so doing, contradicts the claim that

the economic structure ultimately determines the legal and political superstructure. See H.B. Acton, *The Illusion of an Epoch* (London: Cohen & West, 1955), 167. G.A. Cohen responds to Acton's criticism by offering a *Rechtsfrei* ("law-free") interpretation of Marx's theory in which the juridical term property "right" is replaced by the non-juridical term "power": see G.A. Cohen, *Marx's Theory of History: A Defence* (Princeton: Princeton University Press, 1978), 221. Notwithstanding the ingenuity of Cohen's analytical defence of Marx's theory, productive relations cannot easily be disentangled from property relations, which assume distinct legal forms in different modes of production. Consequently, while a "law-free" formulation of productive relations makes sense conceptually, it is far more difficult to decouple productive relations from legal relations in the analysis of actual modes of production. Cohen's more important functional point is that "[economic] bases need [legal] superstructures, and they get the superstructures they need because they need them" (Cohen, *Marx's Theory of History*, 233).

62. Richard N. Hunt, *The Political Ideas of Marx and Engels*, 2 vols. (Pittsburgh: University of Pittsburgh Press, 1974), 2: 185.
63. Marx and Engels, "Manifesto of the Communist Party," *Marx-Engels Reader*, 490.
64. While Marx did not reject the possibility of a peaceful transition to communism in the most advanced capitalist countries, he was sceptical that the capitalist class would voluntarily relinquish ownership of productive property without engaging in a violent form of resistance. For a recent perspective on the place of reform in Marx's later writings, see Samuel Hollander, "Marx and Engels on Constitutional Reform vs. Revolution: Their 'Revisionism' Reviewed," *Theoria* 57, no. 122 (2010): 51–91.
65. Marx and Engels, "Manifesto of the Communist Party," 490.
66. Marx's argument in favour of revolution is best contrasted with Immanuel Kant's view that revolutions are inherently illegitimate because they violate the juridical condition. Kant writes: "The reason why it is the duty of the people to tolerate even the most intolerable misuse of power is that it is impossible ever to conceive of their resistance to the supreme legislation as anything other than unlawful and liable to nullify the entire legal constitution" (Immanuel Kant, "The Metaphysics of Morals," in *Kant: Political Writings*, ed. Hans Reiss, trans. H.B. Nisbet [Cambridge: Cambridge University Press, 1991], 145).
67. Marx, "Afterword to the Second German Edition of *Capital*," *Marx-Engels Reader*, 299.
68. Marx, "The Communism of the *Rheinischer Beobachter*," MECW 6: 228 (my emphasis).
69. Marx, "The First Trial of the *Neue Rheinische Zeitung*," MECW 8: 314.

70. Marx never renounced the spirit of his early journalistic writings for the *Rheinische Zeitung*. Marx actually agreed to have these "liberal" writings republished as a collection in 1851. At the very least, this shows that Marx was not embarrassed by his earlier views. See Hunt, *The Political Ideas of Marx and Engels*, 163.
71. It is worth comparing Marx's account of how rights are transformed historically with Hegel's reflections on this topic in his essay, "Proceedings of the Estates Assembly in the Kingdom of Württemberg." Hegel writes: "Old rights and 'old constitutions' are such fine grand words that it sounds impious to [contemplate] robbing a people of its rights. But age has nothing to do with what 'old rights' or constitution mean or whether they are good or bad. Even the abolition of human sacrifice, slavery, feudal despotism, and [countless] other infamies was in every case the cancellation of something that was an 'old right'" G.W.F. Hegel, *Hegel's Political Writings*, trans. T.M. Knox (Oxford: Clarendon Press, 1964), 282–283. One could very well substitute Hegel's point about the "abolition" of feudal despotism with Marx's anticipated abolition of exploitative relations of production and capitalist private property.
72. Marx and Engels, "Manifesto of the Communist Party," 484.
73. Ibid., 485.
74. Similar interpretations concerning the transformation of property relations and rights under communism can be found in Mihailo Markovic, "Philosophical Foundation for Human Rights," *Praxis International* 1, no. 4 (1982): 397; Sean Sayers, "Private Property and Communism," in *Marx and Alienation: Essays on Hegelian Themes* (London: Palgrave Macmillan, 2011), 131; Costas Douzinas, "Adikia: On Communism and Rights," in *The Idea of Communism*, eds. Costas Douzinas and Slavoj Zizek (London: Verso, 2010), 84–85; Étienne Balibar, "The Reversal of Possessive Individualism," in *Equaliberty: Political Essays*, trans. James Ingram (Durham: Duke University Press, 2014), 67.
75. Marx, *Capital Volume 1*, 763 (my emphasis).
76. C.B. Macpherson provides a helpful elaboration of these two integral forms of property that draws on Marx's account. See C.B. Macpherson, "Human Rights as Property Rights," in *The Rise and Fall of Economic Justice and Other Essays* (Toronto: Oxford University Press, 2013), 79.
77. Engels refers to the Paris Commune as the "Dictatorship of the Proletariat" in his introduction to Marx's "The Civil War in France." See Marx, "The Civil War in France," *Marx-Engels Reader*, 629. This is not to say that the Paris Commune was without serious political shortcomings or that it represented a universal blueprint for communism according to Marx.
78. Marx, "The Civil War in France," *Marx-Engels Reader*, 635 (my emphasis).
79. Marx refers to communism as the "the positive supersession of private property, or human self-estrangement, and therefore as the real appropriation

of the human essence by and for man" ("The Economic and Philosophic Manuscripts of 1844," *Marx-Engels Reader*, 84).

80. See Marx, *Grundrisse*, 87–88: "All production is appropriation of nature on the part of an individual within and through a specific form of society [...] that there can be no production and hence no society where some form of property does not exist is a tautology. An appropriation which does not make something into property is a *contradictio in subjecto*." For a well-argued account of Marx's views on property along similar interpretive lines, see Sean Sayers, "Private Property and Communism," in *Marx and Alienation*, 117–118.
81. Marx, "The Civil War in France," *Marx-Engels Reader*, 631.
82. The proper balance between judicial discretion and democratic accountability is still the subject of considerable debate among legal scholars.
83. For a recent defence of this interpretation, see Allen Wood, *The Free Development of Each: Studies on Freedom, Right, and Ethics in Classical German Philosophy* (Oxford: Oxford University Press, 2014), 252–267.
84. Marx, "Critique of the Gotha Program," *Marx-Engels Reader*, 528–529.
85. Ibid., 530.
86. Ibid., 530–531, 530.
87. Ibid., 531.
88. Ibid., 531–532. This passage follows the logic of Marx's rhetorical question (ibid., 528) whether "economic relations [are] regulated by legal conceptions or do not, on the contrary, legal relations arise from economic ones?" Marx's materialistic theory holds that it is the mode of production that gives rise to different legal relations, not the reverse.
89. Ibid., 531.
90. Allen Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (1972): 271.
91. Marx and Engels, "Manifesto of the Communist Party," 490.
92. Ibid.
93. Marx, "The Civil War in France," *Marx-Engels Reader*, 633.
94. Marx, "Critique of the Gotha Program," *Marx-Engels Reader*, 537.
95. Marx, "Conspectus on Bakunin's Statehood and Anarchy," *Marx-Engels Reader*, 545.
96. Marx and Engels, "The German Ideology," MECW 5: 80–81.
97. Marx, *Grundrisse*, 163 (my emphasis).
98. See Marx, "Critique of the Gotha Program," 540; "The Civil War in France," *Marx-Engels Reader*, 632.
99. Marx, *Capital Volume 3 III*, MECW 37: 807.
100. Marx and Engels, "Manifesto of the Communist Party," 491.
101. For a well-argued account on this point, see Gould, *Marx's Social Ontology*, 110.

102. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 110–111.
103. Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism* (Totowa, NJ: Rowman & Littlefield, 1982), 84–85.
104. Rawls, *A Theory of Justice*, 112.
105. Marx and Engels, "The German Ideology," MECW 5: 247.
106. Ibid., 439 (my emphasis).
107. Marx, "Critique of the Gotha Program," 531.
108. Ibid.
109. G.W.F. Hegel, *Science of Logic*, trans. A.V. Miller (London: George Allen & Unwin, 1969), 107 (my emphasis).
110. Hegel's remarks in section 155 of the *Philosophy of Right* are particularly instructive in this regard.
111. See, for example, Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1968), 37; Robert C. Tucker's "Note on Texts and Terminology," in *The Marx-Engels Reader*, xli–xlii. While Tucker and Avineri emphasize the conceptual significance of *Aufhebung* in Marx's thought in varying degrees, neither extends it to the topic of rights. I elaborate in considerable detail on the conceptual significance of *Aufhebung* for Marx's nuanced account of rights in Igor Shoikhedbrod, "Re-Hegelianizing Marx on Rights," *Hegel Bulletin* 40, no. 2 (2019): 281–300.
112. Marx, "Critique of the Gotha Program," 529 (my emphasis).
113. Marx, *Capital Volume 3*, 819.
114. The idea that certain rights have the potential of superseding their bourgeois limitations is evidenced by Marx's treatment of the "right to work" and its inclusion in an earlier draft of the 1848 Constitution of the French Republic. Marx writes: "The right to work is, in the bourgeois sense, an absurdity, a miserable, pious wish. But behind the right to work stands the power over capital; behind the power over capital, the appropriation of the means of production, their subjection to the associated working class and, therefore, the abolition of wage labour, of capital and of their mutual relations." See Marx, "The Class Struggles in France," MECW 10: 78.
115. Marx, *Grundrisse*, 158. For an excellent summary and analysis of Marx's three-stage argument, see Gould, *Marx's Social Ontology*, 21–22.

CHAPTER 4

The Normative Argument for Communist Legality

Every form of production creates its own legal relations, form of government, etc. In bringing things which are organically related into an accidental relation, into a merely reflective connection, [bourgeois economists] display their crudity and lack of conceptual understanding.[1]

The objective of this chapter is to develop a normative argument for legality in the context of a communist society in which class antagonisms have been abolished along with production on the basis of generalized commodity exchange. While a functional argument for communist legality finds roots in Marx's claim that every form of production gives rise to its own legal relations,[2] the question of why legality has moral value that is independent of the class-based social structures in which it now exists needs to be elaborated and defended.[3]

The chapter opens with a critical evaluation of Evgeny Pashukanis's commodity exchange theory of law, which offers by far the most systematic account of the development and dissolution of legality in the Marxist tradition. Despite its theoretical advances, however, Pashukanis's theory misattributes the origin of law to generalized exchange relations and reduces all legal phenomena to the domain of private law. Such myopic reasoning prompted Pashukanis's conclusion that law and rights would "wither away" in developed communist society, only to be replaced by the supremacy

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
https://doi.org/10.1007/978-3-030-30195-8_4

of technical regulation. In contradistinction to Pashukanis, Marx himself traces the emergence of law to historically specific productive relations, some of which predate generalized commodity exchange while others will survive the abolition of commodity exchange. The central thesis of this chapter is that Marx's new materialist conception of right commits him to a specifically communist version of legality, the veracity of which will be defended on textual and conceptual grounds.

After challenging Pashukanis's derivation of legal relations from commodity exchange relations, I interpret Marx's account of productive relations through the prism of recognition. In capitalist society, individuals relate to each other primarily through the medium of commodity exchange, in which relations of cold respect set the normative threshold for recognition. In communist society individuals would relate to each other in a socio-economic order of socialized production, in which recognition would rest on a generalized concern with the free development of individuals and the satisfaction of diverse needs. While communism abolishes class antagonisms and production on the basis of generalized commodity exchange, it cannot eliminate the juridical factor from social relations without thwarting the free development of individuals. After outlining Marx's more radical account of recognition in communist society, I draw on Georg Lukács's *Ontology of Social Being* to make the normative case for communist legality and rights. Labour forms the foundation of Marx's materialist ontology of social being, and every act of labour carries a value-laden choice between alternatives. I argue that since Marx thinks that law should express the needs of society, communist legality is normatively warranted because it would mediate between different teleological projects so as to realize the free development of individuals and meet their diverse needs.

4.1 Forecasting the "Withering Away" of Law: The Theoretical Deviations of Evgeny Pashukanis

Although the prognosis that right and law will wither away is customarily attributed to Marx and Engels, neither of them argued that communist society would be devoid of *law* as such. Engels predicted that in the higher phase of communist society, "*state interference* in social relations becomes, in one domain after another superfluous, and then dies out of itself: the government of persons is replaced by the administration of things, and by

the conduct of processes of production."[4] Although Engels's pithy conclusion invites a technical vision of communist society, the context for these remarks makes clear that Engels, like Marx, envisioned the abrogation of the state as an external organ of class repression.[5] Vladimir Lenin, who came closest to equating law with organized coercion, reached a similar conclusion in his theoretical work, where he anticipated, albeit inconsistently, that individuals in the higher phase of communist society would habitually comply with the elementary rules of social conduct.[6] Although much depends on how law is defined—whether authoritative rules are codified and the extent to which these rules can be distinguished from mere customs—Lenin's anticipation of habitual compliance does not rule out the possibility of there being law or right in communist society, though it does rule out the necessity of organized or professional coercion. A conceptual distinction can indeed be drawn between law, understood as a generalized system of juridical norms, and the apparatus of organized or professional coercion. I will return to the issue of coercion later in the chapter. Suffice it to say that Marx and Engels thought that the implementation of legal rules in developed communist society would not require a professional apparatus of coercion, opening the possibility for rehabilitative approaches to crime.[7]

The most representative thinker of the "withering away" thesis was the notable Soviet legal theorist, Evgeny Pashukanis, whose *General Theory of Law and Marxism*—published in the early years of Bolshevik rule—remains the most elaborate Marxist treatise on law. In many respects, Pashukanis's theory was a definite advance over class-instrumentalist theories that reduced law to the generalized will of a ruling class. Pashukanis demonstrates convincingly that class-instrumentalist theories cannot explain why modern law assumes an impersonal form that is distinct from direct class domination.[8] While formalist theories of law abstract from existing relations of production and succumb to legal fetishism, whereby law assumes a wholly independent ideational existence, class-instrumentalist theories emphasize the class content of law without explaining its nuanced form. A general theory of law was therefore needed, one that could explain the specificity of the legal form without neglecting the reality of class domination. Pashukanis explains his aims in the following terms:

> As a Marxist, I did not set myself the task of constructing a theory of pure jurisprudence, nor could I set myself such a task. […] My aim was this: to present a sociological interpretation of the legal form and of the specific categories which express it.[9]

Pashukanis begins his treatise with a perennial question in legal theory: What is law? In its most basic formulation, the law can be defined as a set of authoritative rules that regulate relations between individuals.[10] However, on Pashukanis's view, such a generic formulation suffers from imprecision and conceptual obfuscation because it fails to capture the specificity of law as a distinct social phenomenon. If law is regarded simply as a set of authoritative rules, then it cannot be readily distinguished from a broad range of social institutions, including the military and the church, in which relations between individuals are governed in an authoritarian way.[11] With this general formulation, the law loses its specificity and is subsumed in the broader milieu of social relations. In place of the generic formulation of law, Pashukanis offers instead an account of the "legal form" that fuses positive law and legal validity with the concept of juridical personhood. Pashukanis writes:

> The legal system differs from every other form of social system precisely in that it deals with private, isolated subjects. The legal norm acquires its *differentia specifica*, marking it out from the general mass of ethical, aesthetic, utilitarian and other such regulation, precisely because it presupposes a person endowed with rights on the basis of which he actively makes claims.[12]

Accordingly, a legal system is incomprehensible in the absence of atomized legal subjects that are capable of exercising rights—and not just any rights, but the property rights of commodity owners. Although Pashukanis puts forward a general theory of law, his account of the legal form, as we will see, is framed entirely on the basis of private law, that is to say, the domain of law concerned strictly with transactions between self-interested market actors. Pashukanis writes:

> The form of law with its aspect of subjective right (*Berechtigung*) is born in a society of isolated bearers of private egoistic interests. If all economic life is to be built on the principle of agreement between autonomous wills, every social function, in reflecting this, assumes a legal character.[13]

Pashukanis no longer conceives of the law as a set of authoritative rules that regulate relations between individuals; instead, he considers all law to be derived from exchange relations between atomistic property owners in the market.

Pashukanis traces his account of the legal form to Marx's discussion of exchange in the first volume of *Capital*.[14] Like his predecessors in the German civil law tradition, Marx traces the emergence of juridical personhood to the proliferation of generalized exchange relations between formally free and equal proprietors. Although the concept of juridical personhood originates in Roman law, it only becomes generalized in a capitalist society in which production is organized on the basis of commodity exchange, and in which labour becomes a commodity for sale in the market. Marx affirms this appoint in the *Grundrisse*:

> In Roman law, the *servus* [slave] is therefore correctly defined as one who may not enter into exchange for the purpose of acquiring anything for himself. […] It is, consequently, equally clear that although this legal system corresponds to a social state in which exchange was by no means developed, nevertheless, in so far as it was developed in a limited sphere, it was able to develop the *attributes of the juridical person, precisely of the individual engaged in exchange*, and thus anticipate (in its basic aspects) the legal relations of industrial society, and in particular the right which rising bourgeois society had necessarily to assert against medieval society. But the development of this right itself coincides completely with the dissolution of the Roman community.[15]

Juridical personhood presupposes a society in which individual producers are regarded as free and equal parties in contractual exchange. Consequently, a society in which production is organized on the basis of generalized commodity exchange must legally rule out the possibility of regarding human beings as articles of property (as the Roman *servus* was regarded). Although it can be argued that ancient slave and medieval feudal societies had clearly defined property rights for masters and lords, these societies were characterized by direct coercion and arbitrary privilege. The idea of the juridical person emerges most clearly in capitalist society, in which individual producers relate to each other through the medium of commodity exchange and on the basis of equal legal rights. In this respect, freedom of contract is honoured, and individual labourers are "free" to sell their labour powers as commodities in the market, provided that labour power is sold within definite temporal limits. It is against this historical background that Marx refers to capitalist society as "a society in which the great mass of the produce of labour takes the form of commodities, in which, consequently, the dominant relation between man and man, is that of owners of commodities."[16]

At first sight, it appears that Pashukanis's commodity exchange theory of law is a faithful and consistent elaboration of Marx's inference that the juridical person—the bearer of equal legal rights—emerges in a society in which production is geared towards commodity exchange and the imperatives of the market. As we will see, however, it is one thing to claim that juridical personhood emerges out of developed exchange relations, but it is another matter to suggest that all forms of law and right are reducible to commodity exchange relations, and that juridical personhood thereby exhausts the concept of law. In his rigorous search for the *differentia specifica* of law, Pashukanis ends up conflating three distinct concepts under the umbrella of legal form: positive law, legal validity, and juridical personhood. *Positive law* refers to the written set of legal rules that govern relations between individuals in a given society; *legal validity* provides some evaluative criteria for establishing what counts as law; and *juridical personhood* refers to the individual's status as a bearer of equal legal rights. By deriving all legal phenomena from generalized exchanged relations, Pashukanis and proponents of his view infer that ancient slave and feudal societies were largely bereft of law because they lacked developed exchange relations. Any traces of law in pre-capitalist societies are then attributed to nascent commodity exchange relations.

Incidentally, the ahistorical and broadly teleological dimension of Pashukanis's thought has been endorsed by prominent liberal legal theorists such as Lon Fuller. Following in the footsteps of Pashukanis, Fuller writes:

> In truth, the only law is bourgeois law. To be sure, legal institutions in embryo can be found in feudal or slave society, where they are intertwined with religious and military elements. Modern scholars are likely to misinterpret these rudimentary legal elements in pre-capitalist societies as the equivalent of modern law. Actually, these embryonic and undifferentiated legal elements are like the first tentative groping towards a capitalist organization that can be detected even in the most primitive societies.[17]

Notwithstanding their opposing theoretical and political orientations, Fuller and Pashukanis are in agreement that the concept of law is incomprehensible in the absence of generalized commodity exchange. As a result, "bourgeois law" and capitalist productive relations become constitutive features of any legal system. Pashukanis eventually conceded the existence of feudal law, but only because feudal society exhibited, in his view, "purchase

and sale, with products and labour assuming the form of commodities, and with a general equivalent, i.e. money, throughout the entire feudal period."[18] By acknowledging the existence of commodity exchange in feudal society, Pashukanis reaffirms the one-sidedness and rigidity of his theoretical outlook, with the notable drawback that generalized exchange relations become synonymous with commercial activity as a whole.[19]

Pashukanis's account of the legal form carries far-reaching consequences for the fate of law in developed communist society. Although Pashukanis grants that recourse to law will still be necessary during the transition from capitalism to communism, he leaves no doubt about the withering away of law in developed communist society. Since the legal form is derived from the commodity form, any conceivable communist society in which production is no longer organized on the basis of commodity exchange relations would have to be a society that is devoid of both law and rights. The decisive triumph of planned production over anarchic market relations would pave the way for the disappearance of legal relations from all facets of human life. Pashukanis accentuates this thesis with his insistence that adherence to the "withering away" thesis is the decisive test for determining the degree to which a legal theorist adopts a Marxist outlook, for any other position would concede the eternal character of the commodity form. Pashukanis writes:

> The problem of the withering away of law is the cornerstone by which we measure the degree of a proximity of a jurist to Marxism. […] One who does not admit that the planned organizational base eradicates the formal legal basis is, essentially speaking, convinced that the relationships of commodity-capitalist economy are eternal, and that their loss at the present is merely an abnormality which will be eliminated in the future.[20]

Pashukanis's legal theory presents itself as a formidable challenge to any future-oriented account of communist legality and rights. The mere mention of socialist legality is dismissed by Pashukanis as a misguided attempt to ascribe eternal attributes to a historically finite legal form.[21] Pashukanis argues that the continuity of the legal form in the historical transition to developed communism is but the lingering defect of commodity exchange relations and the resulting opposition of private interests.[22] Communist society will liberate itself from the legal form as soon as it abolishes class antagonisms and production on the basis of commodity exchange.[23] After all, the legal form also masks the material reality of class domination

and serves as an artificial barrier to a genuine community that would be founded on spontaneous cooperation, mutual interests, and unity of social purpose.[24] Once the means of production are socialized and production is planned with the aim of meeting human needs, administration will become a purely technical matter concerning the most efficient means for allocating collective ends, especially under conditions of material abundance.[25] *Technical regulation*—as distinct from *legal regulation*—will involve such matters as expediting the transport of trains and adopting the most effective techniques for healing sick persons, neither of which would warrant juridical or ethical judgements as far as Pashukanis is concerned.[26] The disappearance of the commodity form will be accompanied by the simultaneous disappearance of law, courts, and the basic legal rights to which juridical persons are entitled. It is worth recalling that these legal rights include the right to life, liberty, and security of the person, rights against arbitrary arrest, imprisonment, and seizure of property, the presumption of innocence, the right to independent legal counsel, and, in a word, due process.

Pashukanis's rigid distinction between technical and legal rules is framed so as to distinguish developed communism from all other societies, in which recourse to legal regulation is necessary. However, as Hugh Collins has correctly observed, the dividing line between technical and legal regulation becomes blurred as soon as one moves beyond the narrow confines of private law.[27] In contrast to private law, which takes as its starting point the relations between private persons (property owners, to be exact), public law is concerned with the relations between a government and its citizens, or in the case of communism, the relationship between the public power and the individual producers. If democratic planning and worker self-management are necessary features of communism, then traffic rules, workplace safety standards, and regulations concerning health care provision cannot be subsumed under the general heading of technical regulation, because the content of these rules is just as much ethical and juridical. Pashukanis places these rules under the banner of technical regulation because he assumes, without reservation, that all legal rules stem from the nexus of private law and the opposition of interests between competing commodity owners. He writes: "No matter how ingeniously devised and unreal any one of the juridical constructs may appear, it is on firm ground so long as it remains within the bounds of private law, and of property law in particular."[28] However, by remaining strictly within the bounds of private law, Pashukanis's general theory of law cannot make independent theoretical sense of public

law. This shortcoming is reflected in Pashukanis's assertion that "the very concept of 'public law' can only develop through its workings, in which it is continually repulsed by private law; so much so that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity."[29]

After reluctantly acknowledging the historical existence of feudal law, Pashukanis grants the continuing relevance of legal regulation, except this time in the context of a state-socialist society that was moving steadily away from commodity exchange relations. The changing political circumstances in the Soviet Union, in particular, the initiation of the Five-Year Plan and the imposition of collectivization in the countryside, compelled Pashukanis to revise his thesis that legal regulation emerges out of commodity exchange relations. He now concedes the relevance of public administrative law for as long as state coercion remains intact:

> Considering the process of curtailment of the legal form, however, we must take full account of the fact that, so long as the element of state coercion remains in operation, even in the sphere of relationships *having nothing in common with the market and exchange*, we will be dealing with legal regulation. […] Consequently, a particular type of legal system, which may be called public-economic or a system of administrative-economic law, will also be retained.[30]

Three problematic conclusions follow from Pashukanis's admissions. First, if public administrative law is preserved in the sphere of relationships having *no connection* with commodity exchange, then it is cannot be asserted that the "legal form" is derived from generalized commodity exchange. Second, if the thesis of the withering away of law is predicated on the withering away of the coercive state apparatus, then Pashukanis betrays his original account of the legal form by locating the defining characteristic of law in state coercion, rather than in the opposition of interests between competing commodity owners in the market. Finally, if public administrative law can exist in the absence of generalized commodity exchange, then there is no reason why law or right would wither away in communist society, especially since democratic administration would be retained in such a society. After all, the private law governing market transactions does not exhaust the concept of law as such.

China Miéville, a contemporary advocate of Pashukanis's commodity exchange theory, admits that Pashukanis did not appreciate the significance of public administrative law.[31] He also concedes that Pashukanis's elevation of technical regulation at the expense of legal regulation is problematic given its bureaucratic deference and inability to offer conceptual resources for resolving potential disputes in the communist society of the future.[32] Legal regulation, for Pashukanis, presupposes conflicting private interests, whereas technical regulation presupposes unity of social purpose. Marx emphasizes the importance of collective self-determination in communist society, which would entail democratically managed production and legislation by the associated producers. Pashukanis, on the other hand, delegates the task of determining the most efficient means for realizing collective ends to specialist agencies and bureaucrats.[33] Moreover, Pashukanis's one-sided critique of the legal form and his celebration of technical regulation at the expense of legal regulation means that the associated producers would no longer have recourse to the minimal legal protections afforded by bourgeois right.[34] That said, Miéville concludes that the weaknesses in Pashukanis's theory do not invalidate it.[35] The problem is that Miéville overlooks the extent to which Pashukanis's weaknesses are the direct outcome of his commodity exchange theory of law.

4.2 Pitting Pashukanis Against Marx

The shortcomings of Pashukanis's theory can be summed up on four levels, each of which has deleterious consequences and distances Pashukanis theoretically from Marx. As has already been noted, Pashukanis conflates three distinct concepts—positive law, legal validity, and juridical personhood—under the unitary umbrella of the legal form. Second, he derives all legal phenomena from generalized commodity exchange relations, which confines the scope of his analysis to private law in general and to property law in particular. Third, he cannot make independent theoretical sense of public law, which informs his subsequent portrayal of democratic planning as a technical process that is devoid of juridical and ethical content. Finally, he contradicts Marx's central claim that legal relations stem from historically specific productive relations.

A cursory reference to the positive law of a given society hardly suggests that the society in question is based on developed exchange relations or that this society's laws are just from a normative point of view. The Prussian *Landesgesetz* and the Napoleonic Code are both instances of positive

law in the sense that they set out authoritative rules that regulated relations between individuals and carried the threat of penal sanction. The criteria for legal validity can range from H.L.A. Hart's "rule of recognition"[36] to Lon Fuller's more elaborate internal morality of law.[37] While much of the positive law corresponding to feudal societies, for example, militated against the idea of juridical personhood, it would be a mistake to infer that feudal societies were devoid of positive law. It is true that capitalist production is unlike ancient slavery and feudalism because individual producers relate to each other primarily through the medium of commodity exchange and on the basis of equal legal rights. However, while Marx attributes the emergence of juridical personhood to the proliferation of generalized exchange relations under capitalism, he does not conflate positive law with juridical personhood, nor does he derive positive law and the standards of legal validity from generalized exchange relations.[38]

Pashukanis's most significant departure from Marx lies in his derivation of legal relations from commodity exchange relations. This deviation was already noted by fellow Marxists such as Pyotor Stuchka and Karl Korsch.[39] More recently, a revamped version of the same criticism has been put forward by Bob Fine, who maintains: "Whereas Marx derived law from relations of commodity production, Pashukanis derived it from commodity exchange. This was the essence of their difference."[40] While Fine's criticism of Pashukanis is warranted, he does not provide sufficient textual support for refuting Pashukanis's theory as a faithful elaboration of Marx's understanding of law. Fine approaches Marx's account of law through an analogous discussion of value, money, and capital, which confines his own inquiry to capitalist production and precludes consideration of pre-capitalist and post-capitalist varieties of law or right.[41]

The theoretical differences between Marx and Pashukanis are captured most clearly, if tragically, by their confrontations with the force of positive law—Marx in Rhenish Prussia and Pashukanis in Soviet Russia. As has already been noted in the preceding chapters, Marx and his colleagues at the *Neue Rheinische Zeitung* were arraigned before a Cologne jury court in 1849, charged with inciting revolution in connection with a political refusal to pay taxes; they were later acquitted. Pashukanis, for his part, was denounced by Stalin's associates as an enemy of the Soviet people and disappeared in 1937.[42] Marx's confrontation with Prussian law evidences a new materialist treatment of right that contradicts Pashukanis's commodity exchange theory. Marx, as we will see, distinguishes between positive law,

legal validity, and juridical personhood, and he reaches the prescient conclusion that positive law changes as a consequence of changing relations of production.

The March Revolution of 1848 was a liberal or "bourgeois" revolution inasmuch as it was directed against the Prussian monarchy and the prevailing system of feudal privilege. Following a brief period of liberal reform, the Prussian government unleashed a repressive campaign against suspected dissidents and revolutionary democrats. Marx and other members of the *Neue Rheinische Zeitung* were tried on the basis of laws that had been enacted retroactively. While Marx acknowledged the new laws as a matter of fact, he denied that they had legal validity. He asks: "How then was the idea conceived to allow the United Provincial Diet, the representative of the old [i.e., feudal] society, to dictate laws to the new society which asserted its rights through the revolution?"[43] Marx also questions the legal basis for trying members of the *Neue Rheinische Zeitung* under retroactively enacted laws: "After a revolution or counter-revolution has been consummated the invalidated laws cannot be used against the defenders of these laws. This would be a cowardly pretense of legality which you, gentlemen, will not sanctify by your verdict."[44] While Pashukanis remained silent on matters of legal validity, Marx assumed that valid laws must be generalizable, public, and non-retroactive.

Whereas Pashukanis argues that the legal form rises and falls with the commodity form, Marx suggests that positive law changes as a consequence of changing material conditions of life, regardless of whether production is organized on the basis of commodity exchange. Marx insists that the old feudal laws of the Prussian state "were engendered by the old conditions of society and must perish with them. They are bound to change with the changing conditions of life."[45] He then offers an important normative judgement concerning the imposition of "old" laws under altered material conditions of life:

> To maintain the old laws in face of the new needs and demands of social development is essentially the same as hypocritically upholding out-of-date particular interests in face of the up-to-date general interests. *This maintenance of the legal basis* aims at asserting such particular interests as if they were the *predominant* interests when they are *no longer dominant;* it aims at imposing on society laws which have been condemned by the conditions of life in this society, by the way the members of this society earn their living, by their commerce and their material production; it aims at retaining in function

> legislators who are concerned only with particular interests; it seeks to misuse political power in order forcibly to place the interests of a minority above the interests of the majority.[46]

The adoption of Pashukanis's commodity exchange theory renders Marx's discussion of "new" and "old" laws utterly incoherent, and this is because Pashukanis subscribes to a static and ahistorical conception of law whereas Marx does not. While Pashukanis theorizes the "withering away" of law *tout court*, Marx's dialectical outlook commits him to the more consistent view that positive law changes, or at any rate ought to change, as a consequence of transformed material circumstances, which means that even a developed communist society would require a system of legal justice. In contrast to Pashukanis, Marx's understanding of law is not confined to transactions between self-interested market actors. Positive law predates generalized commodity exchange and will survive the abolition of commodity exchange under associated or communist production.

4.3 The Dubiousness of Technical Regulation

The radicalness of Pashukanis's theory stems from his claim that the replacement of generalized exchange by planned production would mean the disappearance of ethical and juridical judgements in communist society.[47] Rather than relying on juridical mechanisms for resolving potential disputes between the associated producers, communism would, on this view, be characterized by unity of social purpose, the ultimate measure of which would be technical efficiency and expediency. Pashukanis's elevation of technical regulation was based on the misguided assumption that planned production would create conditions of material abundance that would eliminate the social need for law and ethics. As we have seen, liberal political philosophers, such as John Rawls and Allen Buchanan, agree with Pashukanis in holding that communist society will have transcended the circumstances of justice. The circumstances of justice arise whenever a society is defined by material scarcity and the presence of interpersonal conflict.[48] Common to such interpretations is the assumption that a technical fix will eliminate the social need for legality and rights.[49]

Although Marx assumes that the development of productive forces under communism will generate levels of material abundance sufficient for meeting the diversity of human needs while decreasing necessary labour time, at no point does he suggest that technical judgements will take

the place of ethical and juridical considerations. It should be recalled that Marx's heuristic reference to a given mode of production is not confined to physical survival or technical expedience. Instead, a mode of production captures the concrete way in which human beings express themselves in the world based on what they produce and the manner in which they produce at a given point in time. Marx and Engels write:

> This mode of production must not be considered simply as the reproduction of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite form of life on their part […] as individuals express their life, so they are.[50]

Furthermore, Marx evaluates different historical modes of production in normative terms, based on the degree to which they contribute to or hinder the development of freedom—the expansion of human powers and capacities. Freedom in developed communist society would consist of

> socialised man, the associated producers, *rationally regulating their interchange with Nature*, bringing it under their common control, instead of being ruled by it as by the blind forces of Nature; and achieving this with the least expenditure of energy and *under conditions most favourable to, and worthy of, their human nature*.[51]

Marx's insistence on producing in a manner worthy of human nature is a definite consideration of value, which rests on a normative judgement about how human beings should or should not be treated under communist production.

Pashukanis, for his part, sought to replace "legal regulation" with a technical mode of regulation. The divergence between legal regulation and technical regulation mirrors the conceptual difference between practical and instrumental reason in Kantian morality. While a purely technical account of regulation may point to the most efficient means for realizing collective ends, it does not offer a normative basis for evaluating the validity of means or ends. To be sure, human beings have been treated differently across historical modes of production. In what follows, I will contrast capitalist and communist relations of production through the prism of recognition and show why Marx's radical account of recognition presupposes a reconstituted notion of juridical personhood and a specifically communist version of legality.

4.4 Defining the Terms of Recognition: Cognitive and Normative Considerations

The struggle for recognition has become something of a catchphrase in contemporary moral and political philosophy.[52] The most vocal exponents of the recognition approach have been neo-Hegelian philosophers, who have found in recognition theory a critical framework for contesting existing forms of social exclusion and domination. The theoretical inspiration for this approach harks back to Hegel, who maintains in a well-known passage of his *Phenomenology of Spirit* that "self-consciousness exists in and for itself when, and by the fact that, it also exists for another; that is, it exists only in being acknowledged."[53] Hegel's dialectic of lordship and bondage presents domination as a self-defeating process, because the ideal form of recognition can only be obtained reciprocally from an equally free agent. Intersubjectivity is part of the picture even at such a rudimentary level of self-consciousness, and for good reason. The presence of the other is an inescapable feature of the human condition, whether one dominates the other for the sake of achieving self-certainty (the Lord), whether one trembles at the spectre of pure nothingness (the Bondsman), or whether one seeks the recognition of one's human rights in the context of a liberal polity.

Before approaching Marx's account of recognition, it is worth distinguishing between two kinds of recognition that are rarely differentiated: namely, cognitive recognition and mutual recognition. Cognitive recognition is a process of cognitive awareness that does not, by itself, lend moral respect or concern; for example, I may recognize a passer-by on the street, but my cognitive awareness of the passer-by does not translate into a substantive normative acknowledgement of the passer-by.[54] Relations of mutual recognition, however, are informed by a definite reciprocity or symmetry. I draw this distinction, because in some cases (e.g. class struggle), cognitive recognition may actually lead to conflict and even revolution. Cognitive recognition is illustrated by Hegel's observation that through the process of labouring and transforming nature for the Lord, the Bondsman becomes aware of himself as a free being: "In fashioning the thing, [the Bondsman] becomes aware that being-for-self belongs to *him*, that he himself exists essentially and actually in his own right."[55] In this sense, it takes only a cognitive recognition on the part of the Bondsman to bring an end to his condition of bondage. Marx makes an analogous claim in the

Grundrisse concerning the experience of the wage-labourer under capitalism:

> The recognition of the product as its own, and the judgment that its separation from the conditions of its realization is improper—forcibly imposed—is an enormous awareness, itself the product of the mode of production resting on capital and as much the knell to its doom, as with the slave's awareness that he cannot be the property of another.[56]

However, the cognitive recognition of one's freedom as person, or the realization that the present order is improper, is not synonymous with mutual recognition. The latter presupposes reciprocal acknowledgement of freedom, which will form the basis for Marx's radical understanding of recognition.

4.5 Alienated Production Versus Associated Production: Marx's Radical Account of Recognition

As Axel Honneth has rightly noted, Marx's earliest reflections on recognition are outlined in his comments on the political economy of James Mill.[57] These comments form an important supplement to the discussion of alienated labour in the Paris manuscripts of 1844. Marx begins his critical commentary by explaining how the expansion of human needs leads to the development of exchange relations between mutually disinterested proprietors.[58] Under conditions of generalized commodity exchange, relations between persons are mediated by the instrumental exchange of commodities in the market, in which persons are respected solely in terms of their status as owners of their bodies and of their property, while articles of property take the form of commodities that carry definite exchange value. The exchange relation rests on the reciprocal recognition of juridical personhood, which confers a capacity for negative rights along with the expectation that these rights will be respected by others. While commodity exchange is regarded as an integral form of recognition in capitalist society, Marx sees the exchange process as being motivated instead by mutual deception and a broader servility to the alien power of commodities.[59] Marx writes:

> But our recognition of the mutual power of our objects [i.e., commodities] is a battle in which he conquers who has more energy, strength, insight, and dexterity. […] Who defeats whom is an accident as far as the totality of the relationship is concerned. The ideal intended victory is with both sides, i.e., each has, in his own judgment, defeated the other.[60]

And he continues:

> If this mutual enslavement to an object [i.e., the commodity] at the beginning of the process appears now as in the relationship of lordship and slavery, that is only the crude and open expression of our true relationship. […] Our mutual value is for us the value of our mutual objects. Thus, man himself is for us mutually worthless.[61]

Accordingly, while commodity owners are recognized in their capacity as persons who are deserving of respect, the normative threshold for recognition is limited to the negative prescriptions of non-interference with choice and respect for the property rights of possessive individuals.[62] To the extent that social relations are mediated by instrumental transactions in the market, relations between persons are characterized by mutual indifference and cold respect.[63] There is absent in exchange any positive concern for public welfare or human needs: any concern of this sort would be dismissed as an external imposition on liberty and deemed an affront to human dignity. Marx affirms:

> Our mutual alienation from the human essence is so great that the direct language of this essence [producing for others] seems to us to be an affront to human dignity, and in contrast the alienated language of the value of things seems to be the language that justifies a self-reliant and self-conscious human dignity.[64]

The language of exchange value thus estranges human beings from freely producing the objects of each other's needs, that is, it makes this production something foreign and hostile, and prevents them from obtaining reciprocal recognition in and through the process of cooperative production.

In due course, Marx contrasts relations of recognition under capitalist private property and commodity exchange with the relations of recognition that would obtain under conditions of associated production and social property. Marx's more radical account of recognition is based on the idea of producing for others, which would foster the reciprocal realization of

human needs and the validation of individuality through the production and consumption of use values. The thin respect afforded to commodity owners in the exchange relation would be supplanted by a deeper concern with the meeting of human needs. Needless to say, Marx's concept of species-being also takes centre stage in his concluding remarks about "producing as human beings":

> Supposing we had produced as human beings; each of us in his production would have doubly affirmed himself and his fellow men. I would have: (1) objectified in my production my individuality and its peculiarity and thus both in my activity enjoyed an individual expression of my life and also in looking at the object have had the individual pleasure of realizing that my personality was objective, visible to the senses and thus a power raised beyond all doubt. (2) In your enjoyment or use of my product I would have had the direct enjoyment of realizing that I had both satisfied a human need by my work and also objectified the human essence and therefore fashioned for another human being the object that met his need. (3) I would have been for you the mediator between you and the species and thus been acknowledged and felt by you as a completion of your own essence, and a necessary part of yourself and have thus realized that I am confirmed both in your thought and in your love. (4) In my expression of my own life I would have fashioned your expression of your life, and thus in my own activity have realized my own essence, my human, my communal essence. Thus, in this relationship what occurred on my side would also occur on yours.[65]

Marx thus casts exchange, which is considered an integral medium of recognition in capitalist society, as a defective or alienated form of recognition. In this respect, his critical assessment of exchange in this early work runs contrary to Hegel's more positive treatment of the subject in the *Philosophy of Right*. Marx regards the institutions of private property in the means of production and commodity exchange as being informed by a process of mutual plundering and a servility to the value of things, whereas Hegel views commodity exchange as a quintessential form of recognition in any modern society.[66] To be sure, Marx's thinking had undergone considerable change by the time he formulated the major premises of his new materialist outlook. His early account of recognition, much like the distinction between *authentic* and *inauthentic* human essence, loses its ahistorical character and becomes grounded in the critique of capitalist political economy.

On Axel Honneth's reading, Marx simply abandoned his earlier formulation of recognition and replaced it with a purely technical and economistic theory that no longer emphasized recognition as such.[67]

However, a closer reading of Marx's mature work, particularly the *Grundrisse*, suggests otherwise. The *Grundrisse* is a collection of posthumously published notes that Marx wrote as a rough outline of *Capital*. It shows Marx's skilful use of the dialectical method as a means of critiquing the presuppositions of capitalist political economy. Equally revealing is Marx's mature treatment of recognition in the *Grundrisse*, which combines his earlier assessment of exchange with a more systematic analysis of exploitation in the sphere of production. Recognition in capitalist society is mediated by the exchange of commodities of equal value in the market. Marx writes: "Although individual A feels a need for the commodity of individual B, he does not appropriate it by force, nor vice versa, but rather they *recognize* one another reciprocally as proprietors, as persons whose will penetrates their commodities."[68] The normative threshold for recognition is again confined to instrumental respect for the rights of competing commodity owners:

> The common interest which appears as the motive of the act [of exchange] as a whole is recognized as a fact by both sides; but, as such, it is not the motive, but rather proceeds, as it were, behind the back of these self-reflected particular interests, behind the back of one's individual's interest in opposition to that of the other.[69]

Furthermore, in the sphere of capitalist production—as distinct from that of simple exchange—the selling of labour power turns into its opposite, namely, the domination of labour by capital. This results in an asymmetrical exchange—an exchange without an equivalent:

> The exchange of equivalents, which seems to presuppose ownership of the products of one's own labour – hence seems to posit as identical: *appropriation through labour,* the real economic process of making something one's own, and *ownership of objectified* labour; what appeared previously as a real process is here recognized as a legal relation, i.e. as a general condition of production, and therefore recognized by law, posited as an expression of the general will – turns into, reveals itself through a necessary dialectic as absolute divorce of labour and property, and appropriation of alien labour without exchange, without equivalent.[70]

Consequently, neither capitalist exchange nor production can serve as a positive model for reciprocal recognition as far as Marx is concerned. The exchange of commodities relies on a thin notion of cold respect, while production is characterized by exploitation and class domination. However, mutual recognition is rooted in the idea that an individual's freedom can only be validated when it receives *reciprocal* acknowledgement from an equally free self.

Marx contrasts production on the basis of commodity exchange with associated production. With the socialization of the means of production and the introduction of democratic self-management, individuals would no longer relate to each other through exchange as mutually indifferent commodity owners. Relations between individuals would be meditated instead by a socialized process of production aimed at meeting the multiplicity of human needs. Marx writes:

> In the second case *the social character of labour* is presupposed, and participation in the world of products, in consumption, is not mediated by the exchange of mutually independent labourers or products of labour [i.e., abstract labour]. It is mediated, rather, by the social conditions of production within which the individual is active.[71]

The ideal form of recognition is undermined in the act of exchange because what is being exchanged is abstract labour. Concrete labour, on the other hand, is labour whose place would be known in the total labour of associated production *ex ante,* and whose contribution to the social purpose would be mediated through the process of democratic planning and worker self-management.

The normative threshold for recognition under associated production would thus be raised from that of cold respect to a deeper concern with the free development of individuals and the satisfaction of their needs.[72] Marx's more radical formulation of recognition is captured in his famous assertion that "in place of the old bourgeois society, with its classes and class antagonisms, we shall have an *association*, in which the free development of each is the condition for the free development of all."[73] The recognition of the unhindered development of *each* individual, including the recognition of his or her respective needs, is the condition for the free development of *all* individuals. The implication is that productive relations must be radically transformed and classes abolished before mutual recognition can become a

concrete reality under associated production. However, rather than positing associated production as a utopian ideal, Marx sees hints of this form of production developing within capitalist society, leading to his conclusion that joint-stock companies and worker-owned cooperatives represent "within the old form the first sprouts of the new."[74] Furthermore, Marx writes that "the capitalist stock companies, as much as the co-operative factories, should be considered as transitional forms from the capitalist mode of production to the associated one."[75] These passing remarks suggest that "associated production" and "social property" are far less distant and utopian than is usually thought.

To be sure, mutual recognition in communist society would no longer take place among mutually indifferent *atomistic* individuals but among explicitly *social* individuals. Marx takes the social individual as his primary ontological subject, even though the nature of this ontological subject changes throughout human history.[76] Marx writes:

> The human being is in the most literal sense a ζῷον πολιτικόν [a political animal], not merely a gregarious animal, but an animal which can individuate itself only in the midst of society. Production by an isolated individual outside society […] is as much of an absurdity as is the development of language without individuals living *together* and talking to each other.[77]

Elsewhere, Marx maintains that "only in community with others has each individual the means of cultivating his gifts in all directions; only in community, therefore, is personal freedom possible."[78] Mutual recognition is an intersubjective process, and Marx is convinced that individuals can realize their status as free beings only in community with others.

4.6 Mutual Recognition and the Reconstitution of Juridical Personhood

Marx's radical theory of recognition presents itself as a corrective to the defective form of recognition in capitalist society, namely, that of cold respect between mutually indifferent commodity owners. The standard liberal charge against it is that Marx's ontology of the social individual is unjustifiably collectivist or holistic, so much so that his account of mutual recognition would undo the independent self whose freedom communist society claims to vindicate. Leszek Kołakowski rehearses this view in his essay "Marxism and Human Rights." Kołakowski maintains that Marx's

view of the "social self" is hostile to the idea of rights because "an individual's value is not related to his personal life, but to his being a component of the collective 'whole.'"[79] He concludes that "one should naturally expect that the ultimate liberation of humanity would consist in the coercive reduction of individuals into inert tools of the state, thereby robbing them of their personality, of their status as active subjects."[80] In other words, Marx's social ontology is incompatible with the notion of juridical personhood (the capacity for having rights) and inevitably lends itself to the politics of socialist totalitarianism.[81]

Kołakowski's critique is correct when directed against the "crude communism" derided by Marx in his 1844 Manuscripts, that is, a despotic community in which the annulment of private property and exchange relations is accompanied by universal levelling and the negation of personality in every sphere of life.[82] A similar criticism may be levelled against Evgeny Pashukanis, who was convinced that the abolition of commodity exchange relations would eliminate juridical personhood outright (a conclusion he would personally regret). The sensible communitarian response to Kołakowski's critique of holism is that any theory of rights, whether atomistic or holistic in its ontology, presupposes a community in which certain human attributes obtain meaning and are deemed worthy of protection.[83] By counterposing the "separate self" to Marx's idea of the "social self," Kołakowski overlooks the *social* context that makes talk of rights possible in the first place. While Marx shares the communitarian critique of liberal atomism, his account of communism presupposes a reconstituted notion of juridical personhood, without which neither "free individuality" nor radical recognition is possible. The community of associated producers that Marx has in mind requires individuation along with social ownership of the means of production.

Marx grants that the individual's status as a bearer of equal rights emerges historically under capitalism, in which production is organized on the basis of commodity exchange.[84] However, he does not conclude from this that rights are somehow confined to societies in which production is based on exchange and market imperatives. On the contrary, Marx reiterates the extent to which associated production presupposes developed exchange relations as a prior condition. He notes, for example, how the absence of developed exchange relations in pre-capitalist societies trapped individuals into restrictive categories that subjugated them to the dominion of the community or to the arbitrary will of other individuals.[85] He

suggests moreover that the formal freedom and abstract equality presupposed by developed exchange relations constitute historical advances in the development of human freedom:

> Equality and freedom presuppose relations of production as yet unrealized in the ancient world and in the Middle Ages. Direct forced labour is the foundation of the ancient world; the community rests on this as its foundation; labour itself is a "privilege," as still particularized, not yet generally producing exchange values, is the basis of the world of the Middle Ages. Labour is neither forced labour, nor, as in the second case, does it take place with respect to a common, higher unit (the guild).[86]

Rather than casting the historical development of exchange relations as an insurmountable barrier to the development of communism, Marx sees this development instead as a technical and cultural precondition for the free development of individuals. Although Marx thinks that the formal freedom achieved by capitalism remains rooted in an *objective dependence* on private property and the imperatives of the capitalist market, he is convinced that any romantic longing for a return to pre-juridical relations between human beings is as "ridiculous" as the apologetic claim made by bourgeois ideologues that capitalist production marks the end of human history. Marx writes:

> Universally developed individuals, whose social relations, as their own communal (*gemeinschaftlich*) relations, are hence also subordinated to their own communal control, are no product of nature, but of history. *The degree and the universality of the development of wealth where this individuality becomes possible supposes production on the basis of exchange values as a prior condition*, whose universality produces not only the alienation of the individual from himself and from others, but also the universality and the comprehensiveness of his relations and capacities. In earlier stages of development the single individual seems to be developed more fully, because he has not yet worked out his relationships in their fullness, or erected them as independent social powers and relations opposite himself. It is as ridiculous to yearn for a return to that original fullness as it is to believe that with this complete emptiness history has come to a standstill.[87]

Individuals are already respected in their capacity for having rights just by virtue of being subjects of equivalent exchange in capitalist society. Insofar as the generalization of legal rights is viewed by Marx as a precondition for

"universally developed individuals," it hardly makes sense that the emancipation of individuals from an objective dependence on alien market forces would mean depriving them of elementary legal rights. The catalogue of legal rights, as we have seen, includes the right to life, liberty, and security of the person, the right against arbitrary arrest, imprisonment, and seizure of property, the presumption of innocence, the right to independent legal counsel, and due process more generally.

Despite their substantive limitations, the legal rights conferred on individuals in capitalist society are not somehow to be undone in communist society, for this would mean reverting to pre-juridical relations in which human beings are not even *formally* recognized as persons, let alone social individuals with diverse needs. Marx concluded that a romantic yearning of this sort is "ridiculous." Legal rights would not be negated under associated production; instead, they would take on more adequate content. Marx's mature account of recognition raises the normative threshold from cold respect to a generalized concern with the free development of individuals and the satisfaction of needs. However, a concern of this kind presupposes that social individuals possess basic legal rights, short of property rights that result in exploitation and class domination (i.e. private ownership of production and the right to appropriate the proceeds of alien labour).

Marx's radical account of recognition is therefore inconceivable unless the associated producers are respected in their capacity for formal freedom and basic legal rights. Carol Gould's pioneering study of Marx's social ontology points precisely in this direction. Gould observes:

> Mutuality [in communist society] goes beyond instrumental reciprocity in that each does not take the other as a means only, but also as an end in him or herself. Further, it goes beyond the recognition by each other's equal capacity for freedom although it presupposes this recognition. […] That is, each recognizes and respects not only the other's capacity for freedom, but also the specific ways in which the other is fulfilling or realizing this capacity, that is, the other's development of his or her positive freedom.[88]

The associated producers would therefore need rights vis-à-vis each other and vis-à-vis the collective body of associated producers. To be sure, these rights would be social rather than pre-social in origin and they would not be framed as absolute trumps. It is likely that the associated producers would find fewer occasions for insisting upon their rights under conditions of increased solidarity and material abundance.[89] However, it does not follow

from this that the associated producers would be deprived of rights. Contrary to what Kołakowski may have thought, Marx's social ontology is not philosophically averse to a historically situated and relational understanding of rights. Respect for a reconstituted notion of rights is a precondition for Marx's radical account of recognition. The fact that juridical personhood emerges out of developed commodity exchange relations does not mean that it is limited to capitalist societies. To impute such a view to Marx would mean embracing Pashukanis's commodity exchange theory and the thesis that law and rights rise and fall with the commodity form.

4.7 The Preliminary Case for Communist Legality

As has already been noted, Marx derives legal relations from historically specific productive relations, and he sees positive law as undergoing transformation with changing relations of production. At a conceptual level, Marx's new materialist conception of right commits him to a system of justice that would be appropriate to the needs of individuals in the context of communist production.[90] The general principle "from each according to his abilities, to each according to his needs" comes to mind here, but sufficient as this principle may be for matters of distributive justice, it does not offer a prima facie case for communist legality. After all, one could infer, as Pashukanis did, that technical efficiency and material abundance would eliminate all sources of interpersonal conflict and render legality superfluous under communism. However, there is no textual evidence that communist society would eliminate the potential for *individual* conflicts and disputes on all matters, even under conditions of associated production and relative material abundance. Marx hints as much in his 1859 Preface to *A Contribution to a Critique of Political Economy*: "The bourgeois relations of production are the last antagonistic form of the social process of production-*antagonistic not in the sense of individual antagonism*, but of one arising from the social conditions of life of the individuals."[91] In other words, individual conflicts could still arise under developed communism, whether as a consequence of passion or of diverging preferences, and the resolution of these conflicts, however rare, would still require a system of legality. After all, Marx is not suggesting that social individuals would be saints whose projects will always coincide; individual disagreements will still occur in the absence of class antagonisms and production on the basis of commodity exchange.[92]

Engels also considered the possibility of interpersonal conflicts in communist society, "where everyone receives what he needs to satisfy his natural and his spiritual urges, where social gradations and distinctions cease to exist."[93] Although he was convinced that communist society would eliminate the root causes of crime and property disputes, he acknowledged that individual conflicts could still arise and would demand resolution by arbitrators:

> In order to protect itself against crime, against direct acts of violence, [capitalist] society requires an extensive, complicated system of administrative and judicial bodies which requires an immense labour force. In communist society this would likewise be vastly simplified, and precisely because—strange though it may sound—precisely because the administrative body in this society would have to manage not merely individual aspects of social life, but the whole of social life, in all its various activities, in all its aspects. We eliminate the contradiction between the individual man and all others, we counterpoise social peace to social war, we put the axe to the *root* of crime—and thereby render the greatest, by far the greatest, part of the present activity of the administrative and judicial bodies superfluous. […] Conflicts can then be only rare exceptions, whereas they are now the natural result of general hostility, and will be easily settled by arbitrators.[94]

To be sure, one could argue that Engels's account of arbitration is also *technical* rather than *juridical*, but as was the case with Pashukanis, the rigid distinction between legal and technical rules is dubious.[95] Even if the process of arbitration occurs outside an adversarial court setting, it would still require an impartial system of justice for adjudicating between opposing claims, however rarely these might occur. Contrary to Pashukanis's conclusions, the coordination of freight trains and the healing of sick persons would require legal regulation under communism. In the absence of clearly defined, generalizable, and predictable rules, the technical objectives stemming from the transport of freight trains might result in physical damage to individuals and the surrounding environment. The implementation of effective healing techniques might compromise the safety and dignity of patients. Ad hoc judgements, whether by bureaucratic decrees or unconstrained officials, would not pass Marx's test for valid law. "The law," writes Marx, "must be founded upon *society*, it must *express* the *common interests* and *needs* of *society*—as distinct from the caprice of individuals—which arise from the material mode of production prevailing at the

given time."[96] A normative position of this sort would require a generalizable and prospective system of rules that would guide individual action in the direction of mutual concern. Without these procedural features, the free development of some individuals would be thwarted by the arbitrary caprice of others, even in the absence of class domination and competition for scarce resources. Communism warrants a system of legality that would enable individuals to satisfy their diverse needs. If that is the case, then communist society cannot eliminate the juridical factor from social relations, as Pashukanis had hoped, without thwarting the free development of individuals—the basis for mutual recognition under communism.

4.8 Legality Without Organized Coercion?

Marx's openness to the possibility of communist legality will not convince those who regard organized coercion as a necessary condition for legality.[97] After all, how could there be a system of legality in the absence of professional coercers? As we have seen, Marx provides the following response in the *Communist Manifesto*: "When, in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character."[98] Political power is defined by Marx as the "organized power of one class for oppressing another,"[99] while public power is associated with the self-determination of the vast association, which would include legislative power. Marx views the state's coercive functions as superimposed and external to society, serving historically as the instrument of class domination. Marx theorizes that in the higher phase of communist society, public power (public authority) will lose its repressive character and take the form of an association. Although the repressive and *external* character of the state will be abolished in communist society, there is no reason why legality would lose its role or significance.

The abolition of the *external* state is affirmed in Marx's subsequent writings. Although he predicts that there will be greater solidarity between individuals and that labour will become life's prime want, there is no evidence that coercion will be reduced entirely, and there are good reasons for thinking that the association will take the place of the *external* state as the institutional guarantor of communist legality. When discussing the historical experience of the Paris Commune, for example, Marx notes: "While the merely repressive organs of the old governmental power were to be amputated, its legitimate functions were to be wrested from an authority

usurping pre-eminence over society itself, and restored to the responsible agents of society."[100] The Paris Commune took the form of a short-lived radical democracy that remained law-bound, with elected judges who were responsible for rendering justice in accordance with the communal constitution.[101] The tenor of Marx's reflections about the withering away of the external state apparatus is repeated in the *Critique of the Gotha Program*, where he insists that "freedom consists in converting the state from an organ superimposed upon society into one completely subordinate to it."[102] Finally, in his response to the anarchist Mikhail Bakunin, Marx explains that "when class domination ends there will be no state in the present political sense of the word."[103] In all such instances, Marx points out that the *external* and coercive character of the state will be abolished, while the public power of the association will retain a legitimate function, and presumably this legitimate function will involve enacting laws or authoritative rules in a manner that is appropriate to the common interests and needs of individuals in communist society.

For sound democratic and epistemological reasons, however, Marx did not detail the future "laws" of communist society; this task was left for the associated producers themselves. Marxist theorists and revolutionaries would confront the realities of state socialism in the twentieth century. Evgeny Pashukanis, who had initially predicted the withering away of legality and the supremacy of technical regulation, eventually concluded that the rule of law and the protection of individual rights were definite advances over the arbitrary caprice of individuals. The alternative to a system of legality—as Pashukanis learned all too swiftly but belatedly—was the caprice of a despotic individual.[104]

4.9 In Search of Marx's Social Ontology: Lukács and the Ethical Necessity of Legal Mediation

Unlike Pashukanis, the Hungarian Marxist Georg Lukács survived Stalin's terror and its immediate legacy. In *History and Class Consciousness*—his best-known work—Lukács saw law as the quintessential expression of reification, a process in which relations between persons assume fixed and thing-like properties as a consequence of generalized commodity production.[105] However, in his final work, *The Ontology of Social Being*, Lukács sought to renew Marxism by elaborating what he took to be Marx's social ontology. This inquiry led him to rethink the place of law and ethics in communist society. In many respects, Lukács's *Ontology of Social Being*

was the lifelong product of experiencing "actually existing socialism," as well as thinking beyond reified exchange relations. Lukács arrived at the conclusion that a Marxist ethics was inconceivable without a materialist ontology of social being.

The study of ontology is concerned with the nature of being, and Lukács was intent on elaborating the nature of social being in Marx's new materialist philosophy. Lukács consequently eschews accounts of being that are rooted in a transcendental subject or an absolute Spirit. Following Marx, Lukács traces the "leap" from biological being to social being through the praxis of labour:

> Only with labour does its ontological nature give it a pronounced transition character. It is by its very nature a relationship of interchange between man (society) and nature, and moreover with inorganic nature (tool, raw material, object of labour) as well as organic, and although this relationship can also figure at certain points in the [causal] series just indicated, it characterizes above all the transition in the working man himself from purely biological being to social being.[106]

Lukács is not suggesting that speech acts, for example, are a peripheral category of social being; his point is that they are already presupposed by social being.[107] The distinctive feature of labour is that it accounts for the transformative "leap" from biological being (a being that is essentially determined by nature) to social being (a social and purposive being). Lukács takes labour as the model for social practice because it involves choices between alternatives that are not readily supplied by nature, which is governed by its own laws.

Each individual act of labour is purposive in character because it involves value-laden choices between alternatives. Lukács writes:

> Every human social activity is necessarily the product of alternatives, and presupposes a choice or decision in relation to these. […] This series runs from the opposition of the useful and non-useful, beneficial and harmful, by way of many social mediations, up to the "highest values" such as good and evil.[108]

While economically necessary labour is informed largely by instrumental considerations of use value (decisions between what is useful and what is not), interactions between individuals assume a broadly ethical character

inasmuch as social individuals try to influence each other's views in order to arrive at mutually desirable ends.[109] Lukács writes:

> The decisive distinction between the original alternatives in labour oriented simply to use-value and those at higher levels is based above all in that the former involve teleological positings that transform nature itself, while in the latter the goal in the first place is to influence the consciousness of other people so as to bring about the desired teleological positing on their part.[110]

Social interaction necessitates ethical discourse and institutionalized forms of mediation, in which social individuals participate in the collective process of choosing between competing alternatives. The need for legislation would become all the more pronounced under associated production because decisions will need to be made about common ends in the presence of multiple possibilities. Lukács notes:

> In the legal system any general statement is made with a dual intention: firstly, to influence the teleological projections of every member of society in a certain direction, secondly to persuade the group of people whose social assignment is to implement statutory definitions of the law into legal practice, to make their teleological projections in a given manner.[111]

A legal system is thus an integral form of mediation that shapes the value orientations and actions of individuals in definite ways:

> It is clear […] that certain […] rules, which acquire a position of autonomy in the course of history, are by their actual nature forms of mediation. […] We can refer to the sphere of law in the broadest sense (*Recht*). […] This mediating function must receive a constitution independent from the economy, and heterogeneously structured in relation to it, precisely in order to fulfill its task in the optimal way.[112]

While stressing the necessity of legal mediation in a post-capitalist society, Lukács avoids the pitfalls of formalism, which transforms law into a fetishized entity that is divorced from society, and "vulgar materialism," which reduces law to the economic structure while overlooking its mediating role. Lukács writes:

> We can see here once again how the real problem is necessarily overlooked both by the idealist fetishizing that would make the sphere of law into something with a basis entirely of its own, and by vulgar materialism that would derive this complex mechanically from the economic structure.[113]

Despite his thoroughgoing critique of formalism, Evgeny Pashukanis ultimately fell into the trap of "vulgar materialism" by deriving the legal form mechanically from the commodity form, thus precluding any serious discussion of the normative significance of legal mediation in the communist society of the future. Lukács arrived at a different conclusion about legality than Pashukanis because he began, like Marx, with the act of production rather than exchange. Lukács was also convinced that technical judgements could never take the place of juridical and ethical judgements, inferring that "no matter how high the level of development of technology (its support by a whole series of sciences), this cannot be the sole ground for decision between alternatives."[114]

4.10 Conclusion

Juridical considerations cannot be expunged from the normative horizon of communism because they stem from the reality of social being, a reality that necessitates value-laden choices between alternatives. Since Marx thinks that law should express the needs of society, legality cannot be abolished in communist society because it will be needed to mediate between different teleological projects so as to best realize the free development of individuals and meet diverse needs. The revival of Marxism requires an adequate conception of right that can illuminate contemporary social reality without succumbing to the pitfalls of legal nihilism and formalist fetishism. This task of illuminating a new materialist theory of right remains all the more pressing at a time when class power and economic inequality remain firmly entrenched in contemporary capitalist democracies.

Notes

1. Karl Marx, *Grundrisse*, trans. Martin Nicolaus (Middlesex: Penguin, 1973), 88.
2. Ibid.
3. The question of whether or not law *should* "wither away" in a future classless society has elicited different responses from legal and political philosophers on the Left. Olufemi Taiwo maintains that recourse to law, especially litigation, is a sign of defective social relations that would

not arise in a genuine community of free individuals, whereas Christine Sypnowich argues that legality has moral value beyond class-based societies. See Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Ithaca: Cornell University Press, 1996), 187; Christine Sypnowich, *The Socialist Concept of Law* (Oxford: Oxford University Press, 1990), 27.

4. Frederick Engels, "Socialism: Utopian and Scientific," MECW 24: 321 (my emphasis).
5. Ibid. Engels notes: "As soon as there is no longer any social class to be held in subjection; as soon as class rule, and the individual struggle for existence based upon our present anarchy in production, with the collisions and excesses arising from these, are removed, nothing more remains to be repressed, and *a special repressive force, a State*, is no longer necessary" (my emphasis).
6. Vladimir Lenin, "The State and Revolution," in *The Lenin Anthology*, ed. Robert Tucker (New York: Norton, 1975), 374.
7. After acknowledging that Hegel's retributive theory of punishment honours individual dignity in the abstract, Marx criticizes retributivism for its one-sided fixation on individual responsibility and complete disregard of background social circumstances. Marx reaches this conclusion while condemning capital punishment in the United States; see Marx, "Capital Punishment—Mr. Cobden's Pamphlet," MECW 11: 497. For more on Marx's critique of retributive punishment, see Marx and Engels, "The Holy Family," MECW 4: 179; Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2, no. 3 (1973): 217–243.
8. Evgeny Pashukanis, *Law and Marxism: A General Theory*, trans. Barbara Einhorn (London: InkLinks, 1978), 139.
9. Ibid., 107. Pashukanis is especially critical of Hans Kelsen's formalist theory of law, which, in his view, "explains nothing, and turns its back from the outset on the facts of reality, that is of social life, busying itself with norms without being in the least interested in their origin (a meta-juridical question!), or their relationship to any material matters" (ibid., 52).
10. This generic definition of law is also advanced by Christine Sypnowich in *The Concept of Socialist Law* (Oxford: Oxford University Press, 1990), 2.
11. Pashukanis, *Law and Marxism*, 100–101.
12. Ibid., 101.
13. Ibid., 103.
14. Ibid., 111.
15. Marx, *Grundrisse*, 245–246.
16. Karl Marx, *Capital Volume 1*, ed. Frederick Engels (New York: International Publishers, 1967), 60.
17. Lon Fuller, "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory," *Michigan Law Review* 47 (1949): 1161.

18. Evgeny Pashukanis, "The Marxist Theory of Law and the Construction of Socialism," in *Selected Writings on Marxism and Law*, ed. Peirs Beirne and Robert Sharlet, trans. Peter B. Maggs (London: Academic Press, 1980), 195.
19. For an excellent account that criticizes the conflation of capitalist production with pre-capitalist commercial activity, see Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (London: Verso, 2002).
20. Evgeny Pashukanis, "Economics and Legal Regulation," in *Selected Writings*, 268–269.
21. Pashukanis, *Law and Marxism*, 82.
22. Ibid., 132–133.
23. Pashukanis castigates socialist theorists who suppose that communist law will take the place of the bourgeois legal form: "The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations" (ibid., 61). Pashukanis concludes that "Marx conceives of the transition to developed communism not as a transition to new forms of law, but as a withering away of the legal form as such" (ibid., 63).
24. Ibid., 81–82.
25. Ibid., 135 and 158.
26. Ibid., 81–82.
27. Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1984), 110.
28. Pashukanis, *Law and Marxism*, 82.
29. Ibid., 106.
30. Pashukanis, "Economics and Legal Regulation," 269 (my emphasis).
31. China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto Press, 2006), 111.
32. Ibid., 100.
33. Pashukanis, *Law and Marxism*, 81.
34. Bob Fine, *Democracy and the Rule of Law: Marx's Critique of the Legal Form* (Caldwell, NJ: Blackburn Press, 2002), 164.
35. Miéville, "For Pashukanis," 111.
36. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 92–93. Hart maintains that a legal system is based on the union of primary and secondary rules. Authoritative commands do not provide an adequate basis for determining how law is made, amended, and enforced, or what distinguishes law from non-law. The latter requires what Hart calls a "rule of recognition."
37. Lon Fuller outlines in *The Morality of the Law* (New Haven: Yale University Press, 1964) eight ways in which a society can fail to make law. Of these

eight, generality, publicity, non-retroactivity, and stability are usually considered fundamental principles of legality. Fuller goes so far as to conclude that "a total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all" (Fuller, 39).

38. The propensity to subsume law under juridical personhood is reflected in the work of contemporary defenders of Pashukanis. See, for example, Raymond Koen, "In Defence of Pashukanism," *Potchefstroom Electronic Law Journal* 14, no. 4 (2011): 117.
39. See P.I. Stuchka, *Selected Writings on Soviet Law and Marxism*, ed. and trans. Robert Sharlet, Peter B. Maggs, and Peirs Beirne (Armonk, NY: Sharpe, 1988); Karl Korsch's "Appendix" in Pashukanis, *Law and Marxism*.
40. Fine, *Democracy and the Rule of Law*, 157.
41. Ibid., 159.
42. Michael Head, *Pashukanis: A Critical Reappraisal* (New York: Routledge, 2008), 153.
43. Marx, "The Trial of the Rhenish District Committee of Democrats," MECW 8: 327.
44. Ibid., 324. Marx reaffirmed his opposition to retroactive laws in 1853, this time in absentia. He observed how the actions of the leading Crown prosecutor against the Cologne communists proved that "the law against conspiracy does not require any indictable action, but is simply a law with a political purpose. […] The success of his attempt promised to be all the greater because of the decision to apply the new Prussian Penal Code that had been promulgated after the accused had been arrested. On the pretext that this code contained extenuating provisions the servile court was able to permit its retroactive application" (Marx, "Revelations Concerning the Communist Trial in Cologne," MECW 11: 455).
45. Marx, "The Trial of the Rhenish District Committee of Democrats," MECW 8: 327.
46. Ibid., 328.
47. Pashukanis, *Law and Marxism*, 158.
48. John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1991), 110–111.
49. Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism* (Totowa, NJ: Rowman & Littlefield, 1982), infers that juridical considerations will be replaced by "technical" judgements in communist society: "Democratic decisions about production will consist mainly of collective scientific judgements concerning the most efficient means for satisfying needs, not political or juridical judgements" (Buchanan, 59).
50. Marx and Engels, *The German Ideology*, MECW 5: 31.

51. Marx, *Capital: Volume 3*, ed. Frederick Engels (New York: International Publishers, 1967), 820 (my emphases).
52. See Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25–73; Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflict*, trans. Joel Anderson (Cambridge: Polity, 1995). Taylor's account of recognition has come under criticism in recent years: see Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).
53. G.W.F. Hegel, *Phenomenology of Spirit*, trans. A.V. Miller (Oxford: Oxford University Press, 1977), §178, p. 111.
54. I use the terms "recognition" and "acknowledgement" interchangeably.
55. Hegel, *Phenomenology of Spirit*, §196, p. 118.
56. Marx. *Grundrisse*, 463. One should not exaggerate the significance of this passage for Marx's social theory as a whole, as there has been a problematic tendency to conclude that Marx simply appropriated Hegel's dialectic of Lordship and Bondage and transposed it to the arena of class struggle. See, for example, Alexandre Kojève's influential *Introduction to the Reading of Hegel*, ed. Alan Bloom, trans. James Nichols Jr. (Ithaca: Cornell University Press, 1980), 64 and 159.
57. Honneth, *The Struggle for Recognition*, 149–150.
58. Marx, "On James Mill," in *Karl Marx: Selected Writings,* ed. David McLellan (New York: Oxford University Press, 2000), 130.
59. Ibid., 131. Marx refers to this phenomenon as the "fetishism of commodities" in his mature work. See Marx, *Capital: Volume 1*, 72–73.
60. Marx, "On James Mill," 131.
61. Ibid., 132.
62. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), defines possessive individualism in terms of the "concept of the individual as *essentially* a proprietor of his own person or capacities, *owing nothing to society for them*" (Macpherson, 3; my italics).
63. I borrow the formulation of mutual recognition as "cold respect" from Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004), 63.
64. Marx, "On James Mill," 131.
65. Ibid., 132.
66. See Andrew Chitty, "Recognition and Property in Hegel and the Early Marx," *Ethical Theory and Moral Practice* 16, no. 2 (2013): 685–697.
67. Honneth, *The Struggle for Recognition*, 149–150.
68. Marx, *Grundrisse*, 243 (my emphasis).
69. Ibid., 244.
70. Ibid., 514.

71. Ibid., 172.
72. I agree with Daniel Brudney's claim that Marx's account of recognition in communist society rests on the principle of concern rather than love. See Daniel Brudney, "Producing for Others," in *The Philosophy of Recognition*, ed. Hans-Christoph Schmidt am Busch and Christopher F. Zurn (Lanham: Lexington, 2009), 160.
73. Marx and Engels, "Manifesto of the Communist Party," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 491 (my emphasis).
74. Marx, *Capital: Volume 3*, 438.
75. Ibid.
76. Carol Gould, *Marx's Social Ontology* (Cambridge: MIT Press, 1980), 35.
77. Marx, *Grundrisse*, 84.
78. Marx and Engels, "The German Ideology," MECW 5: 78.
79. Leszek Kołakowski, "Marxism and Human Rights," *Daedalus* 112, no. 4 (1983): 92.
80. Ibid.
81. Theories of human rights are not limited to an atomistic ontology. For "relational" theories of human rights, see Carol Gould, *Interactive Democracy: The Social Roots of Global Justice* (Cambridge: Cambridge University Press, 2014). See also Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2011).
82. Marx, "Economic and Philosophic Manuscripts of 1844," *Marx-Engels Reader,* 83.
83. Charles Taylor, "Atomism," in *Powers, Possessions and Freedom: Essays in Honour of C.B. Macpherson*, ed. Alkis Kontos (Toronto: University of Toronto Press, 1979), 48.
84. Similarly, unlike Pashukanis, Marx regards developed exchange relations (and the recognition of juridical personhood implied therein) as a precondition for the free development of individuals in communist society. See Marx, *Grundrisse*, 158 and 162.
85. Ibid., 164.
86. Ibid., 245.
87. Ibid., 162 (my emphasis).
88. Gould, *Marx's Social Ontology*, 176. Gould refers to this form of recognition as "individuals-in-relations."
89. One need not be a Marxist to appreciate the corrosive effects of perpetually invoking one's rights against others. Hegel was equally critical: "To have no interest except for one's formal right may be pure obstinacy, often a fitting accompaniment of a cold heart and restricted sympathies; for it is uncultured people who insist most on their rights, while noble minds look to other aspects of the thing. […] On that account, to have a right gives one a warrant, but it is not absolutely necessary that one should insist

on one's rights, because that is only one aspect of the whole situation" (G.W.F. Hegel, *Outlines of the Philosophy of Right,* ed. Stephen Houlgate, trans. T.M. Knox [Oxford: Oxford University Press, 2008], Addition to §37, p. 55).

90. On Marx's account, the justice pertaining to transactions between agents of production stems from the nature of productive relations: "The justice of the transactions between agents of production rests on the fact that these arise as natural consequences out of the production relationships. [...] *This content is just whenever it corresponds, is appropriate, to the mode of production. It is unjust whenever it contradicts that mode*. Slavery on the basis of capitalist production is unjust; likewise fraud in the quality of commodities." Karl Marx, *Capital: Volume* 3, 339–340 (my emphasis). In this respect, exploitation on the basis of future communist productive relations would be unjust.
91. Marx, "Preface to *A Contribution to a Critique of Political Economy*," *Marx-Engels Reader*, 5 (my emphasis).
92. Although Marx thinks that human beings are predisposed to sociality, he acknowledges that we are vulnerable to the experience of suffering. Marx writes: "Man as an objective, sensuous being is therefore a *suffering* being—and because he feels what he suffers, a *passionate* being. Passion is the essential force of man energetically bent on its object" (Marx, "Economic and Philosophic Manuscripts of 1844," *Marx-Engels Reader*, 116). It is doubtful that this capacity for suffering can ever be transcended, which has important implications for the fate of legality and rights.
93. Fredrick Engels, "Speeches at Elberfeld," MECW 4: 248.
94. Ibid.
95. Janet Campbell proposes a conceptual distinction between administrative regulation and legal regulation; see Janet Campbell, *An Analysis of Law in the Marxist Tradition* (Lewiston: Edwin Mellen Press, 2003), 183.
96. Marx, "The Trial of the Rhenish District Committee of Democrats," MECW 8: 327.
97. Allen Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (1972): 271.
98. Marx and Engels, "Manifesto of the Communist Party," *Marx-Engels Reader*, 490.
99. Ibid.
100. Marx, "The Civil War in France," *Marx-Engels Reader*, 633.
101. Ibid.
102. Marx, "Critique of the Gotha Program," *Marx-Engels Reader*, 537.
103. Marx, "Conspectus on Bakunin's Statehood and Anarchy," *Marx-Engels Reader*, 545.
104. Pashukanis eventually acknowledged the importance of legality and the protection of "personal" rights in socialist society. However, we will never

know what Pashukanis actually thought. See Evgeny Pashukanis, "State and Law under Socialism," in *Selected Writings on Marxism and Law*, 359.

105. See Georg Lukács, *History and Class Consciousness* (Cambridge: MIT Press, 1971), 107; Csaba Varga, *The Place of Law in Lukacs' World Concept* (Budapest: Akadémiai Kiadó, 1985), 80.
106. Georg Lukács, *The Ontology of Social Being: Labour*, trans. David Fernbach (London: Merlin, 1980), iv.
107. Ibid.
108. Lukács, *The Ontology of Social Being: Hegel's False and His Genuine Ontology*, 78.
109. Lukács, *The Ontology of Social Being: Labour*, 89.
110. Ibid.
111. Lukács cited in Csaba Varga, *The Place of Law in Lukacs' World Concept*, 118.
112. Lukács, *The Ontology of Social Being: Labour*, 90.
113. Ibid., 89.
114. Ibid., 36.

PART II

The Contemporary Context

CHAPTER 5

Contemporary Responses to Marx's Critique of Liberal Justice

> *Between equal rights force decides. Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, i.e., the class of capitalists, and collective labour, i.e., the working-class.*[1]

The preceding chapters examined the development of Marx's new materialist theory of right, his treatment of rights, and the normative rationale for a transformed version of legality and rights under communism. This chapter recapitulates Marx's critique of liberal justice and considers how it has been taken up by some of the political theorists who have been most influential in the twenty-first century, most notably John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser. What unites these disparate thinkers is their shared assumption concerning Marx's dismissal of justice and right as such, as well as their competing attempts to respond to Marx's critique of liberalism. Notwithstanding their diverse responses to Marx's challenge, the theorists in question acknowledge the importance of restructuring property relations under the present conditions of global financial capitalism and grant the normative basis for some version of market socialism, though to varying degrees. Rawls responds to Marx's challenge by invoking the hypothetical regime of property-owning democracy in which there is dispersed ownership of productive property; Habermas safeguards

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
https://doi.org/10.1007/978-3-030-30195-8_5

democratic will-formation against systemic colonization with recourse to a co-original system of rights; Honneth defends the idea of social freedom, which finds its ultimate realization under market socialism; and Fraser revalues crisis theory with the goal of renewing public power and redrawing the traditional boundary between the economic and the political. Underlying most of these responses is the assumption that Marx rejected formal justice as such, a contention that the previous chapters sought to refute. Instead of envisioning the destruction of formal justice, Marx's new materialist theory calls for a revolutionary transformation of existing property relations, the absence of which enables those with concentrated ownership of productive property to influence legislation in their own interests. The formal equality underpinning the rule of law is increasingly at loggerheads with the economic realities of global financial capitalism, the accumulative imperatives of which override popular sovereignty and erode democratic lawmaking.

Anatole France's novel *The Red Lily* has for a long time been a standard point of reference for the critique of liberal justice. The novel's most politically outspoken character Monsieur Choullette offers a scathing indictment of bourgeois law and its quintessential blindness to the twin realities of economic inequality and class domination.[2] Choullette's pronouncements could just as easily have come from Karl Marx, whose earliest critique of liberal justice was articulated in the context of his reflections on the wood theft law. It is worth recalling that the customary practice of gathering fallen forest wood was equated with theft, and the poor Rhineland peasants who were caught gathering fallen wood were obliged to pay fines or perform mandatory labour in the service of wealthy forest owners (see Chapter 2). Although Marx was still wedded to a Hegelian version of natural law theory in 1842, he already discerned the deficiencies of formal liberal justice. In principle, formal justice abstracts from considerations of class, sex, and race and regards all agents as disembodied juridical persons, each of whom is equal in the eyes of the law even if they are unequal as a matter of fact. That formal justice abstracts from these historical shackles is a double-edged sword. As was noted in Chapter 4, formal equality is a major advance when contrasted with the regimes of arbitrary privilege and direct domination that preceded capitalist production and its relations of equivalent exchange. However, by abstracting from considerations such as class, sex, and race, formal justice regards these power-laden attributes as politically irrelevant and thereby ignores their material significance in everyday life.

Accordingly, while formal justice prohibits rich and poor from stealing bread and sleeping under bridges, material poverty is experienced by the poor alone—a concrete fact that generally escapes the purview of formal justice. The young Marx interpreted the wood theft law as a direct assault on the livelihood of impoverished peasants, who were as equal to the wealthy forest owners in the eyes of the law. Yet the threat of fines and mandatory labour had devastating consequences for the poor while enriching the landed aristocracy. As far as Marx was concerned, wood theft legislation degraded the universality of the law by making justice subservient to the narrow interests of propertied wealth. Marx reasoned that, "this logic, which turns the servant of the forest owner into a state authority, *turns the authority of the state into a servant of the forest owner.*"[3] However, when legislation becomes subordinate to the narrow interests of propertied wealth in this way, "the most irrational and illegal means are put into operation against the accused; for supreme concern for the interests of limited private property necessarily turns into unlimited lack of concern for the interests of the accused [i.e., the propertyless peasants]."[4]

The idea of formal or legal equality and its existence alongside substantive class inequalities informs all of Marx's subsequent writings. He offers a far more critical perspective concerning the deficiencies of formal justice in "On the Jewish Question," in which he demonstrates how the liberal constitutional state deems distinctions attendant on religion, rank, private property, and occupation to be irrelevant in the sphere of politics, only to reproduce these same distinctions in the arena of civil society—the sphere of the capitalist market. Marx also shows how classical liberalism and its representatives reduce the rights of citizens to the "inalienable" rights of private property and unfettered exchange, both of which assert the imperatives of capitalist accumulation against the public good. If Marx's formative reflections on the liberal constitutional state brought to bear the persistence of economic inequality in civil society, then the first volume of *Capital* would reveal "the secret of profitmaking" and the way in which capital dominates labour in the hidden abode of production, all against a background of formal equality. Capitalism, for Marx, is a political-economic system in which ownership of the means of production and control over the social surplus becomes concentrated in a few hands. Aside from its systemic tendency towards monopoly and periodic crises, capitalism also produces a reserve army of unemployed labourers and a class structure in which to this day the majority of individuals do not have sufficient access to, or control over, productive property. The formal character of bourgeois justice abstracts

from asymmetries of class and ignores the ways in which these asymmetries influence legislation in capitalist democracies. Marx's political prescriptions are well known: the communist revolution would socialize the means of production and "expropriate the expropriators," which would, in the long run, create the material and cultural conditions for a classless communist society.

The collapse of state socialism did much to discredit the impetus for communist revolution and the normative appeal of social and cooperative forms of ownership. Even before the collapse of the Soviet Union, the era of post-war reconstruction was characterized by the gradual expansion of the welfare state and the extension of socio-economic rights across much of Western Europe and North America, due in no small part to class compromise and the threat of state socialism in "the East."[5] The neoliberal phase of the late 1980s signalled the retrenchment of the welfare state, the large-scale privatization of public assets, and the championing of trade liberalization across much of the globe. During its triumphant period, neoliberal ideology was touted as the only feasible way of organizing economic production in complex societies, a discourse that was reinforced theoretically by Francis Fukuyama's "end of history" thesis,[6] and by Margaret Thatcher's TINA ("there is no alternative") doctrine in politics.

The triumphalist neoliberal outlook was brought into question, first, by the debilitating consequences of structural adjustment programmes that were undertaken in Latin America and in the former Soviet Union, and more recently, by the global financial crisis of 2008, which shook the world's markets and revealed the darker underbelly of global financial capitalism. Economic inequality has been on the rise—nationally and internationally—for the past twenty years, while real wages have generally remained stagnant in the wealthiest capitalist democracies.[7] Although capitalism has always been a global phenomenon, multinational corporations have also become a major fixture in the twenty-first century, and the same is true of financial capital, which is far more mobile and speculative than the industrial capital common in Marx's time.[8]

The manifold realities of global financial capitalism have led to renewed interest in Marx's critical analysis of capitalism among political theorists. To be sure, political theorists in the Anglo-American and critical theory traditions had been grappling with Marx's critique of formal justice well before the financial crisis of 2008. At least two guiding threads bring together what are otherwise different theoretical responses to the challenges posed by Marx. The first is a general acknowledgement by leading theorists that

Marx's critique of capitalism and its resultant asymmetries of wealth and political power present the most powerful challenge to contemporary advocates of welfare liberalism. The second is the equally prevalent view that Marx's critique of capitalism led him to dispense with formal justice as such. With respect to the latter charge, John Rawls has argued that Marx envisioned the "evanescence of justice,"[9] while Jürgen Habermas has concluded that Marx's materialist inversion of Hegel's philosophy of history led to his "blanket rejection of legal formalism (in fact a rejection of the legal sphere as a whole)."[10] Similar interpretations can be found in the work of Axel Honneth and other leading representatives of the critical theory tradition such as Rainer Forst.[11] While there is sufficient textual basis to question this long-standing interpretation of Marx on justice and rights, this chapter will focus on how John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser have responded to Marx's critique of formal or liberal justice in the face of global financial capitalism. Notwithstanding their diverse theoretical responses, there emerges a striking convergence among the theorists surveyed towards the view that Marx's critique of liberal justice cannot be addressed adequately without transforming property relations in existing capitalist democracies and rethinking the relevance of political economy for political theory. This prescient observation dawned most impressively on John Rawls, especially in his final book, *Justice as Fairness: A Restatement*.

5.1 John Rawls: Property-Owning Democracy and the *Aporia* of Concentrated Capital

In *Rescuing Justice and Equality*, the socialist philosopher G.A. Cohen refers to *A Theory of Justice* as one of the great works of Western political thought, and for good reason.[12] Notwithstanding the many powerful critiques that have been levelled against it, Rawls's formulation of justice as fairness stands as one of the most impressive attempts in the twentieth century to justify the political philosophy of liberalism. To be sure, Rawls's way of justifying liberalism changed over the course of his intellectual career. In *A Theory of Justice*, he sought a comprehensive philosophical defence of the principles of justice that, in his view, were widely shared by citizens living in liberal democratic societies. Rawls's two principles of justice remained ordered in such a way that the first principle—equal political liberties—obtained lexical priority over fair equality of opportunity and the difference principle (which is the second principle). The difference principle allows

for distributive inequalities to the extent that these inequalities could be shown to improve the condition of the "worst off" in society. Rawls's later works, especially *Political Liberalism* and *Justice as Fairness*, evidence his acknowledgement of the "fact of reasonable pluralism." The basic intuition behind this idea is that, given that citizens in liberal democratic societies disagree about principles of political justice and have competing conceptions of the good, principles of justice (including those articulated in *A Theory of Justice*) could no longer be defended on comprehensive philosophical, religious, or metaphysical grounds. Rawls arrived at the conclusion that principles of justice could then only obtain a hearing in the arena of public reason, where justice as fairness would count as one conception of justice among others. The most that could be hoped for under such conditions of pluralism was an "overlapping consensus," where citizens with competing comprehensive doctrines could arrive at a consensus around a *political* conception of justice, though from different standpoints and for different reasons.[13] That said, Rawls remained hopeful about the prospects for reconciliation and political stability, notwithstanding the challenges posed by the fact of reasonable pluralism.

Rawls's response to Marx's critique of formal liberal justice is elaborated most explicitly, if briefly, in *Justice as Fairness*. However, *A Theory of Justice* can also be read as an early theoretical attempt to deflect the force of Marx's critique, one that relies on a hypothetical arrangement in which reasonable individuals agree on fair principles of justice in a manner consistent with their status as free and equal moral persons. Although Rawls's Kantian-inspired "veil of ignorance" has justifiably received its share of criticisms from communitarian and feminist authors, it offers an abstract way of deducing generalizable principles of justice in the absence of arbitrary distinctions of rank, class, sex, race, and natural endowments. Rawls's approach differed in an important respect from earlier versions of contractarianism in that the very purpose of his original position was to abstract, via the veil of ignorance, from all of the arbitrary inequalities and contingencies that pervade contemporary capitalist democracies.[14] Rawls recognized that any impartial account of justice could not get off the ground without confronting the challenges posed by Marx and the socialist tradition, the most important of which was the charge that universal appeals to justice that bracket class hierarchies and asymmetries of political power amount to ideology, understood here in the pejorative sense of vested class interests masquerading as the general interests of all.

Rawls understood the force of Marx's challenge, and it is no accident that he opted for a hypothetical situation in which individuals are unaware of their conceptions of the good and such arbitrary social markers as race, class, and sex.[15] Rawls explains:

> If knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies. […] If the original position is to yield agreements that are just, the parties must be fairly situated and treated equally as moral persons. The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situations.[16]

Notwithstanding its methodological flaws, the original position led Rawls to the conclusion that reasonable persons acting under the veil of ignorance would agree to a structure of primary goods in which their basic liberties are secured along with a distributive scheme honouring fair equality of opportunity and the difference principle.[17] Although the original position takes a more subsidiary role to public reason in *Political Liberalism* and *Justice as Fairness*, justice as fairness remained a "realistic utopia" on Rawls's view.[18]

Rawls's difference principle is usually regarded as the more controversial of his two principles of justice because of its egalitarian point of departure. While the difference principle is egalitarian in many respects, one should not overlook Rawls's enduring concern with the question of the "fair value of the political liberties," that is, the extent to which citizens are actually capable of exercising their civil and political rights. He writes:

> Freedom as equal liberty is the same for all […] but the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. […] Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice.[19]

Whereas the difference principle is first and foremost a principle of redistribution aimed at ameliorating the condition of society's "worst off," Rawls's concern with the problem of the fair value of the political liberties led him to emphasize the importance of creating background institutional conditions so that his two principles of justice could be satisfied in a well-ordered society.

In addition to demonstrating that the two principles of justice were closely connected, Rawls become more attentive to the relevance of political economy and questions of economic organization for political justice. Rawls observes in *A Theory of Justice* that the ways in which a society's economic system is organized have profound implications for social relations, both present and future. Rawls writes:

> An economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognized. They were stressed by economists as different as Marshall and Marx. Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institutions to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds.[20]

Notwithstanding his theoretical endorsement of an ideally functioning market system, Rawls remained agnostic as to whether the principles of justice would best be realized in a property-owning democracy, in which the means of production are privately owned, or in the context of a liberal socialist regime (a market socialist society), in which productive assets are socialized while the coordinating function of the market is retained. It is telling that when *A Theory of Justice* was first published, most of Rawls's critics on the political left read him as an archetypical defender of welfare state capitalism.[21] Rawls contested this interpretation and explained that his theory of justice was not meant as a defence of welfare state capitalism, since welfare state capitalism violates the principles of justice.[22] While Rawls's remarks caught many of his left-leaning critics by surprise, they went hand in hand with his growing awareness that the politics of equality was interwoven with issues of economic organization. Moreover, Rawls's proposed institutional solution to the maladies of welfare state capitalism—property-owning democracy—was meant, as we will see, as a response to the challenge posed by Marx and the socialist tradition. What is most important in this context is that Rawls related Marx's challenge back to the problem of the fair value of the political liberties, and not the difference principle. Rawls writes:

> The idea of their fair value [i.e., of equal political liberties] is introduced in an attempt to answer this question: how shall we meet the familiar objection, often made by radical democrats and socialists (and by Marx), that the equal liberties in a modern democratic state are in practice merely formal? While it may appear, the objection goes, that citizens' basic rights and liberties are effectively equal […], social and economic inequalities in background institutions are ordinarily so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests.[23]

Whereas the Rawls of *A Theory of Justice* focuses on the centrality of the difference principle, limited only by the lexical priority of equal political liberties, the Rawls of *Justice as Fairness* emphasizes the importance of creating background institutional conditions in which no single class is capable of steering the economy and determining legislation in their own class interests. Although Rawls appears to have been inspired by Rousseau in his diagnosis of the dangers posed by wealth concentration, property-owning democracy was his attempt to address Marx's critique of formal liberal justice, which would also explain why Rawls became far more sceptical about the institutional potential of progressive taxation in his later work. As Rawls himself explains, the idea of property-owning democracy—a concept he borrowed from the Nobel Prize-winning economist James Mead—was an attempt to theorize the background institutional parameters that would be necessary for realizing justice as fairness.[24] It is worth noting that these same institutional parameters are absent in the most robust welfare states, where the state aims at correcting rather than transforming pre-tax wealth disparities, while a wealthy minority retains disproportionate control over the means of production. Although Rawls noted the urgency of such progressive reforms as the public funding of elections, limits on campaign financial contributions, and more accessible outlets for expression as bulwarks against the concentration of capital ownership,[25] he was adamant that a well-ordered society would require a far more radical transformation of property relations than what follows under welfare state capitalism. Rawls offers a striking contrast between welfare state capitalism and his preferred model of property-owning democracy:

> The contrast between a property-owning democracy and welfare-state capitalism deserves closer-examination, since they both allow private property in productive assets. One major difference is this: the background institutions of property-owning democracy work to disperse the ownership of wealth and

> capital, and thus prevent as small part of society from controlling the economy, and indirectly, political life as well. By contrast, welfare-state capitalism permits a small class to have a near monopoly of the means of production.[26]

It is hardly surprising, then, that Rawls's comparative analysis of the compatibility of different political-economic regimes with justice as fairness (laissez-faire capitalism, command-style socialism, welfare-state capitalism, property-owning democracy, and liberal/market socialism) is followed by a pithy attempt to address Marx's critique of liberalism, interpreted here as his critique of formal liberal justice.[27] Although Rawls acknowledges the force of Marx's critique, he is at pains to demonstrate that a property-owning democracy in which access to capital assets is widely dispersed among the citizenry would address most of Marx's serious criticisms.[28] For example, in response to Marx's claim in "On the Jewish Question" that classical liberals reduce the rights of citizens to the so-called rights of man and the egoistic accumulation of private property, Rawls responds that in a well-ordered property-owning democracy, "the higher-order interests of citizens as free and equal" would be honoured, hinting that a transformed society of this sort would cultivate a corresponding ethos among free and equal citizens so that egoism and mutual indifference would not be as prevalent as they are under capitalism.[29] As for Marx's charge that under conditions of class domination liberal rights are at best merely formal, Rawls responds that in a property-owning democracy, "the fair value of the political liberties (working with the other principles of justice), all citizens, whatever their social position, may be assured a fair opportunity to exert political influence."[30] Rawls anticipates further objections from Marx and the socialist tradition, including the importance of workplace democracy and the incompatibility between private ownership of the means of production and principles of political justice. All of the objections that Rawls attributes to Marx's critique of liberalism boil down to the issue of the fair value of the political liberties and the debilitating consequences of concentrated ownership of productive wealth. Rawls's institutional solution to the problem of concentrated ownership of capital was property-owning democracy, and it is telling that he frames each of his responses to Marx's critique of liberalism in such a way that all the heavy lifting is performed by the same concept of property-owning democracy.

After acknowledging that neither laissez-faire capitalism nor welfare-state capitalism can address Marx's critique and the demands of justice as fairness, Rawls is left with a choice between the regime of property-owning

democracy and liberal (market) socialism.[31] In both cases, the constitutional protection of equal political liberties is retained along with the coordinating function of the market. The decisive difference between the two regime types is that property-owning democracy allows for private ownership in productive assets, while market socialism is characterized by social and cooperative forms of ownership and also involves a greater degree of planning (though not the central planning common in state socialist societies). As was noted earlier, Rawls leaves open the question of which regime type would best realize the principles of political justice, noting on a number of occasions that the choice between political-economic systems cannot be made in advance because it will vary according to a society's values, history, and practices.[32] For similar reasons, Rawls submits that "justice as fairness includes no natural right of private property in the means of production [...] nor a natural right to worker-owned and -managed firms".[33] Irrespective of the institutional choice between property-owning democracy and liberal socialism, Rawls understood better than most of his contemporaries that the liberal ideal of free and equal personhood militates against the reality of concentrated ownership of productive wealth, and that a just society would require a radical transformation of property relations. This important observation was both a testament to Rawls's acute political awareness and also the source of his theoretical weaknesses. Rawls ends up underestimating the political implications of transforming background institutional circumstances while exaggerating the institutional potential of property-owning democracy in the context of global financial capitalism.

Although Rawls did not develop the institution design of property-owning democracy in sufficient detail, his invocation of the concept has inspired considerable elaboration and criticism in recent years. Scholars such as Martin O'Neill and Thad Williamson, who are intent on elaborating and defending property-owning democracy as a concept with political traction in the twenty-first century, maintain that property-owning democracy is both realistic and urgently needed for the renewal of egalitarian politics in contemporary capitalist democracies.[34] Social democratic critics, on the other hand, take Rawls to task for his uncharitable critique of the welfare state and hold that the ideal of property-owning democracy is neither coherent institutionally nor preferable to the welfare state regime that is already under attack.[35] The critical assessment of property-owning democracy undertaken here takes as its starting point Rawls's theoretical objectives in *Justice as Fairness*, the most important of which was his attempt to address the radical critique of liberalism put forward by Marx

and the socialist tradition. Judged from this angle, the weaknesses that beset property-owning democracy originate, first, in Rawls's contradictory attempt to reconcile a radical transformation of property relations while adhering to a justificatory strategy that prioritizes political stability and reconciliation. There are also problems with Rawls's method of addressing the issue of concentrated ownership of capital. Although Rawls correctly diagnoses the dangers of concentrated capital, he underestimates the difficulties of sustaining dispersed ownership of productive property while allowing for private ownership of productive assets in the context of global financial capitalism.

While *JAF* took the fact of reasonable pluralism as its starting point, Rawls remained wedded to the ideals of political stability and reconciliation throughout his career. Rawls also continued to regard justice as fairness as a "realistic utopia," even if the difference principle was no longer conceived as a constitutional essential.[36] Rawls put the matter as follows: "eventually we want to ask whether the fact of reasonable pluralism is a historical fate we should lament. To show that it is not, or that it has its very considerable benefits, would be to reconcile us in part with our condition."[37] Despite his theoretical insights, Rawls did not appreciate the extent to which his insistence on transforming background institutional circumstances was at loggerheads with his justificatory strategy, especially his yearning for political stability. As regards Rawls's justificatory strategy, Simone Chambers has argued that any coherent account of property-owning democracy would warrant a radical transformation of property relations in existing capitalist democracies.[38] Rawls also saw property-owning democracy as a realistic utopia that flowed from the shared political culture or ethos of citizens living in liberal democratic societies, including the United States of America. The trouble is that American citizens have been putting up with far greater wealth inequality than justice as fairness would allow. Therein lies the dilemma for Chambers, who writes that "Rawls claims to be articulating beliefs that, although latent, are nevertheless constituent of our political culture. This in turn implies that existing property relations and the distribution of wealth are out of line with political culture."[39] Although Chambers's characterization of political culture is far too fixed, even with respect to the American context,[40] she has identified a powerful tension in Rawls's argument for property-owning democracy. If property-owning democracy warrants a radical transformation of property relations, then a transformation of this kind should resonate with citizens living in liberal democracies. Since property-owning democracy does not appear to resonate with

prevailing American political culture, then attempts at actuating the radical property relations necessary for justice as fairness would violate Rawls's own justificatory strategy and the importance he attached to public reason in later work. The tension between Rawls's commitment to property-owning democracy and his justificatory strategy is exacerbated when one considers the revolving door between parliamentary politics and corporate interests in contemporary capitalist democracies, where the owners of productive property exert disproportionate influence over legislation. Rawls understood the dangers of the corporate-politics nexus, but he also regarded property-owning democracy as a realistic utopia that would resonate with citizens of liberal democratic societies in ways that would reconcile them with reality.

While Rawls correctly identified the dangers stemming from concentrated ownership of capital, he exaggerated the extent to which dispersal of capital assets could be maintained over time while allowing for private ownership of productive assets. The fact that Rawls formulated his ideal-theoretical account of property-owning democracy while assuming a "closed state" raises additional questions about the plausibility of his proposed model, for it brackets out the external pressures imposed on national economies by global financial markets and multinational corporations (i.e. offshoring and capital flight). Samuel Freeman points out that Rawls never intended the difference principle to be applied globally, in part because of issues of legal enforcement, and also because Rawls was far more interested in transforming background circumstances of justice.[41] Supposing that Freeman's interpretation is correct, Rawls's model of property-owning democracy lacks conceptual resources for tackling the challenges of global financial capitalism because it sweeps these challenges under the rug. Marx, for his part, anticipated the tendency for capital to become concentrated and centralized, nationally and globally.[42] With the advent of finance capital and a global market for goods, services, and labour, it is unclear how Rawls would secure the dispersal of capital while allowing for private ownership of productive property. Nor could Rawls call upon intergovernmental organizations such as the International Monetary Fund and the World Trade Organization, since it is not in their mandate to tackle the problem of wealth concentration.

To be sure, Rawls was able to bite the bullet and concede that his account of social justice is equally compatible with a liberal (market) socialist regime, in which productive assets are owned publically or cooperatively. With this admission, Rawls inched closer to Marx, who held that the realization of

substantive freedom would require a revolutionary transformation of property relations—a conclusion Rawls would ultimately have to reject given his justificatory strategy and commitment to political stability. It is to Rawls's credit that he identified the tension between concentrated ownership of capital and the normative ideals on which liberalism is predicated. However, if property-owning democracy was Rawls's ultimate response to the critique levelled by Marx and the socialist tradition, then his alternative offers little in the way of preventing those with concentrated ownership of capital from influencing legislation in their interests. Despite its theoretical promise, property-owning democracy remains radically utopian and cannot reconcile citizens of liberal democracies with the challenges posed by global financial capitalism.

5.2 Jürgen Habermas: Systemic Colonization and the Tension Between Democracy and Capitalism

Whereas John Rawls arrived at Marx's critique of formal justice indirectly, Jürgen Habermas is heir to the Western Marxist tradition, whose theoretical founders include Antonio Gramsci, Georg Lukács, and the first generation of Frankfurt School theorists. Habermas's early work was written in the spirit of Western Marxism, and he once sought a theoretical reconstruction of historical materialism.[43] Although Habermas situates himself within the critical theory tradition, he has departed considerably from Marx and the first generation of Frankfurt School theorists, embracing a broadly neo-Kantian philosophical approach for redeeming the emancipatory potential of modernity. His most explicit departure from Marx is articulated in a collection of essays that were first published in his book *Theory and Practice*. In one such essay, Habermas signals his turn away from Marx's dialectic of labour in favour of a linguistically grounded theory of communicative reason. Habermas writes:

> Today we have enough reason to keep these two dimensions [i.e., labour and interaction] rigorously separated […] to set free the technical forces of production […] is not identical with the development of norms, which could fulfill the dialectic of moral relationship in an interaction free of domination.[44]

The motivation for Habermas's "linguistic turn" is not hard to decipher: Max Horkheimer and Theodor Adorno had already demonstrated in their *Dialectic of Enlightenment* that Marx's dialectic of labour and the potential unleashed by society's productive forces would succumb to the domineering logic of instrumental rationality, resulting in an unprecedented domination of human beings and nature. Habermas accepted the diagnosis of labour offered by Horkheimer and Adorno but rejected their conclusions concerning the impossibility of emancipation in the modern world. Although the link between labour and interaction was never recovered, Habermas found a way out of the "administered society" in communicative reason and procedural conditions of justification. The discursive theory of law and democracy is an integral contribution to Habermas's attempt to reclaim the emancipatory potential of modernity by justifying a "post-metaphysical" account of liberalism after the twilight of natural law theory and revolutionary Marxism.

Habermas's earliest response to Marx's critique of formal liberal justice is developed in the context of his essay "Natural Law and Revolution."[45] In this essay, Habermas offers a comparison of the American and French revolutions that tracks their diverging historical and theoretical presuppositions. Jean-Jacques Rousseau is presented as the chief theoretician of the French Revolution, while John Locke and Thomas Paine factor heavily in Habermas's discussion of the American Revolution. Habermas distinguishes the two revolutions on the grounds that the American Revolution sought a liberation of commodity exchange relations in accordance with principles of classical political economy, while the French Revolution asserted an entirely new constitution that broke decisively with the remnants of the Ancien Régime.[46] Although the essay opens with a discussion of modern theories of natural law, Habermas eventually sets the stage for Marx's critique of the bourgeois constitutional state through his reading of "On the Jewish Question" and *The Eighteenth Brumaire of Louis Bonaparte*. He observes that Marx initially interpreted the natural law–inspired rights of the bourgeois constitutional state on their own terms, showing in the end that "the formal and general laws of the bourgeois private legal order must be economically deprived of their professed justice."[47] However, after summarizing Marx's critique of the bourgeois constitutional state and his characteristic insistence on the revolutionary abolition of capitalist private property by a proletarian majority, Habermas concludes that Marx's critique led him to dispense with legality altogether.[48]

Habermas regards Marx's dismissal of legality as contributing to a "global civil war" between natural law theorists and revolutionaries in the twentieth century. Each of the parties involved in this global civil war was one-sided in its aims. The Marx-inspired revolutionaries embraced legal nihilism as a consequence of their deference to a rigid materialist philosophy of history, while the advocates of natural law clung stubbornly to an ahistorical and antiquated defence of natural rights aimed at justifying the status quo. Habermas would articulate his middle-ground alternative to these extremes some thirty years later, in *Between Facts and Norms*. Notwithstanding his origins in the Western Marxist tradition, Habermas's charge that Marx dismissed legality is itself one-sided. As was observed in the preceding chapters, Marx thought that a revolutionary transformation in the material conditions of life will result, or at least ought to result, in fundamental changes to the prevailing system of right. Central to Marx's new materialist account of right is the insight that every mode of production gives rise to historically specific legal relations, including a structure of rights that is characteristic of that mode of production. While Marx did not subscribe to an abstract and transhistorical theory of natural law, he was not a legal nihilist; this development lies squarely with Evgeny Pashukanis. Rather than being bent on discrediting legality with his materialist inversion of Hegel's philosophy of history, Marx sought a revolutionary transformation of capitalist productive relations, and the creation of socialist or communist legality, in which the legal form would no longer be at loggerheads with the content of class domination. For all of his criticisms of liberalism, however, Marx actually offers a theoretical bridge for Habermas's inference that a democratically constituted socialist society would require its own legality.[49] The dividing line between Habermas and Marx, then, is not the fate of legality or right, but the compatibility between democratically enacted law and capitalism. However, before this contention can be substantiated, the link between Habermas's early essay and his co-originality thesis has to be explained in the light of his response to Marx's critique of liberal justice.

"Natural Law and Revolution" is best read as Habermas's earliest attempt a settling accounts with modern natural law theory on the one hand and Marx's dialectic of revolution on the other. Habermas writes that philosophers can no longer justify the so-called natural rights "independently—whether ontologically, transcendentally-philosophically or anthropologically (the nature of the world, of consciousness, or of man)."[50]

Habermas argues that the decentred notion of reason and the radical differentiation of values brought about by the rationalization process undermine retrograde attempts at deriving rights from God, nature, or the philosophy of consciousness. As for Marx and the party of revolution, Habermas insists that rights have evolved from their narrow origins in bourgeois private law and have become integral features of the modern welfare state.[51] Accordingly, the recognition of socio-economic rights, along with basic civil and political rights, must be accompanied by the theoretical admission that rights can no longer be dismissed as ideological veneers for vested class interests. Habermas writes:

> We do not conceive the fundamental rights historically, in terms of the organization of social life, merely in order to devalue them as ideology, we do so precisely to keep the ideas from losing their meaning, once their basis in life has been removed, and thus coming to justify precisely that from which they were once to liberate mankind; the attenuated substantial force of political domination and social power, which is neither willing nor able to be legitimized in terms of publically discussed and rationally justified purposes.[52]

The stage was finally set for Habermas's discursive theory of law and democracy.

Incidentally, the link between "Natural Law and Revolution" and the discursive theory of law and democracy is supplied by Habermas himself in *Between Facts and Norms*. Habermas writes: "Three decades ago I criticized Marx's attempt to transpose the Hegelian philosophy of right into a materialistic philosophy of history."[53] After reciting a key passage from "Natural Law and Revolution," Habermas insists that the global civil war between natural law theorists and revolutionaries came to a definitive conclusion with the collapse of state socialism and the inability of the victorious neoliberal party to set limits on global capitalism.[54] With the end of the ideological war between natural law theorists and revolutionaries, Habermas set his sights on reconciling the ideals of private and public autonomy through his co-originality thesis. However, the project of reconciling private and public autonomy—the system of rights and popular sovereignty—under post-conventional conditions was a continuation of the middle-ground position sketched out by Habermas in his earlier essay "Natural Law and Revolution."

Habermas develops his co-originality thesis against the background of the traditional divide in German jurisprudence between private law and

public law, that is, between defenders of pre-political liberal rights and exponents of civic republicanism. A similar trend is played out in the long-standing feud between natural law theorists, who draw inspiration for natural rights from God, nature, or human rationality, and the legal positivists, who emphasize the coordinating function of modern law while expunging law of its normative character. As far as Habermas is concerned, each of these theoretical variants results in a one-sided account that overlooks the complementary relationship between legality and democracy. As an alternative to these extremes, Habermas shows the complementary links between the legal form, the discourse principle ("Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses"), and the principle of democracy.[55] The twist is that none of these concepts can assume priority over the others because they presuppose each other. The system of rights that emerges historically with the legal form requires a post-conventional procedure of justification in which legislation is rendered legitimate by free and equal citizens engaged in discursive will-formation. In this sense, there can be no private rights guaranteeing autonomy to individuals without a legitimate process of democratic legislation in which rights bearers are simultaneously considered the authors of their own laws.[56]

Habermas derives the system of rights in logical order, moving from the most abstract to the concrete form of rights. He begins with (1) the fundamental rights guaranteeing private autonomy, which presuppose membership in a particular political state or association, followed by (2) rights to due process, (3) rights to political participation, and (4) the social and economic conditions required for exercising rights 1–4.[57] Habermas's understanding of the fifth category of rights is reminiscent of Rawls's account of the "fair value" of the political liberties. Unlike Rawls, however, Habermas is not interested in putting forward a substantive theory of social justice in the age of "post-metaphysics" and radical pluralism, which is why his system of rights retains a strictly formal character. The most that can be hoped for, according to Habermas, is a procedural theory that can shed light on the necessary conditions for justification, the measure of which is always retrospective rather than prospective. After all, Habermas is at pains to avoid the pitfalls associated with conventional natural law theory and revolutionary legal nihilism. Habermas leaves little doubt about his objectives in *Between Facts and Norms*:

> At stake is the old problem of how the rational project of a just society, in abstract contrast to obtuse reality can be realized after confidence in the dialectic of reason and revolution, played out by Hegel and Marx as a philosophy of history, has been exhausted—and only the reformist path of trial and error remains both practically available and morally possible.[58]

In addition to reconciling legality and democracy, Habermas's discursive theory of law and democracy holds the promise of justifying the liberal constitutional state in the age of "post-metaphysics."

Writing shortly after the collapse of state socialism and before the full-fledged attack on the welfare state, Habermas was convinced that his reformist corrective had laid to rest Marx's critique of the liberal constitutional state. However, nearly twenty-five years later—in the aftermath of the Eurozone crisis and the prospect of a dissolved European Monetary Union—Habermas finds himself confronting the neglected tension between democratically enacted law and capitalism, a tension he thought was largely contained by the welfare state. Although Habermas was following in the footsteps of Marx and Lukács when he identified the "indissoluble" tension between democratic politics and capitalism in his *Theory of Communicative Action*, he departed from both when he concluded that the threat of systemic colonization of the democratic lifeworld by capitalist market imperatives is not a phenomenon peculiar to capitalist societies but is a permanent feature of modernity.[59] Habermas rehearses a similar view in *Between Facts and Norms*, where he writes:

> The systemic *integration* [i.e., marketization and bureaucratization] competes with the form of integration mediated by the actors' consciousness, that is, the *social integration* taking place through values, norms, and mutual understandings. […] For this reason, the relation between capitalism and democracy is fraught with tensions, something liberal theories often deny.[60]

Despite being critical of systems theorists for their disavowal of agency and normativity, Habermas has been convinced by his adversaries in at least one important respect: although he starts with the intuitively correct observation that modern societies are functionally differentiated and require complex forms of coordination, he ends up subscribing to the rigid view that capitalist markets in their present form are functional requirements for any modern society. It follows that systemic pathologies resulting from capitalist property relations can only be mitigated by redistributive welfare state

measures but never eliminated, let alone transformed by democratic socialist forms of economic organization that combine the price mechanism, workplace self-management, and democratic control over investment.

Although Habermas remains a sober-minded social democrat who is worried about the consequences of unchecked capitalism, he transforms a descriptive claim concerning the complexity of modern life into a normative claim about the futility of more radical alternatives to capitalist markets. It is only when pressed by critical interlocutors that Habermas acknowledges the theoretical appeal of "purely normative based models for a 'market socialism,'" which "pick up the correct idea of retaining a market's effective steering effects and impulses to innovation without at the same accepting the negative consequence of a systematically reproduced unequal distribution of 'bads' and 'goods.'"[61] What Habermas rejects outright is a full-fledged version of economic democracy, in which the steering function of the market (the price mechanism) is eliminated and replaced by a totalizing vision of associated production. Habermas attributes this romanticized vision of economic organization to Marx and his successors in the socialist tradition.[62] In so doing, Habermas reaffirms the Weberian view that any modern society will require a money-steered medium along with a legal-bureaucratic apparatus that is functionally separated from the concrete values, deliberations, and political decisions of citizens. Positively enacted law is the only means by which the democratic lifeworld can curtail the colonizing reach of money and power.[63] Habermas arrives at the conclusion that the separation of system and lifeworld reduces them to *disjecta membra*, whose unity can never be restored after the rationalization process has taken hold.[64]

On the interpretive level, it is true that Marx envisaged a developed communist society in which the law of value—that is, the capitalist drive for accumulation—would no longer be operative. However, he did not think this change would happen overnight, nor did he suggest that post-capitalist society would entail the authoritarian planning common in state-socialist societies. Instead, he described worker-owned cooperatives as the first sprouts of "associated production" emerging within capitalist society, implying that some market mechanisms could still be retained in the early stages of post-capitalist society.[65] He also warned that the worker-owned cooperatives would confront many of the same steering pressures experienced by capitalist enterprises, including obstacles from external markets and the prospect of unemployment. Although Marx wrote little about what a developed communist society would look like, he made it clear that a

developed communist society would inherit the productive forces developed by capitalism instead of relapsing into the undifferentiated mode of social life suggested by Habermas.[66]

Habermas's primary philosophical complaint against Marx is that he relied on the Hegelian concept of "totality," which prompted his misguided yearning for a holistic vision of associated producers.[67] Habermas rejects the concept of totality, which he sees it as relying on a defunct "philosophy of consciousness"—in Marx's case, the vision of society as a unitary subject. While Marx viewed modes of production as concrete totalities or wholes, he left little doubt that a concrete totality is made up of multiple determinations, among which the realm of economic necessity counts as an important determination.[68] Moreover, contrary to Habermas's assertion that Marx failed to see "evolutionary advantages" of capitalist production over pre-capitalist forms,[69] he explicitly acknowledged that "bourgeois society is the most *developed and most complex historic organization of production*."[70] It is therefore difficult to see why a more developed communist mode of production would eliminate the need for all functional differentiation. Habermas underestimates the extent to which Marx viewed capitalist production and developed exchange relations as necessary precursors to associated production, even if he allowed for the possibility of a non-capitalist road to communism. By ignoring this dialectical dimension of Marx's thinking, Habermas arrives at the mistaken view that Marx's call for associated production involves a misguided attempt to recouple system and lifeworld in a way that would restore the undifferentiated unity common in premodern societies. Marx's account of associated production presupposes a more complex form of production in which social individuals retain ownership and democratic control over production.

Habermas's misreading of Marx on the issue of social complexity leads him to conflate the systemic requirements of coordinating modern production with a specifically capitalist structure of property relations. Habermas is right that coordination will be necessary—even in the most complex societies—but it need not take the specific ownership structure entailed by capitalist property relations. The trouble is that Habermas does not differentiate between markets, which historically predate capitalism, and the property regime corresponding to capitalist markets specifically, where labour, land, and money are commodified, while control over productive property remains in the hands of an unelected minority. The theoretical conflation of markets with capitalism poses particular problems for the discursive theory of law and democracy because Habermas ends up depriving

his theory of what it needs for curtailing the colonizing reach of corporate power and accompanying asymmetries in wealth and political influence.

With the predominance of finance capital globally and the "democratic deficit" within international financial institutions, popular sovereignty is hollowed out while the rule of law is undermined at the behest of corporate power. Habermas cannot reconcile the complementary relationship between positive law, the discourse principle, and the principle of democracy if corporate interests increasingly trump popular sovereignty and undermine the public's participation in rational discourse, both domestically and internationally. In this respect, even sympathetic critics of Habermas, including William Scheuerman, David Ingram, and James Marsh, conclude that Habermas's deflationary theory of law and democracy cannot contend with the systemic forms of domination that result from capitalist economic arrangements.[71] The stakes are higher than Habermas may be willing to acknowledge. For even if one accepts the sensible claim that Habermas has sound democratic reasons against imposing *his* substantive view of social justice upon society, this does not lessen the criticisms that have been levelled against him. Since Habermas acknowledges that democratic will-formation can flourish, "ideally," in "an egalitarian public of citizens [that] has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation,"[72] the case for market socialism and more radical alternatives to financialized capitalism cannot be dismissed as easily as they have been.[73] For even if Habermas offers a purely procedural theory of law and democracy, the gap between his proceduralism and the challenges posed by global financial capitalism have become so great as to render his theory unpersuasive.

After a prolonged hiatus, Habermas has returned to matters of political economy. In contrast to Rawls, Habermas does not assume the problematic scenario of a "closed state" that is insulated from the pressures of global financial markets, and for good reason. In his ongoing debate about the Eurozone crisis with Wolfgang Streeck, Habermas is resolute that a global capitalist economy renders the proposal for a strong redistributive nation state nostalgic and even politically dangerous, given the realistic possibility of "fragmentation along national lines."[74] To his credit, Habermas has also criticized, in his capacity as a politically engaged citizen and scholar, the vengeful austerity policies that have been imposed on smaller countries (like Greece) by Europe's financial elites. In *The Lure of Technocracy,* Habermas returns full circle to the neglected tension between democratically enacted law and capitalism. Habermas warns:

> Without feedback from the insistent dynamics of a political public sphere and a mobilized civil society, political management lacks the drive to use the means of democratically enacted law to redirect the profit-oriented imperatives of investment capital into socially acceptable channels in accordance with the standards of political justice.[75]

Elsewhere, he observes:

> In the vicious cycle between the profit interests of the banks and the investors and the public interest of over-indebted states, the financial markets have the upper hand. […] Systemic mechanisms are increasingly escaping the intentional influence of democratically enacted law. This trend can be reversed, if at all, by recovering the scope for political action at the European level.[76]

It is regrettable that under "systemic imperatives" and technocratic directives, Habermas leaves out the global class of capitalists and the multinational corporations that continue to exert disproportionate influence over legislation. Habermas's discursive theory of law and democracy thereby unintentionally plays out its own vicious cycle. With his reluctance to criticize existing property arrangements in the era of globalized financial capitalism, Habermas deprives his theory of what it needs for reconciling popular sovereignty and the rule of law in a persuasive way. The result is that Habermas's countervailing pleas for European solidarity and the transnationalization of democracy appear increasingly detached from the political and economic pressures confronting European citizens.[77] Habermas may have had good reasons for putting aside Marx's critique of formal liberal justice in 1962, during the heyday of the welfare state. Global financial capitalism warrants rethinking the relationship between contemporary capitalist production and forms of communication that do not succumb to systemic colonization. In this respect, Marx's critique of formal liberal justice will remain relevant until the contradiction between democratically enacted law and capitalism is either severely curtailed or abolished, in which case Habermas will really become the "last Marxist."[78]

5.3 Axel Honneth: Market Morality, Social Freedom, and the "Marx Problem"

Axel Honneth is a third-generation critical theorist in the tradition of the Frankfurt School, whose work was influenced by Jürgen Habermas, his mentor and the former director of the Institute for Social Research.

Whereas Habermas's legal theory adopts a procedural method of justification, Honneth's defence of social freedom draws inspiration from Hegel's intersubjective theory of recognition. Honneth's earlier work, *The Struggle for Recognition*, outlined the normative basis of diverse social struggles for recognition and delineated three domains of recognition that have become central for modern freedom: legal respect, friendship, and esteem.[79] While Honneth's tripartite theory of recognition was inspired by Hegel, his ongoing attempt at "re-actualizing" Hegel's *Philosophy of Right* is based on a rejection of Hegelian metaphysics that nonetheless preserves Hegel's account of "Objective Spirit"—the institutional network of social relationships that form the basis for modern liberal democratic freedom. Honneth's interest in institutionalized theories of justice has prompted his critique of the proceduralist theories of justice and law developed by John Rawls and Jürgen Habermas respectively.[80] In place of neo-Kantian theories of justice that rely on transcendent principles, Honneth's proposes an account of ethical life that draws validity from the immanent potential unleashed by existing liberal democratic institutions, chief among them being the sphere of personal relationships, the sphere of the capitalist market, and the sphere of democratic will-formation.

Honneth's magnum opus, *Freedom's Right*, is premised on the neo-Hegelian insight that contemporary liberal democratic societies rest upon an indispensable set of institutional frameworks that facilitate the realization of social freedom. Following Hegel's tripartite division of the subject matter of right in the *Philosophy of Right*, Honneth shows how negative and reflexive freedom are historically presupposed and supplanted in the context of liberal democratic ethical life, where the institutional parameters are in place, at least implicitly, for a more fulfilling account of social freedom to be realized. Social freedom is distinguished from negative and reflexive freedom in the light of the intersubjective conditions that mutually affirming agents acknowledge as the basis of their freedom. Like Hegel, Honneth regards the capitalist market as a vital integrative institution and a differentiated sphere without which social freedom would not be possible. Since Honneth frames his response to Marx's critique of formal bourgeois law in the context of his normative reconstruction of the capitalist market, the discussion that follows will largely be confined to Honneth's thesis that the capitalist market embodies a sphere of social freedom. Honneth dubs Marx's critique of formal bourgeois justice the "Marx problem,"[81] which can be summed up by the conclusion that the capitalist market cannot fulfil its promise of realizing equal legal freedom for all participants because it is

based, in the last resort, on the domination of labour by capital. By proposing a normative reconstruction of the capitalist market, Honneth aims at debunking the neo-classical credo that capitalist markets are permeated by instrumental rationality along with the Marxist charge that capitalism rests on class domination. In this respect, Honneth's reconstructive project approaches political economy as a *moral* science.

Honneth's normative reconstructive approach is the most appropriate starting point for evaluating his response to the so-called Marx problem. Contrasting his immanent social analysis with the dominant neo-Kantian accounts of John Rawls and Jürgen Habermas, Honneth writes:

> This procedure implements the normative aims of a theory of justice through social analysis, taking immanently justified values as a criterion for processing and sorting out the empirical material. In the context of this procedure, 'reconstruction' thus means that out of the entirety of social routines and institutions, we will pick out those that are indispensable for reproduction.[82]

Honneth's method thus takes existing institutional norms and generalized practices as the starting point for social analysis. However, Honneth also cautions that normative reconstruction should not be interpreted as a description of what exists; normative reconstruction also provides critical theorists with immanent tools for criticizing existing social arrangements when these arrangements fail to deliver on their stated objectives. The capitalist market sphere and its corollary principle of achievement are important cases in point. Staying true to his methodological objectives, Honneth pursues a normative reconstruction of the capitalist market under the heading "The We of the Market." Honneth writes:

> In our normative reconstruction, therefore, we should proceed by attempting, in an idealizing manner, to uncover the path in the historical development of the capitalist market that has led to a gradual realization of its underlying principles of social freedom, principles that secure its legitimacy and have emerged under the pressure of social movements, moral protests and political reforms.[83]

Central to Honneth's normative reconstruction of the capitalist market is the claim, made in different ways by Hegel, Durkheim, and Parsons, that the legitimacy of the capitalist market rests on a pre-contractual set of moral rules without which the market system could not fulfil its function of

coordinating supply and demand in the face of ever-changing preferences. Honneth explains:

> The coordination of merely individual material calculations can only succeed if the subjects involved antecedently recognize each other not only legally as parties to a contract, but also morally or ethically as members of a cooperative community. Without such an antecedent sense of solidarity, which obligates the subjects to do more than merely respect the terms laid down in a contract, the opportunities offered by the market could be used to cheat, to pile on wealth and exploit others.[84]

At a very basic level, Honneth's thesis that the capitalist market depends on pre-established moral rules is correct. Every institutional order depends on an underlying sense of legitimacy. It is therefore difficult to disagree with Honneth when he writes that "the institutional sphere of the market cannot be understood as a 'norm-free system'"[85]; but even here, the matter is a question of degree, and the reference to degree should not be taken lightly. Even Marx, who was arguably the fiercest critic of the capitalist market, agreed that the capitalist market rests on pre-established norms that make commodity exchange possible. In the *Grundrisse*, for example, he writes:

> Although individual A feels a need for the commodity of individual B, he does not appropriate it by force, nor vice versa, but rather they recognize one another reciprocally as proprietors whose will penetrates their commodities. Accordingly, the juridical moment of the person enters here, as well as that of freedom, in so far as it is contained in the former. No one seizes hold of another's property by force. Each divests himself of his property voluntarily. But this is not all: individual A serves the need of individual B by means of the commodity *a* only in so far as and because individual B serves the need of individual A by means of commodity *b,* and vice versa […] that is, the common interest which appears as the motive of the act as a whole is recognized as a fact by both sides; but as such, it is not the motive, but rather proceeds, as it were, behind the back of these self-reflected particular interests.[86]

The essential difference between Marx and Honneth is that Marx was far less optimistic than Honneth continues to be about the capitalist market's reliance on a thick sense of cooperative solidarity. Nor would Marx

have been alone in thinking that capitalist market actors are as such severed from the bonds of communal solidarity, which were characterized by customary reciprocal obligations between individuals in pre-capitalist societies. Karl Polanyi, the great economic historian whom Honneth often cites with praise, diagnosed the problem in *The Great Transformation*, where he concluded that the capitalist market, which he termed the "self-regulating market," is characteristically disembedded from society and the normative obligations that previously embedded the "economy" in "society."[87] This historical process of "disembedding" also explained, for Polanyi, why Aristotle derided exchange for its own sake as an unnatural pathology, namely, *pleonexia*.[88] The substantive economy of ancient Athens and its markets remained embedded in a historically concrete form of social life, which had its web of reciprocal ties and obligations. What Aristotle diagnosed as an unnatural pathology in ancient Athens is today deemed natural and respectable in capitalist market societies.

Many of Honneth's critical insights in the preceding paragraphs can also be traced back to Hegel's *Philosophy of Right*. Following in the footsteps of Adam Smith and David Ricardo, Hegel conceived of civil society as the move from the "We" of the family (with its limited collective dispositions) to the independent "I" of the nascent capitalist market, where the individual is finally afforded the sense of extravagance and egoism that was missing in antiquity. Hegel goes so far as to call civil society the pivotal difference between antiquity and modernity.[89] The capitalist market is therefore the quintessential sphere of the atomistic individual, whose relations to other individuals are mediated by the exchange of commodities, whether of goods or of labour. What is particularly noteworthy in this context is that previously established *personal* relations of solidarity between individuals increasingly take the form of an *impersonal* and indifferent attitude in the capitalist market. To be sure, Hegel also theorized that the pursuit of subjective satisfaction was part of a broader integrative process that created an intricate network of dialectical reciprocity.[90] The flip side is that this same system of dialectical reciprocity occurs, as Marx pointed out, "behind the backs of self-interested interests," which end up swallowing up the sense of community in its midst. The institutional dynamics of the capitalist market—the perpetual compulsion to compete, selling high and buying low—end up subverting the prior sense of community, and the web of normative obligations that informed exchange in pre-capitalist societies.

Honneth would undoubtedly question the Polanyi-inspired claim that the morality of the capitalist market is thin at best. Polanyi, for his

part, observed that the economies of pre-capitalist social formations were embedded in dense networks of reciprocal normative obligation. To be sure, many of these pre-capitalist societies were also informed by historical forms of hierarchy and dependence that should not be overlooked. Polanyi also outlined two crucial forms of integration that were dominant in pre-capitalist societies; these were reciprocity and redistribution. Reciprocity, which is most relevant in this context, was based on relations of symmetry that relied on a shared understanding of what each party owed the other. Pre-capitalist political-economic formations were characterized by dense networks of reciprocal obligations that were increasingly eroded by the impending expansion of the capitalist market and its accumulative imperatives.

Accordingly, the capitalist market—or the "self-regulating market" in Polanyi's formulation—severed the dense network of normative obligations that previously embedded the economy in society, and this development also fuelled the "double movement" against the commodification of nature, labour, and money.[91] In his informative essay, "The Market, Mind and Rationality," Abraham Rotstein observes:

> As a form of integration the market pattern differs from the other two [i.e., reciprocity and redistribution] insofar as it is not embedded—that is, it does not operate within the social channels of a prior non-market institution. It requires instead a legally sanctioned market that is formally established or recognized."[92]

There was a prototypical transition to a self-regulating market, where the subjects of exchange—now conceived as atomistic individuals—no longer owed anything to each other than what was prescribed by formal justice, and this is where the pathologies of the capitalist market first made their mark. It is precisely these atomized relations that precipitated Marx's conclusion in his formative reflections on James Mill that exchange on the capitalist market is ultimately tied to mutual distrust, trickery, and plundering.[93] Similarly, in the *Communist Manifesto*, Marx and Engels charge that the bourgeoisie "has pitilessly torn asunder the motley feudal ties that has bound man to his 'natural superiors' and left remaining no other nexus between man and man than naked self-interest, than callous 'cash payment.'"[94] In this regard, Marx only anticipated, in polemical fashion, what Polanyi would explain more systematically in *The Great Transformation*.

Aside from tearing asunder relations of domination and hierarchy, the capitalist market also cut the thick layer of normative obligations that informed economic activity in pre-capitalist societies.

The trouble with Honneth's account of the capitalist market, then, is that it attributes to the market a thick layer of ethical disposition, an ethos of "cooperative solidarity," which is simply not there. The pre-contractual expectation of conceiving of the other as an equal legal person who is deserving of respect is compatible with ruthless competition, instrumental rationality, and exploitation—the very features that militate against Honneth's view of social freedom. These darker externalities cannot be decoupled from the capitalist market that Honneth wishes to salvage by way of normative reconstruction. To be fair, Honneth acknowledges that the existing state of global financial capitalism poses significant problems for his attempt at normative reconstruction. The implication, according to Honneth, is that "the market is no longer primarily viewed as a social institution that offers everybody the opportunity to satisfy their interests in free reciprocity, but as an organ of competition over how to best maximize individual utility."[95] Honneth labels the phenomenon just described as an instance of "misdevelopment" because he desperately wishes to avoid the conclusions of the "Marx problem"—the prognosis that capitalist market societies cannot realize the promise of equal legal freedom for all individuals, in which case any attempt at normative reconstruction of the market would prove futile. Honneth has all the more reason for calling the current state of global financial capitalism a "misdevelopment" because he cannot see a viable future beyond the market system that has arisen with the functional differentiation of modern society. Honneth explains:

> If we take into account the fact that there do not seem to be any practical alternatives to the economic system of the market, then there is good reason to translate the deficits Marx sketches in his critique of capitalism into the horizon opened by Hegel and Durkheim: Neither the problem of exploitation nor that of enforced contracts should be grasped as structural deficits that can only be removed by abolishing the capitalist market economy, but as challenges posed by the market's own normative promise, which can thus only be solved within the market system itself.[96]

The underlying flaw of Honneth's normative reconstruction is that it does not demonstrate that the capitalist market depends on a thick pre-contractual sense of cooperative solidarity. By idealizing the normative basis

of the capitalist market, Honneth also leaves readers with few avenues for criticizing the pathological dynamics of existing capitalist markets. Aside from the related problems of structural unemployment, periodic economic crises, and systemic inequality—all of which had been anticipated by Hegel—the capitalist market does not realize the relations of cooperative solidarity on which Honneth's analysis of social freedom ultimately rests. While there are many self-conscious "I's" in the capitalist market, there remain far fewer self-conscious "We's." Honneth is at pains to strike an "ought" from an "is" that is normatively thin from the outset.

In contrast to Habermas, however, Honneth has dutifully acknowledged that he did not adequately differentiate between the capitalist market and an economy consisting of markets. In a helpful rejoinder to critics of *Freedom's Right*, Honneth writes:

> A "capitalist market" society must be understood as a special form of the social embeddedness of markets, in which the organization of markets in productive capital, liquid capital, and land capital is tied in with their expected yields. It is not self-evident that markets can only exist in this social form.[97]

In this respect, Honneth affirms that his radical reformist understanding of social freedom is compatible with the theoretical premises of market socialism, which is a far cry from the neoliberal blackmail of a single alternative. Honneth writes:

> It is obvious that a complete "socialization" of the market could only be possible under post-capitalist conditions. All the changes called for, from the abolition of power imbalances between market participants, to the establishment of discursive intermediary bodies, through to the humanization of work, are measures which are considered urgent and necessary for achieving social freedom within a market society.[98]

Honneth also reminds critics that his normative reconstructive approach and its emphasis on learning processes prevent him from detailing what a fully socialized market society would look like. The possibility of socializing the market provides an excellent segue to Honneth's most recent attempt to "update" the idea of socialism.

Honneth sees the idea of socialism as emerging in response to the unprecedented changes confronting the working class with the advent of industrial capitalism. On Honneth's reading, the early socialists—Saint-Simon, Fourier, and Owen—formulated their critiques of early capitalism

on the grounds that the egoistic basis of capitalist market society disavowed the French Revolution's insistence on fraternity, as well as liberty and equality.[99] According to Honneth, all of the early socialists sought a reconciliation of liberty and fraternity in ways that would propel society beyond the narrow propriety account of freedom that took hold with the expansion of capitalism across Europe. Honneth writes:

> The early socialists all assumed that the largely legal notion of individual freedom was far too narrow for it to be reconcilable with the principle of fraternity. With a bit of hermeneutic goodwill, we could say that the three early socialist groups discovered an internal contradiction in the principles of the French Revolution due to its merely legal or individualist understanding of freedom. Though they might not have been very aware of it, these socialists all sought to expand the liberal concept of freedom in order to reconcile it somehow with the aim of "fraternity."[100]

Honneth points out that the young Marx was able to distinguish himself from the other socialist theorists because his Hegelian point of departure enabled the formulation of an alternative account of freedom that combined an ethic of self-realization with the cultivation of mutual concern through a process of cooperative production.[101] However, like Habermas before him, Honneth insists that Marx was overtaken by a blind faith in a metaphysical philosophy of history, which led to his privileging of a collective revolutionary subject—namely, the proletariat—that was destined to realize the promise of social freedom once and for all.[102] It was this unfounded faith in a philosophy of history, Honneth maintains, that led Marx and the early founders of socialism to neglect the burgeoning democratic lifeworld and the unprecedented potential unleashed by bourgeois or liberal rights.[103] Even more troubling for Honneth was the dogmatic desire on the part of socialist theoreticians to do away with the functional differentiation of modern capitalist societies and to replace the "anarchy of the market" with comprehensive central planning.[104]

Honneth's provocative conclusion concerning the theoretical deficiencies of classical socialism and its reliance on comprehensive central planning prompts his praise for Eduard Bernstein's politics of reformism and the outright rejection of class struggle on the grounds that it must fall back on a defunct philosophy of history.[105] Leaving aside the point that Marx welcomed political emancipation and acknowledged the value of universal suffrage, he certainly *did not* think that the implementation of gradual reforms

was utterly useless. Marx's insistence on revolutionary transformation did not prevent him from appreciating the expansion of unions, the struggle to limit the length of the working day, and the role of class struggle in forcing changes in legislation.[106] Nor was Marx opposed to worker-owned and controlled cooperatives as a transitional phase to associated production, which Honneth has acknowledged in *Freedom's Right*.[107] The price of disavowing class struggle as an instance of social struggle is that Honneth's idea of socialism increasingly resembles the neo-Kantian theories of justice he so fiercely opposes. While normative reconstruction is supposed to draw validity from the concrete practices and struggles of social groups in existing capitalist democracies, Honneth anchors his updated account of socialism in an abstract conception of democratic citizenship.[108]

By dissociating contemporary social movements from the idea of socialism, Honneth severs what little empirical basis remains for his purely normative account of socialism. In order for cooperative relations of solidarity to constitute a concrete reality rather than an idea that is externally imposed, there would have to exist generalized practices of cooperative solidarity in the productive sphere that build within existing capitalist societies the institutional sprouts for socialism, in which cooperative solidarity rather than competition and exploitation forms the basis of social interaction. Struggles of this sort need not be confined to the prism of class struggle; they could just as well take a modified form of what Polanyi called the "double-movement" against the commodification of labour, land, and money. The short-lived Occupy Movement stands as one empirical example, and the same was once true of trade unions, which were far more potent in the twentieth century, when formal employment was more common than the informal and precarious forms of employment that have exploded in the twenty-first century.

By divorcing the idea of socialism from the moral grammar of social struggle, Honneth is unable to follow through with a normative reconstruction of the capitalist market in a manner that renders socialism as the realization of social freedom. His idea of socialism assumes instead the form of a regulative ideal that is artificially imposed from outside. Honneth's bold attempt to elucidate the morality of the capitalist market accentuates the inherent limitations of that morality, as well as the need to think beyond it, perhaps within his preferred framework of market socialism. However, even a market socialist vision of this kind would benefit from the politics of social struggle that has all but disappeared from Honneth's account

of social freedom. There is nothing inherently "metaphysical" about anti-capitalist struggles, and it is precisely the grammar of social struggle that Honneth's updated idea of socialism needs more than ever. The moral grammar of social struggle would also bring Honneth's normative reconstruction closer in line with the institutional challenges posed by global financial capitalism and the ideological hegemony of neoliberalism.

5.4 Nancy Fraser: The Crisis of Financialized Capitalism and "De-Democratization"

Nancy Fraser is a prominent third-generation critical theorist, whose scholarship reflects a sustained engagement with feminism and the politics of redistribution. Fraser's 1997 book, *Justice Interruptus*,[109] was written at a time when Marxism was in decline both theoretically and politically, while the identity claims of marginalized social groups came to the forefront of debates in political theory. Rather than relying on a one-sided account of recognition or a welfarist recourse to redistribution, Fraser's analysis of the "post-socialist condition" prompted the development of a two-track theory that emphasizes the need for recognition and redistribution in different and potentially conflicting social contexts. Fraser's work evolved into a fruitful debate with Axel Honneth over the question of whether recognizing the identity claims of marginalized social groups or redistributing material resources is a more adequate strategy for resisting domination in liberal democratic societies. In the ensuing debate, Honneth subsumed identity claims and struggles over material redistribution under the unitary umbrella of recognition, which he tethered to the pursuit of freedom, while Fraser proposed a dual recognitive-redistributive paradigm that draws moral force from the universalist concept of "participatory parity," whereby all individuals are deemed equally capable of participating in social, political, and economic institutions.[110]

Fraser's most recent work has turned to considerations of political economy, with a renewed focus on the relevance of crisis theory. It is worth noting that Fraser's engagement with Marx's critique of liberal justice differs from those of Rawls, Habermas, and Honneth insofar as it aims at supplementing Marx's insights about capitalism in the twenty-first century. Fraser's project of proposing an expanded account of contemporary capitalism is developed in a recently published article, "Behind Marx's Hidden Abode," in which she outlines the background conditions that are indispensable for the reproduction of financialized capitalism. While she

acknowledges that Marx offers valuable insights about capitalism as an economic system, she contends that the analysis of contemporary capitalism warrants an expanded formulation that theorizes the place of gender, ecology, and political power in co-constituting financialized capitalism. Fraser writes:

> Marx's thought has much to offer in the way of general conceptual resources; and it is in principle open to these broader concerns. Yet it fails to reckon systematically with gender, ecology and political power as structuring principles and axes of inequality in capitalist societies—let alone as stakes and premises of social struggle. Thus its best insights need to be reconstructed from these perspectives.[111]

Whereas Marx's analysis in *Capital* proceeds from the sphere of exchange to the "hidden abode of production," Fraser takes as her point of departure the hidden spheres on which capitalist accumulation depends for its "conditions of possibility." Although Fraser does not articulate these conditions in sequential order, the first condition would have to be the environment and the natural resources on which capitalist production depends. The second condition of possibility encompasses the predominantly informal, gendered, and increasingly racialized forms of care work that are critical in supplying capitalism with its socialized workforce.[112] Until recently, Marxists have wrongly assigned these social relationships to the domain of "unproductive labour," since the extraction of surplus value has traditionally been bound up with production and the struggle between capital and labour. The third condition of possibility is connected with a legal and political order that sustains capitalist accumulation. Fraser writes:

> Capital accumulation is inconceivable, after all, in the absence of a legal framework underpinning private enterprise and market exchange. It depends crucially on public powers to guarantee property rights, enforce contracts, and adjudicate disputes; to suppress rebellions, maintain order, and manage dissent; and to sustain, in the language of the US Constitution, "the full faith and credit" of the money supply that constitutes capital's lifeblood.[113]

Fraser's expanded formulation locates the sources of crisis in capitalism's non-economic "conditions of possibility": ecology, social reproduction, and political power. In addition to periodic economic crises, contemporary capitalism is marked by ecological crises, crises of social reproduction, and

political crises, all extending beyond class struggle and the arena of production. Fraser differs from Marx in that her account traces the sources of contemporary capitalist crises beyond the inherent contradiction between socialized production and private appropriation. On Fraser's view, these crises are situated at the nexus of economy-environment, economy-social reproduction, and economy-polity. Although Fraser has good reasons for expanding Marx's account of capitalism beyond the sphere of class struggle, she misattributes to Marx the myopic view that capitalism is strictly an economic system. Marx conceived of capitalism instead as a mode of social life, a concrete totality made up of multiple determinations. It is all the more perplexing that Fraser suggests approaching contemporary capitalism as an "institutional social order" that is comparable to feudalism.[114] While Fraser cannot be faulted for her aversion to economically reductionist theories of capitalism, she ends up attributing precisely such a view to Marx.

More recently, Fraser has elaborated specifically on the contradictions stemming from the polity-economy nexus of financialized capitalism. Fraser proceeds by delineating three historical phases of capitalism: the liberal era of competitive or laissez-faire capitalism, state-managed capitalism, and the current era of financialized capitalism.[115] The era of financialized capitalism differs from earlier phases in that industrial production has been exported to peripheral countries, fuelling financial speculation and debt in core countries, while decisions about investment have been entrusted to central banks and supranational organizations (Fraser refers to the World Trade Organization and the European Troika) that are more accountable to corporate interests than to public power.[116] Additionally, drawing on the work of Marxist political theorist Ellen Meiksins Wood, Fraser explains that the separation of economic matters from political considerations has always been a distinctive feature of capitalism:

> The power to organize production is privatized and devolved to capital, which is supposed to deploy only the "natural," "non-political' sanctions of hunger and need; the task of governing the remaining "non-economic" orders, including the external conditions for accumulation, falls to the public power, which alone may utilize the "political" media of law and "legitimate" violence. In capitalism, therefore, the economic is nonpolitical, the political noneconomic.[117]

The characteristic separation of the economy from democratic politics carries far-reaching consequences in the era of financialized capitalism, according to Fraser, because public institutions cannot contend with the social, ecological, and political problems generated by capitalist accumulative imperatives. At the same time, capitalist accumulation depends on these very institutions for its conditions of possibility.[118] The incursion of corporate interests into the domain of public policy exacerbates the political contradictions of financialized capitalism because public power is hollowed out. Drawing on the work of Colin Crouch, Wolfgang Streeck, Wendy Brown, and Stephen Gill, Fraser observes:

> At every level, finally, the new regime [of financialized capitalism] promotes the capture of public power by private (corporate power) […] The revolving door between government and private firms insures […] that representatives of private interests write the very regulations to which they are subject.[119]

Fraser's observations about the hollowing out of public power mirror Marx's concerns about the subservience of justice to the class interests of capitalists.

After outlining the political contradictions of financialized capitalism, Fraser calls for a theoretical renewal of the crisis theory developed (and subsequently abandoned) by Jürgen Habermas in his 1973 book *Legitimation Crisis*. Whereas Habermas theorized that capitalist crisis was largely contained with the consolidation of the paternalistic welfare state, Fraser notes that Habermas did not anticipate that the decline of state-managed capitalism would pave the way for the regime of neoliberal financialized capitalism.[120] Fraser follows up her refinement of crisis theory with a conceptual distinction between administrative crisis and legitimation crisis. An administrative crisis, according to Fraser, is "one in which public powers lack the necessary heft to govern effectively. Outgunned by private powers, such as large transnational corporations, they [public powers] are blocked from making and implementing the policies needed to solve social problems."[121] Whereas an administrative crisis is characterized the inability of institutions to address problems generated by capitalist accumulation, a legitimation crisis involves a loss of public confidence in the validity of existing arrangements; this loss of confidence brings with it the possibility of social change. Fraser submits that the institutionalized order of global financialized capitalism evidences reoccurring administrative crises that have not been accompanied by legitimation crises.[122]

The present state of global financialized capitalism, then, is one in which public power is undermined by corporate power and capitalist accumulative imperatives. Although Fraser does not speculate about the future of global capitalism, she leaves open the possibility of a reformed capitalism and various "post-capitalist" alternatives.[123] As a radical democrat, Fraser places hope in defiant publics that have the potential to renew public power and redraw the boundary between politics and economics in ways that wrest decision-making from corporate power. At the same time, the short-lived Occupy Movement and other progressive movements confirm for Fraser her pessimism about the vitality of existing counter-hegemonic struggles after the decline of traditional left-wing parties and labour organizations.[124] Although Fraser provides an expanded conception of contemporary capitalism that locates the crises of capitalism "behind the hidden abode of production," her detailed analysis of the hollowing out of public power only underscores the relevance of Marx's critique of liberal justice in the present era of global financialized capitalism.

5.5 Conclusion

After the collapse of state socialism and the decline of Marxist theory in academia, political theorists increasingly turned their attention away from class and the once-vibrant field of political economy, where the goal of economic efficiency was examined alongside the organization of production, property relations, and political justice. Many of the prominent political philosophers influenced by the work of John Rawls became embroiled in abstract debates about equality that gravitated away from institutional considerations, while the marginal revolution in economics confined the scope of theoretical inquiry to formal mathematical models that abstracted from normative considerations. With the steady rise in wealth inequality and the global reach of finance capitalism, contemporary political theorists have found themselves in the embarrassing situation of having to discuss "material interests," just as Marx did after confronting the subordination of justice to the narrow interests of private property in the Rhine province. Marx's journey from philosophy and law to the critique of political economy formed the basis for his critique of formal liberal justice. John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser have tried either to respond directly to Marx's critique or to modify his critique in the light of the challenges presented by global financial capitalism. Each of the responses examined in this chapter—property-owning democracy in

Rawls; a de-colonized lifeworld in Habermas; social freedom in Honneth; and the reconfiguration of the polity-economy divide in Fraser—shows the enduring relevance of Marx's critique and underscores the importance of transforming property relations in capitalist democracies. Each of these authors has also signalled what can be described as a preliminary return to political economy; however, the journey back to political theory awaits. In the spirit of continuing this long journey, the final chapter will reconsider the relationship among Marxism, democracy, and the rule of law in the era of neoliberal hegemony.

Notes

1. Karl Marx, *Capital Volume 1*, ed. Frederick Engels (New York: International Publishers, 1967), 235.
2. Choullette's remarks are worth quoting in full: "Our citizenship is another occasion for pride! For the poor it consists in supporting and maintaining the wealthy in their power and in their idleness. At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor to sleep under bridges, to beg on the streets, and to steal their bread. This equality is one of the benefits of the Revolution. Why, that Revolution was effected by madmen and idiots for the benefit of those who acquired the wealth of the crown. It resulted in the enrichment of the cunning peasants and money-lending *bourgeois*. It founded the empire of wealth. It delivered France to those moneyed classes who have been devouring her for a century. Now they are our lords and masters" (Anatole France, *The Red Lily*, trans. Winfred Stevens [New York: Dodd, Mead & Company, 1995], 91).
3. Marx, "Debates on the Law on the Thefts of Wood," MECW 1: 246 (my emphasis).
4. Ibid., 241.
5. T.H. Marshall famously outlined the historical evolution of rights in "Citizenship and Social Class," in *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press, 1950), 155.
6. Francis Fukuyama, *The End of History and the Last Man* (New York: Penguin, 1993).
7. The retrenchment of the welfare state and growing wealth inequality have been documented by leading economists and economic sociologists. See, for example, Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge: Harvard University Press, 2014); Wolfgang Streeck, *Buying Time* (London: Verso, 2014).
8. This is not to suggest that Marx overlooked the emergence of finance capital and the growing importance of credit. Indeed, he anticipated the

rise of joint-stock companies, and even noted the emergence of "fictitious capital."

9. John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 177.
10. Jürgen Habermas, *Between Facts and Norms,* trans. William Rehg (Cambridge: MIT Press, 1996), 478.
11. Axel Honneth, *Pathologies of Individual Freedom* (Princeton: Princeton University Press, 2001), 1. Rainer Forst grants that Marx's account of exploitation brings to bear the relevance of structural forms of injustice in ways that leading theories of distributive justice have ignored. Like Rawls, Habermas, and Honneth, however, Forst is convinced that Marx's account of full communism is problematic because it is indisputably "beyond justice." See Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification,* trans. Ciaran Cronin (Oxford: Oxford University Press, 2017), 121–130.
12. G.A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008), 11.
13. Rawls, *Justice as Fairness: A Restatement*, 32.
14. See Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: University Press, 2006), 30.
15. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 118.
16. Ibid., 122. For a similar explanation, see Rawls, *Justice as Fairness: A Restatement*, 16.
17. John Rawls, *A Theory of Justice,* revised ed. (Cambridge: Harvard University Press, 1999), 130.
18. Simone Chambers, "Justice or Legitimacy, Barricades or Public Reason?," in *Property-Owning Democracy: Rawls and Beyond*, ed. Martin O'Neill and Thad Williamson (Malden: Wiley-Blackwell, 2012), 21.
19. Rawls, *A Theory of Justice,* revised ed., 179.
20. Ibid., 229.
21. See Richard Krouse and Michael McPherson, "Capitalism, 'Property-Owning Democracy,' and the Welfare State," in *Democracy and the Welfare State,* ed. Amy Gutmann (Princeton: Princeton University Press,), 157–185, and David Schweickart, "Property-Owning Democracy or Economic Democracy?," in *Property-Owning Democracy: Rawls and Beyond*, ed. O'Neill and Williamson, 201–222.
22. John Rawls, *A Theory of Justice,* xv.
23. Rawls, *Justice as Fairness: A Restatement*, 148. Norman Daniels provides a persuasive critique of Rawls's conceptual distinction between liberty and the worth of liberty. While my interpretation is influenced by Daniels's critique, it goes beyond it by considering the shortcomings of property-owning democracy. See Norman Daniels, "Equal Liberty and Unequal

Worth of Liberty," in *Reading Rawls: Critical Studies on Rawls' A Theory of Justice*, ed. Norman Daniels (Stanford: Stanford University Press, 1975), 231-253.

24. Ben Jackson, "Property-Owning Democracy: A Short History," in *Property-Owning Democracy: Rawls and Beyond*, ed. O'Neill and Williamson, 32.
25. Rawls, *Justice as Fairness: A Restatement*, 149.
26. Ibid., 139.
27. Rawls engages in far greater depth with Marx's work as a whole in his *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge: Harvard University Press, 2007), 319–382.
28. Although Rawls favoured property-owning democracy, a convincing case can be made that liberal socialism is more consistent with Rawls's mature theory of justice, even if he did not make that case himself. For an excellent interpretation along these lines, see William Edmundson, *John Rawls: Reticent Socialist* (Cambridge: Cambridge University Press, 2017).
29. Rawls, *Justice as Fairness: A Restatement*, 177. Rawls's implicit admission that a property-owning democracy would require a supportive ethos goes some way in countering G.A. Cohen's "Marx-inspired" basic-structure objection. Cohen takes Rawls to task for confining the purview of justice to the formal basic structure, such that profit-maximizing choices would still be condoned by an egalitarian state that is committed to upholding Rawls's difference principle. Cohen's exclusive focus on the difference principle and his fixation on distribution led him to overlook the background (pre-tax) conditions that the later Rawls saw as integral for the realization of social justice. This important omission on Cohen's part may have also contributed to his hyper-privileging of normative philosophy at the expense of institutional considerations. See G.A. Cohen, *Rescuing Justice and Equality*, 2.
30. Rawls, *Justice as Fairness: A Restatement*, 177.
31. Ibid., 178.
32. John Rawls, *A Theory of Justice*, revised edition, 242.
33. Ibid., xvi.
34. Martin O'Neill and Thad Williamson, "Beyond the Welfare State," *Boston Review*, 24 October 2012, https://bostonreview.net/us/beyond-welfare-state.
35. See Stephen P. Lee, "Is Justice Possible Under Welfare State Capitalism?," in *Philosophical Perspectives on Democracy in the 21st Century*, eds. Ann Cudd and Sally Scholz (Dordrecht: Springer, 2014), 121–132.
36. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 228–229.
37. Rawls, *Justice as Fairness: A Restatement*, 5.
38. Chambers, "Justice or Legitimacy, Barricades or Public Reason?," 22.

39. Ibid.
40. A comparative analysis of corporate tax rates in the era of the New Deal reveals just how far American citizens and politicians were willing to exert pressure against the interests of organized capital. Although the New Deal was a far cry from Rawls's vision of property-owning democracy, it is a striking demonstration of how political culture can alter in response to changing social and economic circumstances.
41. Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2006), 315–316. Unlike Rawls, the economist Thomas Piketty advocates a "global tax on capital," which he takes to be a far more humane and realistic solution to the problem of capital concentration than the revolutionary solution proposed by Marx. However, despite Piketty's optimism about the transparency of international financial information, it is unclear how his own solution would significantly alter the nature of capital concentration, especially in the absence of global institutions capable of exerting pressure on multinational corporations. See Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge: Harvard University Press, 2014), 520–522.
42. Marx, *Capital: Volume 1*, 690–691.
43. See Jürgen Habermas, "Towards a Reconstruction of Historical Materialism," *Theory and Society* 2, no. 3 (1975): 287–300.
44. Jürgen Habermas, "Labour and Interaction: Remarks on Hegel's Jena *Philosophy of Mind*," in *Theory and Practice,* trans. John Viertel (Boston: Beacon Press, 1973), 169.
45. Jürgen Habermas, "Natural Law and Revolution," in *Theory and Practice*, *Theory and Practice,* trans. John Viertel (Boston: Beacon Press, 1973).
46. Ibid., 105.
47. Ibid., 110.
48. Ibid., 112–113.
49. Habermas, *Between Facts and Norms,* xli.
50. Habermas, "Natural Law and Revolution," 118.
51. Ibid., 119.
52. Ibid.
53. Habermas, *Between Facts and Norms*, xli.
54. Ibid., xli.
55. Ibid., 107.
56. Ibid., 121.
57. Ibid., 123.
58. Ibid., 57.
59. Jürgen Habermas, *The Theory of Communicative Action*, vol. 2: *Lifeworld and System; A Critique of Functionalist Reason*, trans. Thomas McCarthy (Boston: Beacon Press, 1989), 343.
60. Habermas, *Between Facts and Norms,* 501.

61. Jürgen Habermas, "A Conversation about Questions of Political Theory," in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, ed. René von Schomberg and Kenneth Baynes (Albany: State University of New York Press, 2002), 237. Various normative and institutional proposals for market socialism have been put forward over the last thirty years. See Bertell Ollman and David Schweickart, eds., *Market Socialism: The Debate Among Socialists* (London: Routledge, 1998).
62. Habermas, *Between Facts and Norms*, 479.
63. Ibid., 75.
64. Jürgen Habermas, *The Theory of Communicative Action*, vol. 1: *Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1989), 234.
65. For a heterodox interpretation on this point, see James Lawler, "Marx as Market Socialist," in *Market Socialism*, eds. Ollman and Schweickart, 23–52.
66. For a rich textual interpretation on this point, see Peter Hudis, *Marx's Concept of the Alternative to Capitalism* (Chicago: Haymarket, 2013).
67. Habermas, *Between Facts and Norms*, 46 and 479.
68. Karl Marx, *Grundrisse*, trans. Martin Nicolaus (Middlesex: Penguin, 1973), 101.
69. Jürgen Habermas, "Political Experience and the Renewal of Marxist Theory," in *Autonomy and Solidarity: Interviews with Jürgen Habermas*, ed. Peter Dews (London: Verso, 1992), 94.
70. Marx, *Grundrisse*, 105 (my emphasis).
71. See William Scheuerman, "Between Radicalism and Resignation: Democratic Theory in Habermas's *Between Facts and Norms*," in *Discourse and Democracy: Essays on Habermas's Between Facts and Norms*, ed. Schomberg and Baynes (Albany: State University of New York Press, 2002), 61–85; David Ingram, "Individual Freedom and Social Inequality," in *Perspectives on Habermas*, ed. Lewis Hahn (Chicago: Open Court, 2000), 289–307; James Marsh, *Unjust Legality: A Critique of Habermas's Philosophy of Law* (Lanham: Rowman & Littlefield, 2001).
72. Habermas, *Between Facts and Norms*, 308.
73. As a neo-Kantian theorist, Habermas is in principle opposed to revolutions because they breed violence and can only be justified retrospectively.
74. Jürgen Habermas, *The Lure of Technocracy* (Cambridge: Polity, 2014), 88–89. For Streeck's response, see Wolfgang Streeck, "Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas," *Constellations* 21 (2014): 213–221.
75. Habermas, *The Lure of Technocracy*, 11.
76. Ibid., 81–82.
77. Ibid., 11.

78. Habermas once remarked: "I do think I have been a reformer my whole life, and maybe I have become a bit more so in recent years. Nevertheless, I mostly feel I am the last Marxist" (Habermas quoted in Matthew Specter, *Habermas: An Intellectual Biography* [Cambridge: Cambridge University Press, 2010], 369).
79. Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts,* trans. Joel Anderson (Cambridge: Polity, 1995).
80. Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life*, trans. Joseph Ganahl (New York: Columbia University Press 2014), 5.
81. Ibid., 180.
82. Ibid., 6.
83. Ibid., 197.
84. Ibid., 198.
85. Ibid., 191.
86. Marx, *Grundrisse*, 243.
87. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001).
88. Karl Polanyi, "Aristotle Discovers the Economy," in *Primitive, Archaic, and Modern Economies: Essays of Karl Polanyi*, ed. George Dalton (New York: Anchor Books, 1968), 114.
89. G.W.F. Hegel, *Outlines of the Philosophy of Right,* ed. Stephen Houlgate, trans. T.M. Knox (Oxford: Oxford University Press, 2008), addition to §182, p. 181.
90. Ibid., §183.
91. Karl Polanyi, "Our Obsolete Market Mentality," in *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi*, ed. George Dalton (New York: Anchor Books, 1968), 68.
92. Abraham Rotstein, "The Market, Mind and Rationality: From Vienna to Paris and Back," *Revue européenne des sciences sociales* 44, no. 134 (2006): 41.
93. Marx, "On James Mill," in *Karl Marx: Selected Writings,* ed. David McLellan (Oxford: Oxford University Press, 2000), 131.
94. Marx, "The Communist Manifesto," *Marx-Engels Reader*, 475.
95. Axel Honneth, *Freedom's Right*, 251.
96. Ibid., 196.
97. Axel Honneth, "Rejoinder," *Critical Horizons* 16, no. 2 (2015): 223.
98. Ibid.
99. Axel Honneth, *The Idea of Socialism: Towards a Renewal* (Cambridge: Polity, 2017), 10–11.
100. Ibid., 11–12.
101. Ibid., 15.
102. Ibid., 40.
103. Ibid., 33.
104. Ibid., 47.

105. See ibid., 116–117n14.
106. See Chapter 6.
107. Honneth, *Freedom's Right*, 323.
108. Honneth, *The Idea of Socialism*, 97–98.
109. Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Post-Socialist" Condition* (New York: Routledge, 1997).
110. Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003). For helpful commentary on the Fraser-Honneth debate that takes into consideration the role of the capitalist market, see Christopher Zurn, *Axel Honneth: A Critical Theory of the Social* (Cambridge: Polity, 2015), 127–152.
111. Nancy Fraser, "Behind Marx's 'Hidden Abode': For an Expanded Conception of Capitalism," *New Left Review* 86 (2014): 56.
112. Ibid., 61.
113. Ibid., 64.
114. Ibid., 67.
115. Nancy Fraser, "Legitimation Crisis? On the Political Contradictions of Financialized Capitalism," *Critical Historical Studies* 2, no. 2 (2015): 157
116. Ibid., 179.
117. Ibid., 162–163.
118. Ibid., 160.
119. Ibid., 180.
120. Ibid., 171.
121. Ibid., 165.
122. Ibid., 187.
123. Ibid., 184.
124. Ibid., 165.

CHAPTER 6

Democracy and the Riddle of All Constitutions: Marx's Enduring Lessons

Democracy is the solved riddle of all constitutions.[1]

The aim of this final chapter is to rethink Marxism's relationship to the rule of law and constitutionalism by examining how struggles over both can be vehicles for progressive change. Reflections about the rule of law on the Left have generally ranged from reasoned suspicion to downright contempt. Critics of the rule of law maintain that the justice system in capitalist democracies caters to the interests of dominant classes and that recourse to legal strategies usually results in a damaging form of depoliticization that reasserts existing hierarchies. In 1975, the eminent Marxist historian E.P. Thompson caused controversy on the Left when he concluded his incisive account of the eighteenth-century Black Act with a resolute defence of the rule of law. After exploring the theoretical context for Thompson's conclusion, I examine Marx's analogous reflections on the struggle for a legally limited working day and explain why he saw value in legality, even as he welcomed the revolutionary supersession of capitalist property. I then consider Marx's broader views on constitutionalism in the face of authoritarian reaction. Although Marx's reflections reaffirm that transformative change is to be sought through political mobilization and revolutionary contestation, the rule of law and the struggle over the constitution offer means by which asymmetrically positioned groups can resist domination. I conclude

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
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by explaining why, in Marx's view, the rule of law and constitutionalism depend upon the extension and deepening of democracy, since otherwise the law is unjust and conceals the arbitrary interests of a minority. Marx's enduring lesson for liberalism is that democracy *is* the genuine constitution and that political emancipation is but a stepping stone to a richer conception of human emancipation. Present-day Marxists, for their part, should reconsider the rule of law and the rational kernel of constitutionalism as bridges to a democratic socialist alternative that is in keeping with the goal of human emancipation.

6.1 Unjust Laws and the Norms Underpinning the Rule of Law: Marx and E.P. Thompson

Karl Marx's intellectual journey from rational law to a historically grounded conception of right developed in confrontation with unjust positive law: the wood theft law, censorship legislation, and criminal proceedings against democratic forces in the aftermath of the 1848 revolution in Prussia. Although Marx identified the ways in which positive law typically serves ruling-class interests, he did not reduce the law to class domination. Nowhere was his support for legality more evident than during the reactionary period that followed the defeat of the March Revolution. At the time, Marx issued a fierce condemnation of the Prussian Press Bill, which sought to undermine what he took to be a critical bulwark against the arbitrary exercise of power, namely, the free press. Marx's reflections are worth revisiting because they reveal his usually overlooked concern with the basic principles of legality that are typically advanced by proponents of liberal constitutionalism. Marx warned:

> From the day when this Bill becomes law, officials may with impunity carry out any arbitrary act, any tyrannical and any unlawful act. They may calmly administer beatings or order them, arrest and detain people without a hearing; the press, the only effective control, has been rendered ineffective. On the day when this Bill becomes law, the bureaucracy may celebrate a festival: it will have become mightier, less restrained and stronger than it was in the pre-March period.[2]

The rule of law, though a highly contested concept, has traditionally been defined in opposition to arbitrary rule by individuals and ruling classes.

While the rule of law is usually framed with reference to formal criteria—namely that laws should be clear, general, public, prospective, and stable—these procedural features allow for more substantive conceptions of legality that also emphasize equality before the law, principles of fairness, and respect for the rights of individuals.[3] Contemporary definitions of the rule of law vary widely according to whether one adopts a formal or substantive conception.[4] We will see that E.P. Thompson's reappraisal of the rule of law in the closing pages of *Whigs and Hunters* draws on both procedural and substantive accounts of the rule of law.

The parallel between Marx's formative reflections on the wood theft law and Thompson's critical historical analysis of the Black Act is more than a passing coincidence, since it raises the issue of *unjust* law in connection with the norms that underpin the rule of law. Thompson leaves readers with little doubt about the classist character of the notorious Black Act of 1723, which carried the death penalty for peasants caught stealing deer, cutting trees, or burning property.[5] In Thompson's words, the Black Act was "a bad law, drawn by bad legislators, and enlarged by the interpretations of bad judges. No defence, in terms of natural justice, can be offered for anything in the history of the Black Act."[6] However, rather than depicting the Black Act as a ready-made piece of class legislation against the propertyless, Thompson observes how the process of enclosure introduced new property rights while dismantling the customary use rights that were previously enjoyed by hunters and cottagers in the commons. In this way, Thompson portrays law in eighteenth-century England as a battleground of competing conceptions of property rights. Thompson writes:

> What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: for the landowner, enclosure; for the cottager, common rights; for the forest officialdom, "preserved grounds" for the deer; for the foresters, the right to take tufts…When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.[7]

While *Whigs and Hunters* chronicles repeated instances of legal manipulation in favour of the interests of the ruling class, Thompson frames his critical assessment of the Black Act with the qualification that legal mediation is never exhausted by ruling-class interests *alone*. Thompson writes: "If we say that existent class relations were mediated by the law, this is

not the same thing as saying that the law was no more than those relations translated into other terms, which masked or mystified the reality."[8] He thereby finds a middle ground between the traditional standpoints of legal formalism and class instrumentalism. Legal formalism begins from the most rudimentary elements of legal relations and proceeds to the highest and self-standing principle of legal reason, while class instrumentalism sees in law only the content of class domination.[9] Writing in the historical aftermath of Stalinism and Nazism, Thompson opposes the unflinching attitude of some "structural Marxists," who treat unjust laws and the rule of law as twin instances of class domination.[10] As Thompson acknowledges:

> The law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced the law became a superb instrument by which these rulers were able to impose new definitions of property to their even greater advantage.[11]

Nevertheless, he cautiously rejects instrumentalist accounts that view law *only* as a tool for class domination, noting that even the notorious Black Act set limits on ruling power which subjected the rising Whig oligarchy to its own juridical rhetoric. This juridical rhetoric was eventually appropriated by subordinate classes, who took up the "Free-Englishman's" incontrovertible rights to privacy, habeas corpus, and equality before the law.[12] Thompson also notes that the law could not perform a legitimizing or ideological function without appealing to a *universal* standard that is outwardly just and free of direct manipulation by a ruling class. Thompson submits:

> If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.[13]

After distinguishing conceptually between legal mediation and outright class domination, Thompson argues that the universality of the law—that is, the idea that laws should apply equally to rich and poor, rulers and ruled—imposes definite constraints on ruling power and provides a medium for social contestation. Whereas the rule of law offers a benchmark for assessing and criticizing unjust legislation, the only medium for contestation in an autocratic regime is force itself. Thompson also grants that the idea of

equality before the law will remain a sham so long as class inequalities are not only maintained but extended globally (a point which is of obvious contemporary political resonance).[14] Despite these preliminary qualifications, he arrives at the bold conclusion that the rule of law is "an unqualified human good" insofar as it constrains arbitrary exercises of power by the state and elites. Directing his attention to fellow Marxists, Thompson avers:

> This has not been a star-struck book. I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposition of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.[15]

Marxists of the class-instrumentalist persuasion will find Thompson's championing of the rule of law as a naïve capitulation to liberal jurisprudence and an apologia for ruling-class interests, while legal formalists will complain about the instrumentalism associated with Thompson's own account of the rule of law.[16] Thompson leaves neither side content because he rejects the theoretical extremes posed by class instrumentalism and legal formalism. Anticipating the theoretical reassurance that law will disappear as a matter of course with the advent of communist relations of production, Thompson answers that no modern society is conceivable without a system of legality, and that present-day Marxists should be wary of surrendering their rights to the arbitrary exercise of power, whether in a capitalist or a post-capitalist context.[17] Dispensing with the rule of law and the legal rights afforded by it, writes Thompson, "encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power."[18] Thompson reiterates that the legal sphere is first and foremost an arena of contestation, which militates directly against the formalist doctrine that law's purpose is intrinsic and self-contained.[19]

Thompson's broader theoretical point is that the rule of law offers a benchmark for assessing positive law. Bad laws generate condemnation because they are perceived as having violated shared legal norms. Thompson writes that "we feel contempt [for bad laws] not because we are contemptuous of a notion of a just and equitable law but because this notion has been betrayed by its own professors."[20] The struggle against bad laws is bound up with the sense of justice that prevails in capitalist societies—that

is, the idea that all individuals ought to be treated as equals before the law, regardless of material asymmetries and inequalities. This juridical standard also informs the terrain in which asymmetrically positioned groups struggle over existing laws, and those who combat unjust or bad laws scarcely regard the rule of law as little more than an ideological cloak for class domination.

In recent years, Daniel Cole has argued that Thompson's revisionist outlook offers a formidable challenge to orthodox Marxists for whom the rule of law is an ideological cover for class domination that could play no positive role in the transition from capitalism to communism.[21] Yet if Marx's account of right is no longer viewed through the misguided prism of the "withering away" thesis (a position this book has been advocating), then Thompson's theoretical challenge turns on Marx's position concerning the possibility of achieving progressive victories through the medium of law and the discourse of rights. While Marx does not regard the idea of the rule of law as an *unqualified* human good, especially against a background of pervasive class domination, his outlook on the contestable nature of law shares more in common with Thompson than it does with Thompson's class-instrumentalist detractors. The best evidence for this interpretation is to be found in Marx's incisive reflections in *Capital* on the working day, where class struggle and law are brought into an unlikely partnership in efforts to establish what counts as a normal working day.

6.2 The Rule of Law and the Struggle for a "Normal" Working Day

Capital is often read as Marx's attempt to unearth the immanent logic or "laws of motion" governing capitalist production and its dissolution. Those who view *Capital* exclusively through the lens of the law of the tendency of profit to fall are bound to overlook the significance that Marx ascribes to the legal victories that had been achieved by the working class through class struggle. While legal enactments do not eliminate capitalism's tendency for crisis and the prospect of revolution, Marx recognized that progressive legislation *could* shape the course of this tumultuous process for the better. In the Preface to *Capital*, Marx contends:

> Apart from higher motives, therefore, their own most important interests dictate to the classes that are for the nonce the ruling ones, the removal of all legally removable hindrances to the free development of the working class. For this reason, as well as others, I have given so large a space in this volume

> to the history, the details, and the results of English factory legislation. One nation can and should learn from others. And even when a society has got upon the right track for the discovery of the natural laws of its movement […] it can neither by bold leaps, nor remove by legal enactments, the obstacles offered by the successive phases of its normal development. *But it can shorten and lessen the birth-pangs.*[22]

Notwithstanding his eager anticipation of communist revolution, Marx did not regard factory legislation as a *fait accompli* by the ruling class. It must be kept in mind that he was describing the capitalist mode of production as it was unfolding during the course of the Industrial Revolution, which was marked by deplorable working and living conditions for the children, women, and men whose only commodity for sale in the market was their sheer capacity for labour. Marx describes the English Factory Acts as oscillating between deference to capital's drive for limitless exploitation and the introduction of countervailing legal measures against the wholesale subordination of labour to capital. Marx writes:

> What strikes us, then, in the English legislation of 1867, is, on the one hand, the necessity imposed on the parliament of the ruling classes, of adopting in principle measures so extraordinary, and on so great a scale, against the excesses of capitalistic exploitation; and on the other hand, the hesitation, the repugnance, and the bad faith, with which it lent itself to the task of carrying those measures into practice.[23]

Despite his trenchant criticism, Marx does not conclude from the above passage that the struggle for a legally limited working day was a futile endeavour on the part of the working class. Instead, he reiterates that the length of the working day is set out by law, whose content is shaped by a broader political struggle between capital and labour. Marx affirms:

> The creation of a normal working-day is, therefore, a product of a protracted civil war, more or less dissembled, between the capitalist class and the working-class. As the contest takes place in the arena of modern industry, it first breaks out in the home of that modern industry—England.[24]

Marx assumes in his discussion of the working day that capitalists and labourers possess equal legal rights, and that the rule of law prevails in capitalist democracies, notwithstanding the persistence of exploitation in the sphere of production. While this view still resonates with a modified

instrumentalist charge that legality serves a mystifying function in capitalist democracies, instrumentalists have difficulties explaining why Marx of all thinkers would concern himself with the progressive results of factory legislation if law is merely an ideological veneer for class domination. A more balanced reading of Marx's reflections on the working day offers clues as to why he recognizes the value of legality while remaining committed to the supersession of capitalist property relations.

Marx's characterization of the "antinomy of rights" as it relates to contractual relations between wage labour and capital (discussed in Chapter 3) is especially instructive in this context. While capitalists invoke a legal right to extend the working day as much as possible, workers invoke a countervailing legal right to set protective limits against further encroachment on their health and bodily integrity. Marx writes:

> The capitalist maintains his rights as a purchaser when he tries to make the working-day as long as possible. […] On the other hand, the labourer maintains his right as seller when he wishes to reduce the working-day to one of definite normal duration. There is here, therefore, an antinomy, right against right, both equally bearing the seal of the law of exchanges. Between equal rights force decides. Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, *i.e.*, the class of capitalists, and collective labour, *i.e.*, the working-class.[25]

The antinomy of rights that Marx invokes here is inconceivable without there being in the background the idea of the rule of law, understood here as a system of legal rules that confers equal *formal* protections on all rights bearers. In the absence of such legal rules, no legislation could prevent capitalists from unilaterally extending the working day as long as possible, as was indeed the case during the earliest phases of industrial capitalism.[26] Marx's invocation of "force" in the passage quoted above is meant to highlight that the length of the working day is not fixed in advance by the capitalist class, as would have to be assumed on the class-instrumentalist view of positive law. Instead, the length of the working day and the status of factory legislation are shaped by a broader struggle in which the working class plays an active and decisive role. Not unlike Thompson, Marx sees the legal sphere as an arena for contestation between labour and capital, each endowed with equal rights on the basis of liberal justice. Marx pays particular attention to the English Factory Acts because

they set the scope for justice and demonstrate the extent to which freedom can be realized within the constraints of a capitalist mode of production and its relations of contractual exchange. The ultimate measure of justice, for Marx, is the degree to which human freedom is realized or hindered within a mode of production. It is also no accident that Marx's characterization of the true realm of freedom in *Capital* takes as its starting point the shortening of the working day.[27]

Holding true to his Preface to *Capital*, Marx's chapter on the working day also offers a comparative assessment of factory legislation in England, France, and the United States. In each case, Marx brings to bear the important legal victories that had been achieved by the working class. Marx notes, for example, that while France's twelve-hour working day lagged behind England's Ten Hours Act, it had the advantage of setting stricter limits on the length of the working day in all factories. Marx writes: "French law proclaims as a principle that which in England was only won in the name of children, minors, and women, and has been only recently for the first time claimed as a general right."[28] Marx then turns his attention to the United States, where the abolition of legally sanctioned slavery was accompanied by a demand for an eight-hour working day:

> In the United States of North America, every independent movement of the workers was paralyzed so long as slavery disfigured a part of the Republic. Labour cannot emancipate itself in the white skin where in the black it is branded. But out of the death of slavery a new life at once arose. The first fruit of the Civil War was the eight hours' agitation, that ran with the seven-leagued boots of the locomotive from the Atlantic to the Pacific, from New England to California.[29]

To be sure, Marx's chapter on the working day also closes with a dialectical reversal. The relation between capital and labour, which was originally premised on a voluntary exchange between equals, ends up as exploitation and class domination. Yet the formal equality that undergirds the rule of law also supplies the working class with tools for resisting capitalist exploitation and pressuring Parliament and the courts to implement limits on the length of the working day. Marx affirms this point in his characteristically satirical style:

> For "protection" against the "serpents of their agonies," the labourers must put their heads together, and as a class, compel the passing of a law, an all-powerful social barrier that shall prevent the very workers from selling, by voluntary contract with capital, themselves and their families into slavery and death. In place of the pompous catalogue of the "inalienable rights of man" comes the modest Magna Charta of a legally limited working-day, which shall make clear "when the time which the worker sells is ended, and when his own begins."[30]

Lest there be doubt about the sincerity of Marx's pronouncements about a "modest Magna Charta," this is not the only occasion where he suggests that the law can, and indeed should, be deployed as a safeguard against the unbridled exploitation of labour. In his 1866 commentary for the Geneva Congress of the International Workingmen's Association, Marx stresses the urgency of protecting children and young workers against the destructive effects of capitalist production by means of collective legal action:

> They [the working class] know that, before everything else, the children and juvenile workers must be saved from the crushing effects of the present system. This can only be effected by converting *social reason* into *social force,* and, under given circumstances, there exists no other method of doing so, than through *general laws,* enforced by the power of the state. In enforcing such laws, the working class do not fortify governmental power. *On the contrary, they transform that power, now used against them, into their own agency.* They effect by a general act what they would vainly attempt by a multitude of isolated individual efforts.[31]

Those who are critical of the rule of law will point out that Marx's discussion of the working day is hardly a ringing endorsement of legislative reform, since improvements in factory legislation did not abolish capitalist property relations or bring an end to exploitative relations of production. While it cannot be denied that workers continued to be exploited, the fact that property relations were not radically altered in England, France, or the United States did not prevent Marx from simultaneously acknowledging the important legal victories that had been won by the working class, however limited these victories may appear to twenty-first-century observers in the Global North.

In contrast to class instrumentalists, Marx sees legality as a constraint on state power and a means of contestation against capitalist exploitation.

To be sure, acknowledging that the rule of law offers a medium of contestation for asymmetrically positioned groups (industrial labourers in the present case) is not the same as arguing that recourse to legal strategies will result in a revolutionary transformation of existing property relations. The latter position appears to have been advanced by Thomas Hodgskin, whom Marx cites in *Capital* as inquiring into legislation that contributed to the transformation of feudal property into capitalist private property in England. Marx's pithy response to Hodgskin is that "the author should have remembered that revolutions are not made by laws."[32] As far as Marx is concerned, a radical transformation of property relations would require nothing short of a revolutionary change in the material conditions of life. Such a transformation would usher in a different standard of right and legislation reflecting changed needs. Until such a time, however, individuals will continue to be confronted with existing juridical norms, and it is on this terrain that struggles against unjust laws are waged in capitalist democracies.

6.3 The Struggle Over the Constitution

As was shown in the previous section, Marx identified instances where recourse to law and the discourse of rights could yield progressive victories for labour within the constraints of capitalist production. These victories were the outcomes of militant political struggles over the scope of rights and the justness (or more often injustice) of statuary laws. Marx's inference that the antinomy of rights is animated by a protracted struggle between capital and labour extends all the more powerfully to the struggle over the constitution. Liberal critics of Marx routinely take him to task for depreciating if not altogether dismissing the protections afforded by liberal constitutions.[33] Widespread as this erroneous view may be, we have seen in the first part of the book that Marx was a champion of constitutionalism at precisely those critical moments when the fate of constitutionally guaranteed rights was at stake. In previous chapters, we saw how Marx went further than his liberal counterparts in holding the reactionary Prussian authorities to account for trampling over the rights and freedoms that had been won by the March Revolution. What was true in Prussia would also be true in France, as we see in Marx's reflections on the constitutional situation after the rise of Louis Napoleon.

Marx was an astute observer of constitutional language and the ways that such language could be used by contending classes to constrain emancipatory political possibilities. More often than not, Marx's critical constitutionalism is misread as a dismissal of constitutionalism as such, which ignores the valuable political lessons that he draws by way of such critical analysis. Marx's dissection (written in English) of the French Constitution of 4 November 1848 is an excellent example:

> The eternal contradictions of this Constitution of Humbug, show plainly enough, that the middle-class can be democratic in *words*, but will not be so in deeds—they will recognise the truth of a principle, but never carry it into practice—and the real "Constitution" of France is to be found, not in the Charter we have recorded, but in the *organic laws* enacted on its basis, an outline of which we have given to the reader. The *principles* were there—the *details* were left to the future, and in those details a shameless tyranny was re-enacted![34]

Notice that Marx nowhere rejects the *principles* of the constitution outright or the importance of protecting civil, political, and nascent socio-economic rights; rather, the devil lies in the constitutional details, and Marx's critical dissection brings to light the political dangers that ensue from the deliberate deployment of loose language to exclude, constrain, and undermine the rights possessed by the supposed subjects of the constitution. The consequence of such rhetorical manoeuvring, in Marx's view, is not the expansion of the constitution, but its erosion, under the pretext of securing law and order.

Nowhere is the erosion of constitutionalism made clearer than in Marx's *The Eighteenth Brumaire of Louis Bonaparte*. Not unlike his earlier commentary on the French Constitution of 1848, Marx chides French liberals for abandoning their commitment to constitutionalism and representative government with the political ascendance of the proletariat. What makes *The Eighteenth Brumaire* a particularly powerful work of journalism is Marx's uncanny ability to convey the contradictory political dynamics involved in the struggle over the constitution and the consolidation of state power. We learn that there is no ready-made formula for the conquest of political power by any given class, while the state and its bureaucracy are shown to possess logics of their own that are connected to, but also distinct from, the "economy." Under such contradictory conditions, the struggle over the constitution assumes the utmost importance because the

social forces that fill the temporary vacuum of state power are in a position to frame how the constitution is interpreted and the form that state power will take. In keeping with his critical dissection, Marx notes that the constitutional rights and freedoms that accompanied the revolutionary demands of 1848 France were crafted in such a way that nearly every cherished constitutional right was accompanied by a security restriction that served the interests of a particular class over and against others. Marx puts the matter in the following terms:

> The inescapable roll call of the freedoms of 1848—freedom of the person, press, speech, association, assembly, education and religion, etc.—obtained a constitutional guise, making them invulnerable. Each of these freedoms was proclaimed as the *absolute* right of the French citizen, but always with the marginal gloss that it is unlimited so far as it does not limit the "*equal rights of others* and the *security of the public*," or through "laws" which were to integrate individual freedoms harmoniously with one another and with the security of the public. […] Later these organic laws were promulgated by the friends of order and all those freedoms regulated so that the bourgeoisie finds no obstacle to its enjoyment of them in the equal rights of other classes. Where it denies these freedoms wholly to "others" or permits enjoyment of them only under conditions which are just so many police traps, this always happens solely in the interest of "public security," that is, the security of the bourgeoisie, as the constitution prescribes.[35]

As Marx goes on to explain, the trouble with such self-serving constitutional manoeuvring is that it can backfire politically and pave the way for a broader dismantling of constitutional rights. This is because a constitution that is framed with the intention of respecting *only* those rights that benefit the class that is closest to power (i.e. the liberal bourgeoisie) can always lend itself to more nefarious interpretations with the swing of the political pendulum. It is for this reason that Marx sarcastically infers that "both sides can appeal with perfect justice to the constitution, the friends of order, who subverted all those freedoms, just as much as the democrats, who demanded them all outright."[36] The liberal freedoms enshrined in the constitution can then be subverted legally in accordance with what is deemed politically expedient. Marx's lesson here is that the wording of the constitution matters for the exercise of constitutional rights and freedoms. One could interpret Marx as inferring that constitutional rights are either genuinely universal and inalienable (in the sense that they can be exercised

by all classes equally without substantive restrictions) or they are rights only in name.

The liberal bourgeoisie's misguided wager against the proletariat was dangerous in a second and equally odious sense: it marshalled the fear of "socialism" and radical social change to advance its political aims, only to discover that the same rhetoric would later be deployed against its own representatives, this time by Louis Napoleon, who proclaimed himself the saviour of France through his trusteeship of "property, family, religion, and order."[37] Marx shows how the socialist trope was used by the French bourgeoisie to rouse fear among the masses in order to advance its class interests at the expense of the public at large. It is against this politicized background that Marx observes:

> By branding as "*socialistic*" what it had previously extolled as "*liberal*," the bourgeoisie confesses that its own interests require it to dispense with the dangers of self-government, that in order to restore peace to the countryside the bourgeois parliament must first be laid to rest.[38]

Marx is reiterating here that the liberal bourgeoisie is willing to betray avowed principles of constitutionalism when they are in conflict with its narrow class interests. Such criticism by Marx is, for all intents and purposes, the very opposite of dismissing constitutionalism. What Marx is doing in the above passage is taking the liberal bourgeoisie at its word and showing how its betrayal of constitutionalism and representative government can inadvertently pave the way for the authoritarian triumph of an otherwise unexceptional figure like Louis Napoleon. The bourgeoisie failed to appreciate how its socialist fearmongering could boomerang, with the result that "even the simplest demand for bourgeois financial reform, for the most ordinary liberalism, for the most formal republicanism, for the most basic democracy, is simultaneously castigated as an 'outrage to society' and stigmatised as 'socialism.'"[39] In other words, through its stubborn opposition to more democratic and emancipatory political possibilities, the liberal bourgeoisie unintentionally sowed the seeds of constitutional destruction and thwarted the prospects for modest reforms. It appears that Marx also intended his critical remarks on the bourgeoisie as a warning to would-be socialists and communists that there are serious risks in allying oneself with liberal forces whose support for constitutionalism remains strong only as long as there are no challenges to its political hegemony.

As we will see in the next section, Marx's warning about the perils of limiting constitutionally guaranteed rights through the artful manipulation of legal language is especially relevant today, at a time when the liberal constitutional order finds itself increasingly under attack from authoritarian quarters, while the socialist boogeyman has returned after its Cold War slumber. There are two lessons that can be drawn from Marx's critical constitutionalism for contemporary politics. First, there is a danger in attempts to restrict the scope of existing constitutional rights when these rights (especially freedom of expression, assembly, and association) are appropriated by the downtrodden and reach beyond their narrowly conceived political horizons. Second, the deepening of democracy and its extension to the economy do not undermine constitutionalism and the norms that underpin the rule of law; rather, they safeguard them.

6.4 Solving the Riddle of All Constitutions: The Renewed Urgency of Transformative Politics

Much of this book has emphasized Hegel's enduring philosophical influence on Marx's social and political thought, from Marx's recourse to the idea of rational law in his early journalistic writings to his mature understanding of the dialectical transformation of right and rights. What has not been emphasized so far is the significance of Marx's political disagreement with Hegel, which was inspired by his practical exposure to the material plight of the impoverished Rhineland peasants and the distressed situation of the Mosel vine growers. The experience of bearing witness to these disconcerting social issues led Marx to abandon rational law and eventually to counterpoise true democracy to Hegel's constitutional monarchy as the solution to the riddle of all constitutions.[40] In this final section, I wish to bring Marx's political disagreement with Hegel into sharper relief by explaining why it had a lasting impact on his political thought and the implications that his endorsement of "true democracy" has for our current political conjuncture.

After resigning from the *Rheinische Zeitung* and coming to grips with the limits of rational law discourse, Marx took to private study in Bad Kreuznach and immersed himself in a critical analysis of Hegel's *Philosophy of Right*, which he continued to regard as the most developed formulation of the modern state. Marx's political outlook shifted considerably after his journalistic exposure to concrete social issues in his native Rhineland, issues that were far more political than philosophical in nature. What is most

important for the purposes of our discussion is to tease out the significance of Marx's formative democratic critique of Hegel and to show its relevance to contemporary questions about constitutionalism and the rule of law. Although Marx's critique of Hegel was inspired by Feuerbach's transformative critique, he reorients this critique to laying bare the insurmountable contradictions of Hegel's rational state.

Marx's point of departure from Hegel has to do with the question of sovereignty and the political form that it should take in the modern world. Hegel famously opposed representative democracy to his preferred regime of constitutional monarchy on the grounds that it is atomistic and easily lends itself to destructive forms of fragmentation. Although a good case can be made for a democratic function in Hegel's eclectic theorization of the corporation,[41] the fact remains that Hegel dismissed representative democracy and sought the unity of the modern state by recourse to a mostly titular monarch. For Marx, Hegel's choice of constitutional monarchy was no accident, but was part of a broader failure to grasp what is the subject of the modern constitutional state and what is the political form that best expresses the self-determination of this collective subject—that is, the people. Marx goes on to argue that Hegel confuses subject and predicate, with the result that Hegel's rational state and its mediating institutions assume the status of subject, while the people (i.e. concrete empirical individuals) become predicates that are deprived of their subjectivity and any capacity for self-determination. It is against this background that Marx articulates his critique of Hegel's constitutional monarchy and presents "true democracy" as the answer to the riddle of all constitutions.

For Marx, monarchy and traditional forms of republicanism are defective because a particular moment of the state (i.e. the monarch) ends up determining and perverting the whole. What distinguishes democracy from monarchies and republics is that the democratic constitution is, in both form and substance, the self-determination of the people (the *demos*). As Marx puts it: "In democracy the constitution, the law, the state itself, insofar as it is a political constitution, is only the self-determination of the people, and a particular content of the people."[42] Viewed from this angle, the constitution is to be understood as the active product of the people's everyday decisions, which prompts Marx's Feuerbach-inspired insight that, in a democracy, "man does not exist for law but the law for man."[43] Marx goes so far as to argue that the realization of true democracy would abolish the state as an external organ that is superimposed upon society.[44]

If we focus on Marx's claim that democracy is the "solved riddle of all constitutions" and connect it with his subsidiary point that no particular part of the state determines the character of the whole in a democracy, then there is an important link between Marx's early journalistic writings, his 1843 critique of Hegel's doctrine of the state, and his mature defence of constitutionalism under authoritarian siege. The decisive link is Marx's view that the state and its constitution can be expressed universally only in a democracy whose purview extends to the sphere of the economy and thus confronts the embarrassing truth of material interests. In the absence of genuine democracy, the state and its constitution will express only a particular moment that is distinct from and even in opposition to the whole, with the result that laws will favour the arbitrary interests of the few, and justice or right will succumb to the will of the stronger.

We have seen earlier in this chapter that the idea of the rule of law and constitutionalism have mostly received short shrift from Marxists after Marx, typically being dismissed as an ideological veneer for class domination. At the same time, the theoreticians of classical Marxism—that is, Marx and Engels—made a point of differentiating between a law-governed state (*Rechtsstaat*) and outright class domination, recognizing that the rule of law was an important advance over absolutism and the regime of ascribed status and feudal privilege. We have also seen that both Marx and E.P. Thompson, although they wrote at different historical junctures and were assessing different laws, viewed the legal sphere as an arena of contestation that could yield important victories for asymmetrically positioned groups in class-divided societies. Such critical ambivalence towards law in the Marxist tradition has led Hugh Collins to conclude that "there is an unresolved contradiction in the Marxist position in so far as it includes a blanket concern for legality and liberty as well as an attack on the Rule of Law."[45] However, this seeming contradiction or riddle can be resolved once the object of critique is made clear and the place of law is recast in the context of Marxism's commitment to realizing the goal of human emancipation.

The normative core of the Marxist project is concerned with achieving social conditions that are free of exploitative relations of production and class domination. To this end, the target of Marxist critique is not constitutionalism (i.e. the idea of the rule of law) or the value of legal equality, but the material conditions that generate class domination and exploitation globally. Considered formally, the rule of law is oriented towards justice, but its purview does not extend to considerations of material oppression, which is what animates the Marxist critique. Formal equality conceals and

even legitimates substantive material inequalities between individuals, but it is not the *source* of domination on the Marxist view. Consequently, what Collins has identified as an unresolved contradiction in the Marxist account reflects a much deeper tension between the promise of equal liberal justice, which informs any substantive conception of the rule of law, and the material inequalities that thwart the realization of this promise under capitalist economic arrangements.

Viewed from this reconstructed perspective, the Marxist critique speaks to a fundamental failure in actuating the *universality* that is contained in very the idea of the rule of law and liberal constitutionalism. Granted, a strictly formalist or "thin" conception of legality, defined by such procedural features as generality, publicity, stability, and non-retroactivity, is consistent with material oppression. However, in its fullest realization, it would seem that the rule of law would have to presuppose the abolition of class domination for its universality to be vindicated in practice. Marx's formative critique of the wood theft law pointed precisely in this direction, when he concluded that legislative subservience to the private interests of the forest owners subverted law's universal character. Strange as it may seem, the absence of genuine universality also informed Marx's mature critique of class ideology. If vested class interests masquerade as general interests, then law's universality is similarly degraded. Does the existence of class inequality therefore render any and all appeal to legality and constitutionalism illusory and self-defeating? An affirmative answer to this question would imply a cynical rejection of the legal sphere as a whole, and with it an abandonment of due process and the relinquishing of hard-won civil rights and liberties (freedom of the press, association and assembly) which restrain arbitrary power and enable political mobilization against the status quo, including ongoing opposition to neoliberal hegemony and the prevailing system of financialized capitalism.

Notwithstanding his criticisms of the formality of bourgeois right, Marx did *not* adopt a purely dismissive attitude towards law, either in his capacity as a philosopher or as a revolutionary activist, nor should those who remain committed to the goal of emancipatory transformation today. A contemporary Marxist approach to jurisprudence should reclaim the protections associated with the rule of law and constitutionalism, not least because these protections secure a minimal level of freedom and provide a forum for contesting neoliberal policies at a time when wealth is concentrated in fewer and fewer hands and democratic sovereignty is being undermined by the unprecedented power of transnational capital.[46] To be sure, there are

definite limits to how far a legal strategy can be adopted within a Marxist framework that aims at realizing a democratic socialist alternative to financialized capitalism, one in which cooperative ownership and principles of worker control are extended to the sphere of production. However, this is a political project that extends beyond the bounds of legality and calls upon grassroots social movements (including but not limited to those of the working class) which are actively mobilized against neoliberal hegemony and the prevailing system of financialized capitalism.

Writing in the mid-nineteenth century, Marx was convinced that capitalism would succumb to the weight of the built-in contradictions between socialized production and the private appropriation of surplus value. He put his political faith in an organized working-class movement that would revolt against exploitative production and create the material conditions for communism, where a higher standard of right would inform relations between individuals. While Marx's insights concerning the global dynamics of capitalist accumulation are especially prescient today, the working class to which he attributed transformative potential is more fragmented and politically divided than the transnational capitalist class with which it must now contend on a global scale. The financial crisis of 2008 undoubtedly cast a shadow over neoliberal ideology and reaffirmed the inherent volatility of financial markets and speculative credit. However, the post-crisis response in capitalist democracies was not accompanied by social movements powerful enough to resist the onslaught of austerity and galvanize popular support for the restructuring of property relations. The Occupy Movement and recurring anti-globalization protests around the world evidence frustration with the maladies generated by financialized capitalism: rising unemployment, wealth inequality, economic precariousness, and environmental degradation. However, these countermovements have yet to translate legitimate grievances into positive political programmes aimed at superseding financial capitalism in the spirit of the Marxist critique.[47] What is worse, the existing trends of wealth concentration and corporate dominance appear to be giving way to a neoliberal authoritarianism that is increasingly averse to democratic dissent and threatens to curtail the scope of existing civil and political rights.[48]

The fate of the rule of law and the struggle over the constitution therefore assume a heightened significance in the present political context. Furthermore, a weakened Left is also confronted by the steady ascendance of right-wing authoritarian movements, particularly in the United States and across Europe, that are directing frustration with austerity and economic

precariousness into open hostility towards migrant workers, refugees, and racialized minorities. The prospects for democratic socialist renewal will depend on popular support for social movements that are mobilized against financial capitalism. However, it is important to recognize that these movements also rely on legal levers against arbitrary power that expand the space where an anti-capitalist politics can be waged. Marx understood the significance of this insight in his lifelong battle against Prussian authoritarianism, as well as in his revolutionary quest to supersede capitalist production.

Rethinking the idea of the rule of law and the struggle over the constitution today means approaching Marx's distinction in his early works between political and human emancipation in constructive rather than purely oppositional terms. Political emancipation, for Marx, meant a liberal constitutional state governed by the rule of law and committed to protecting the rights of individuals in the face of material inequality. The chief defect of political emancipation is that it does not liberate human beings from exploitative production relations and class domination, which are relegated to the private sphere and concealed by the formalism of liberal justice. Despite its shortcomings, political emancipation represents a progressive advance and marks the highest form of emancipation that can be achieved within the prevailing capitalist social order. Moreover, the basic presuppositions of political emancipation—legality and equality before the law—are necessary conditions for realizing the more complete form of emancipation that Marx associated with the classless communist society of the future. If we are to revive and extend Marx's insights into the twenty-first century, then the pursuit of a democratic socialist alternative to financialized capitalism warrants rethinking the role of law in furthering human emancipation. In this regard, Alan Hunt has rightly inferred that "the renewal of socialism requires not the withering away of law, but the realization of a legal order that enhances and guarantees the conditions of political and economic democracy, that facilitates democratic participations and restrains bureaucratic and state power."[49]

Although the rule of law is not a remedy for material oppression, it offers an immanent standard by which asymmetrically positioned groups can challenge bad laws and resist the encroachments of the state and transnational capital in the era of neoliberalism. In this sense, the rule of law can serve as an important counterforce in the struggle for human emancipation, even if it is blind to the material asymmetries pervading contemporary capitalist democracies. To expect more from the rule of law and the most critical constitutionalism would mean subscribing to the misguided formalist view that

law possesses an untapped capacity for transcending deep-seated material contradictions, which Marxists must deny. If anything, the contradictions of financialized capitalism reveal the limits of the law and highlight the urgent need for transformative democratic politics. Present-day Marxists can appreciate that legality restrains arbitrary power while remaining committed to transforming capitalist property relations and going beyond the narrow horizon of liberal justice. This would be the mark of a vibrant and critical Marxism that is conscious of its history and still speaks to the needs and challenges of our time.

6.5 Conclusion

This chapter has reassessed Marxism's orientation towards the rule of law and considered the extent to which legal recourse can further the goal of progressive social change in the era of neoliberalism. Although the idea of the rule of law has been the object of critique and derision among Marxists, Marx's reflections on the working day and E.P. Thompson's critical insights in *Whigs and Hunters* were shown to offer theoretical resources for recasting the rule of law as a crucial bulwark against arbitrary power and as a medium for social contestation. While the rule of law and liberal constitutionalism are blind to the material asymmetries that inform the Marxist critique of class domination, they both provide a basis on which asymmetrically positioned groups can challenge bad laws and resist the curtailment of existing rights.

To be sure, recourse to the rule of law and the constitution will not produce the radical transformation of property relations sought by Marxists. Nevertheless, insofar as the rule of law and the struggle over the constitution offer protections against abuses of public and private power, they lend themselves as weapons in anti-capitalist struggles and become necessary components in the quest for human emancipation, which continues to animate contemporary Marxist thought and praxis.

Notes

1. Karl Marx, "Contribution to the Critique of Hegel's Philosophy of Right," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 20.
2. Marx, "The Prussian Press Bill," MECW 7: 251.

3. For an interdisciplinary perspective on the rule of law that emphasizes the distinction between formal and substantive conceptions of legality, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2000), 111.
4. The formal conception of the rule of law is best captured by the positivist legal philosopher Joseph Raz, who likens the rule of law to a sharp knife, the function of which is *not* informed by a substantive conception of justice. See Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1977), 210. In direct contrast to Raz, Ronald Dworkin has argued that the rule of law relies on a substantive conception of justice and rights: see Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 11–12.
5. Daniel Cole, "'An Unqualified Human Good': E.P. Thompson and the Rule of Law," *Journal of Law and Society* 28 (2001): 179.
6. E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Allen Lane, 1975), 267.
7. Ibid., 261.
8. Ibid., 262.
9. For a good overview of the class instrumentalist position, see Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1984), 16–34.
10. E.P. Thompson, *Whigs and Hunters*, 266. While Thompson does not refer to specific Marxist authors, he likely has in mind the structural Marxism of Louis Althusser.
11. Ibid., 264.
12. Ibid.
13. Ibid., 263. Compare Thompson's remarks with those of Engels: "In a modern state not only must the law correspond to the general economic situation and be its expression, it must *of itself* constitute a *coherent* expression that does not, by reason of internal contradiction, give itself the lie. […] All the more so for the rarity with which a statute book is the harsh, unmitigated, unadulterated expression of the domination of one class: this of itself would be contrary to the 'concept of law' (*Recht*)" (Frederick Engels, "Engels to Schmidt, 27 October 1890," MECW 49: 109).
14. E.P. Thompson, *Whigs and Hunters*, 266.
15. Ibid.
16. See Adrian Merritt, "The Nature of Law: A Criticism of E.P. Thompson's *Whigs and Hunters*," *British Journal of Law and Society* 7, no. 2 (1980): 194–216.
17. E.P. Thompson, *Whigs and Hunters*, 266.
18. Ibid.
19. See Ernest Weinrib, "The Intelligibility of the Rule of Law," in *The Rule of Law: Ideal or Ideology?* ed. Allan C. Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 81. Weinrib, a contemporary exponent of legal

formalism, maintains that "in the richest understanding of the Rule of Law, law is intelligible from within and is thus conceptually sealed off from the interplay of extrinsic purposes emanating from the political realm" (ibid.).

20. E.P. Thompson, *Whigs and Hunters*, 268.
21. Cole, "An Unqualified Human Good," 202.
22. Karl Marx, *Capital Volume 1*, ed. Frederick Engels (New York: International Publishers, 1967), 9–10 (my emphasis).
23. Ibid., 494.
24. Ibid., 299.
25. Ibid., 234–235.
26. Some of the earliest statutory restrictions on factory work were introduced with the aim of protecting child workers. Marx notes: "The Revolution effected by machinery in the juridical relations between the buyer and the seller of labour power, causing the transaction as a whole to lose the appearance of a contract between free persons, afforded the English Parliament an excuse, founded on juridical principles, for the interference of the state with factories" (Marx, *Capital: Volume 1*, 397).
27. Marx, *Capital: Volume 3*, ed Frederick Engels (New York: International Publishers, 1967), 820.
28. Marx, *Capital Volume 1*, 300.
29. Ibid., 301.
30. Ibid.
31. Karl Marx, "Instructions for the Delegates," MECW 20: 189 (my emphasis).
32. Marx, *Capital Volume 1*, 751.
33. To be sure, there are important exceptions. Mark Warren insists that Marx's political theory should be read as postliberal rather an anti-liberal because Marx sometimes recognized the value of liberal constitutional protections and shared liberalism's concern with the free development of individuals. The problem is that Warren does not engage sufficiently with Marx's actual reflections on constitutionalism under siege and thereby neglects valuable insights that he has to offer liberal constitutionalists. See Mark Warren, "Liberal Constitutionalism as Ideology: Marx and Habermas," *Political Theory* 17, no. 4 (1989): 511–534. For a more recent and complementary interpretation that affirms Marx's commitment to critical constitutionalism, see Terrell Carver, "Liberalism and Its Discontents," in *The Bloomsbury Companion to Marx*, ed. Jeff Diamanti, Andrew Pendakis, and Imre Szeman (London: Bloomsbury, 2018), 121–133.
34. Marx, "The Constitution of the French Republic Adopted November 4, 1848," MECW 10: 578.
35. Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *Later Political Writings*, ed. Terrell Carver (Cambridge: Cambridge University Press, 1996), 42–43.
36. Ibid., 43.

37. Ibid., 40.
38. Ibid., 57.
39. Ibid., 40.
40. Terell Carver's recent book, *Karl Marx*, makes the important point that Marx's journalistic writings were consistently rooted in concrete political struggles over "the social question"; see Terell Carver, *Karl Marx* (Cambridge: Polity Press, 2018), 90–112.
41. For a well-researched interpretation of Hegel's discussion of the Corporation along these lines, see Alan Brudner, *The Owl and the Rooster: Hegel's Transformative Political Science* (Cambridge: Cambridge University Press, 2017), 244–249.
42. Karl Marx, "Contribution to the Critique of Hegel's Philosophy of Right," *Marx-Engels Reader*, 20.
43. Ibid., 20.
44. This often-cited statement by Marx has elicited considerable debate and confusion among scholars. It is to his credit that Miguel Abensour interprets the passage as signifying the abolition of the state as an external organ of domination, and not as the end of the political. The problem is that Abensour is at pains to place Marx in the republican camp and does not adequately distinguish Marx's account from representatives of that tradition or recognize important continuities in his thought beyond his reflections on the Paris Commune. Shlomo Avineri, on the other hand, emphasizes the continuity in Marx's thought and equates the discussion of "true democracy" with Marx's mature account of communism as an "unalienated" mode of social life, but leaves the democratic dimension of this mode of social life unexplained. See Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Moment* (Cambridge: Polity Press, 2011), 65–66; Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1968), 38–39.
45. Collins, *Marxism and Law*, 146.
46. See Sheldon Wolin, *Democracy Incorporated and the Specter of Inverted Totalitarianism* (Princeton: Princeton University Press, 2008), 239: "Inverted totalitarianism marks a political moment when corporate power finally sheds its identification as a purely economic phenomenon, confined primarily to a domestic domain of 'private enterprise' and evolves into a globalizing copartnership with the state: a double transmutation, of corporation and state. The former becomes more political, the latter more market oriented."
47. Critics on the radical left, such as Jodi Dean, argue that the shortcomings of the Occupy Movement and popular protests more generally underscore the need for a renewed concept of the revolutionary Party as a more viable organizational form for left-wing politics. However, it remains unclear on Dean's view why the Party form has so little political traction today. See Jodi Dean, *Crowds and Parties* (London: Verso, 2016).

48. See Ian Bruff, "Neoliberalism and Authoritarianism," in *The Handbook of Neoliberalism*, ed. Simon Springer, Kean Birch, and Julie MacLeavy (New York: Routledge, 2016), 115.
49. Alan Hunt, "Marxist Legal Theory," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Chichester: Wiley-Blackwell, 2010), 359.

CHAPTER 7

Conclusion

This book has offered a theoretical reconstruction of Karl Marx's conception of right through the lens of his critique of liberal justice. I began by retracing Marx's earliest reflections on jurisprudence, which were inspired by a version of Hegelian natural law theory that measured positive law against the higher standard of rational law. Although Marx gave up the abstract and transhistorical conception of natural law that oriented his early writings of bearing witness to the material plight of the poor, he developed a historically informed understanding of right according to which legal relations are transformed by changing material conditions of life. The dominant interpretation among Anglo-American political theorists is that Marx was committed to the view that, under communism, legality and rights will wither away. In opposition to this widely held interpretation, textual and conceptual arguments were marshalled to support the thesis that, for Marx, *every* mode of production gives rise to its own standard of right along with a structure of rights that corresponds to the needs of individuals at different points in history.

I tried to show that the idea of freedom as the development of human powers and capacities supplied Marx with a normative framework for judging between different standards of right, even as they vary across different modes of production. This reconstructive approach carved out theoretical space for a *new* materialist perspective on right that is not limited to a choice between a transhistorical account of natural law and a positivist

I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism*,
Marx, Engels, and Marxisms,
https://doi.org/10.1007/978-3-030-30195-8_7

paradigm that lacks normative resources for critiquing unjust laws. Marx's 1849 trial speeches show that it is possible to critique positive law with reference to juridical standards that are anchored in historically specific forms of production.

The first part of the book proposed an alternative way of approaching Marx's reflections on right that cast doubt on the conventional view that Marx's materialist outlook leaves no place for legality and rights after capitalism. It also demonstrated that the motivating force behind Marx's critique of liberalism was not a principled opposition to a constitutional regime of equal rights, which, for all of its limitations, represented a progressive historical achievement in Marx's account. Instead, Marx's critique of liberalism was concerned with exposing the exploitative relations of production and the class domination that are concealed beneath the formalism of liberal justice and its catalogue of equal and inalienable rights. Moreover, rather than envisioning the *transcending* of rights under post-capitalist conditions of material abundance and solidarity, Marx's dialectical approach pointed to the *transformation* of civil and political rights on the basis of a communist mode of production that would aim at meeting the multiplicity of human needs. This position goes against conventional liberal and Marxist interpretations, according to which Marx was hostile to individual rights and predicted their obsolescence in the communist society of the future.

As well as offering a textual basis for a reconstituted conception of right and rights in Marx's social theory, I also advanced a normative argument for communist legality in the light of Marx's commitment to the free development of individuals. This was accomplished through a critical engagement with Evgeny Pashukanis's influential commodity-exchange theory of law. Notwithstanding the originality of his contributions to Marxist legal theory, Pashukanis reduced all legal phenomena to generalized exchange relations and arrived at the misguided conclusion that the abolition of exchange relations would pave the way for the disappearance of juridical and ethical judgements. I showed that Pashukanis's theory contradicts Marx's new materialist conception of right, which lends itself rather to the view that communist production would require legal relations of its own. Furthermore, by drawing on the late work of Georg Lukács, I developed in Chapter 4 a normative argument for a communist legality that would mediate between the heterogeneous activities of socialized individuals so that the free development of each could be achieved in a manner that is consistent with the free development of all. The upshot of this argument was that ethical and juridical judgements cannot be eliminated from the

horizons of communism, even if classes are abolished and production is organized on the basis of need rather than exchange.

The second part of the book put Marx in conversation with contemporary political theorists by examining how his critique of liberalism has been approached by John Rawls, Jürgen Habermas, Axel Honneth, and Nancy Fraser in the light of the challenges generated by global financial capitalism. Each of these responses underscored the continued relevance of Marx's critique and brought to bear the risks that growing wealth concentration and transnational corporate power pose for democratic lawmaking. For John Rawls and Axel Honneth in particular, the systemic inequalities and imbalances generated by contemporary capitalism show the importance of restructuring property relations—by property-owning democracy for Rawls and by an updated version of market socialism for Honneth—as a way of anticipating and countering Marx's critique.

In Chapter 6 of the book, I offered a reinterpretation of the traditional Marxist approach to the rule of law and constitutionalism by exploring the extent to which law can further the goal of progressive change in the era of neoliberal hegemony. The idea of the rule of law has been much maligned by Marxists, but a close reading of Marx's own reflections on the working day in *Capital* and of E.P. Thompson's *Whigs and Hunters* showed that the rule of law can be interpreted more constructively as a protective barrier against arbitrary power and a valuable medium for social contestation in class-divided societies. Although the idea of the rule of law is blind to the material asymmetries generated by capitalist accumulation and is not the harbinger of radical social change, it provides a means by which asymmetrically positioned groups can resist the arbitrary exercise of power and challenge unjust laws in a global context of economic inequality and domination.

The procedural protections afforded by the rule of law and liberal constitutions prove all the more important in the present context of neoliberal hegemony, as democratic sovereignty is threatened by corporate power, and progressive social movements encounter increased attacks on freedom of association and assembly. By extension, the status of the rule of law also becomes relevant for renewed political efforts to pursue a democratic socialist alternative to financialized capitalism that aims at expanding the scope of freedom and democratic decision-making in the political and economic domains of social life. In light of this perspective, the idea of the rule of law and constitutionalism more broadly were interpreted as necessary (though insufficient) components in the broader struggle for human

emancipation that continues to animate Marxist thought and its commitment to social transformation.

To be sure, one might still question the practical value of reconstructing Marx's reflections on right and rights in the twenty-first century. Why return to Marx thirty years after the collapse of state socialism? The legacy of the Cold War and the dominance of one-sided readings of Marx as an anti-rights thinker narrowed the horizon of political reflection and foreclosed the possibility of a critical dialogue between Marxism and liberalism. The result was that liberalism's concern with securing equal rights before the law was interpreted through the narrow prism of private property and deemed irrelevant for Marx's vision of emancipation. On the opposite end of the spectrum, Marx's critique of liberal justice was dismissed on the grounds that it was predicated on a collectivism that disregarded individual freedom and contributed to the totalitarian legacy of "actually existing" socialism. The reconstructive approach adopted in this book put both of these perspectives into question. First, it demonstrated that Marx's social theory does not disavow rights as part of its commitment to realizing the free development of individuals. Second, Marx's critique of liberalism was brought into relief by showing how the liberal ideals of freedom and equality are undermined by the background conditions of class domination that stem from private ownership and control over productive property. Viewing Marx's reflections through this lens allowed me to extend his critical insights to the contemporary horizon of financialized capitalism, characterized as it is by the growing concentration of wealth and the undue influence of corporate power in democratic politics. Marx emerged as a thinker whose enduring challenge to liberalism is that it cannot deliver on its juridical promise of equal freedom as long as productive property remains in private hands and the scope of democracy is limited to the political sphere where it is increasingly subdued by corporate power. This tension between the demands of liberal justice and the political realities of financialized capitalism lay the foundation for a renewed dialogue between Marxism and liberalism that is not hamstrung by the ideological shackles that coloured interpretations of Marx in the twentieth century.

While this book has established a theoretical basis for legality and rights in Marx's social and political theory, it is also confronted by important issues that are beyond the scope of the book. The first of these concerns the role of the state and its implications for any post-capitalist conception of right. Historically, right and law have been closely linked with a coercive state apparatus and the existence of class antagonisms. Although this book

has shown that Marx is committed to a reconstituted version of right in post-capitalist society, it remains an open question whether right can exist without a *professional* organ of enforcement or coercion (i.e. the police and army) given the functional complexities of modern life. Marx, for his part, theorized that the state's coercive functions would gradually die out with the abolition of classes, but he left room for what were deemed legitimate administrative and adjudicative functions, at least based on what can be extrapolated from *The Civil War in France* and the *Critique of the Gotha Program*.

In general, the issue of the state is a serious lacuna in Marxist thought, notwithstanding important debates between structural and instrumentalist Marxists in the twentieth century.[1] Marxism needs a more robust theory of the state that can offer a systematic perspective on different state forms (e.g. republican, socialist, despotic) and the property relations that correspond to them. Considering the limited theoretical resources that were left behind by Marx and Engels, this is an important project that needs to be undertaken. Any such theory of the state would also have to confront the problem of political power, which, given the authoritarian experiences of state socialism in the twentieth century, cannot be simply assumed away for the future. The classical Marxist thesis concerning the withering away of the external state (especially its coercive functions) precluded an adequate discussion of the concrete form the state *should* take under post-capitalist conditions. The reconstructive approach taken in this book offered resources for rethinking the fate of right and rights in Marx's thought. However, future research will have to reflect specifically on the relation between law and the degree to which professional or organized coercion is necessary.

A second issue not addressed in this book is the plethora of postcolonial and poststructural critiques of the idea of historical progress. The idea of historical progress figures prominently in Marx's materialist conception of history and informs his discussion of right, but it has come to be seen as Eurocentric and closely bound up with the legacy of colonial oppression.[2] When applied to Marx, the critique usually takes aim at the view that history must pass through a successive series of modes of production before its culmination in communism. In recent years, this unidirectional reading of Marx's materialist conception of history has itself been challenged on the ground that it ignores important changes in Marx's later work, particularly his attitude towards non-Western societies such as India.[3] While faith in the idea of historical progress is in short supply, it is worth noting that Marx's conception of right is normatively tethered to his view of freedom. The

virtue of Marx's account of freedom, interpreted as the development and expansion of human powers, is that the content of freedom is informed by history but not predetermined by it. In this sense, Marx's understanding of right can endure without relying on a teleological conception of history that has been attacked from all quarters. Having said that, it is doubtful that any value-laden perspective can dispense with the idea of moral progress, and Marx's theory is no exception. After all, even the most critical of theories must rely on evaluative criteria for distinguishing between *better* and *worse* social and political arrangements.

Other parts of this book also warrant further inquiry and resonate with current debates in political theory. The issue of domination and the elusive form that it takes under capitalism has been a recurring theme throughout this book. Whereas pre-capitalist political-economic formations relied primarily on personal or direct forms of domination, Marx theorized that capitalist production is informed by exchange relations between commodity owners who are not *legally* bound by the arbitrary will of other individuals. Instead, under capitalism, human beings become dependent on impersonal market forces that escape their conscious direction and control. This form of dependence also gives rise to a system of class domination, whereby the owners of productive property dominate non-owners, though without recourse to personal or direct domination.

Recent years have seen a flowering of interest in theories of non-domination, particularly among neo-republican scholars, who have proposed alternatives to the classical liberal view of freedom as non-interference. Despite growing interest in theories of non-domination, neither Quentin Skinner nor Philip Pettit—two of the more prominent exponents of republican liberty—has engaged sufficiently with Marx's account of domination, nor have they extended their inquiries to the asymmetrical relation between capital and labour.[4] One possible reason for this peculiar omission is that neo-republican theorists generally trace the origin of domination back to an empirical person rather than to a specific class or a historically concrete form of production. Marx's account of impersonal or objective domination, especially as formulated in the *Grundrisse* and *Capital*, can bring to light forms of domination that escape the purview of formal law and are not reducible to the arbitrary power of individuals. Extrapolating from Marx's work in this way can help make sense of the proliferation of precarious and informal labour, as well as the incursion of markets into new social spheres and the generation of forms of domination

unaccounted for by neo-republican theories. Drawing on Marx's understanding of domination is part of an ongoing scholarly effort to interpret his critique of political economy as a form of critical political theory.[5]

As we saw in Chapter 2, Marx's intellectual journey took him from a critique of Prussian law to a critique of capitalist political economy. Returning Marx to the terrain of legal and political theory was an attempt to follow through with the task that he set himself in 1844. This was the task of expounding a critical analysis of right, ethics, and politics that would overcome the deficiencies associated with the speculative philosophy of the time.[6] Although Marx did not formulate a systematic theory of right in later writings, he developed a distinctive approach to legal relations by analysing historically specific relations of production. This meant uncovering the roots of domination in the relation between the producers of social wealth and the class that appropriates this wealth through the prevailing regime of property. Marx deprived the concept of right of its abstract and transcendent attributes, giving it a *new* materialist foundation that is subject to historical variation and transformation. Applying this approach to the capitalist mode of production, Marx was able to explain how class domination and exploitation are preserved in a liberal legal order that is committed to securing the freedom and equality of rights bearers. At the same time, the capitalist mode of production and the juridical order to which it gave rise was also supposed to generate the material and cultural preconditions for an associated mode of production that would be characterized by a higher standard of right. This was as far as Marx took his critical analysis of right, leaving the content of post-capitalist relations to be determined by the socialized individuals of the future.

Marx's work is thought to be guided by two seemingly conflicting methodological aims. The first is concerned with providing a social-scientific analysis of the inner workings of the capitalist mode of production, which is reflective of the methodological approach undertaken in *Capital*. The second is a value-laden critique of exploitation and class domination that is oriented towards realizing the free development of individuals under conditions of socialized production. The tension between these two aims is usually cast in terms of a rigid distinction between factual and value-based analysis: one is either pursuing value-free social science or proposing a normative theory, but not both. Marx's new materialist outlook straddles the line between a critical analysis of facts and a normative orientation that is anchored in the analysis of concrete social relations. For sympathetic critics, such as G.A. Cohen and Jürgen Habermas, Marx's approach to social

analysis lacked normative resources for engaging with the topics of law and justice, as a consequence of either an overreliance on a defunct philosophy of history or an economistic approach to politics. Cohen, as is well known, turned his attention to normative political philosophy with the goal of justifying his version of socialist egalitarianism,[7] while Habermas developed a discursive theory of law and democracy by appealing to neo-Kantian proceduralism.[8] The twilight of Marxian social theory coincided with the abrupt collapse of state socialism and the definitive triumph of global capitalism. However, Marx has a strange way of reappearing at precisely those moments when capitalism finds itself in crisis. Interest in Marx's work has surged after the global financial crisis of 2008, and for good reason. Liberal democracies continue to struggle with the political ramifications of growing wealth inequality and concentration amidst economic uncertainty and precariousness. It is precisely in this context that Marx's thought continues to challenge contemporary defenders of liberalism—not because his account dismisses the liberal ideals of freedom and equality as ideological mystifications, but because it demonstrates how these ideals are subverted by capitalist economic arrangements and the prevailing system of property relations.

The same is true of Marx's reflections on the antinomy of equal rights in capitalist democracies. To what extent can the emancipatory potential of rights be achieved against a background of pervasive material inequality? Can the rule of law be insulated from the influence of capitalist accumulative imperatives if the scope of democratic decision-making is confined to the political sphere? How far can individuals realize their capacities and life plans if they do not exercise control over their conditions of work? These are all pressing questions that Marx's critique brings to the fore and which have yet to be adequately addressed. A theoretical reconstruction of Marx's reflections on right shows that his work offers powerful resources for grappling with issues of law and justice, and that his new materialist approach to social analysis can still shed valuable light on some of the challenges that confront liberal democracies today. Returning to Marx in the twenty-first century means revisiting his critique of liberalism and rethinking what is entailed in moving beyond the narrow and contradictory horizon of liberal justice.

Notes

1. I have in mind the debate between Ralph Miliband and Nicos Poulantzas on the role and character of the state in late capitalism. For a good overview of this debate, see Simon Clark, *The State Debate* (London: Macmillan, 1991), 1–69.
2. Most recently, Amy Allen has argued that contemporary critical theorists such as Jürgen Habermas and Axel Honneth are guilty of grounding their normative theories in "backward looking" conceptions of historical progress, which Allen thinks should be eschewed. See Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (New York: Columbia University Press, 2016), 13.
3. See Kevin Anderson, *Marx at the Margins: On Nationalism, Ethnicity, and Non-Western Societies* (Chicago: University of Chicago Press, 2010), 154–195.
4. See Quentin Skinner, "Freedom as the Absence of Arbitrary Power," in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (Oxford: Blackwell, 2008), 83–101. In fairness, Philip Pettit has argued that the republican conception of freedom as non-domination lends itself to the socialist critique of "wage slavery," but he does not follow through with this statement. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 141.
5. William Roberts's *Marx's Inferno: The Political Theory of Capital* (Princeton: Princeton University Press, 2017) is a promising step in this direction.
6. Karl Marx, "Economic and Philosophic Manuscripts of 1844," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 67.
7. See G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, MA: Harvard University Press, 2000), 101–115.
8. Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: MIT Press, 1996), xli.

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