

THE ROLE OF LAW IN ECONOMIC THOUGHT: ESSAYS ON THE FETISHISM OF COMMODITIES*

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INTRODUCTION

These four Essays discuss the role of law in different aspects of nineteenth century economic thought. The first is about late nineteenth century American economists of a classical (as opposed to neoclassical) mainstream persuasion. The second is about neoclassical economics. The third and fourth are an exegesis and commentary on Marx's Essay on the fetishism of commodities. The Essays share three themes, though they develop them in different ways. The first is that mainstream economic thought has been a vehicle for legitimating the actual arrangements of the capitalism of the time. The second is that the plausibility of the legitimating enterprise is dependent, in a crucial though usually disguised way, on a particular set of incorrect implicit images of what law is and how it works in the economy. The third theme is that a legal realist understanding of the legal system has a destabilizing but also liberating effect both on the mainstream economists' and on the Marxist critical understanding of the distribution of welfare in a capitalist society.

I wrote these Essays in 1979, 1981, and 1985, intending them to be part of a larger study of late nineteenth century legal thought. Though they are unfinished and not fully documented, it seems a good idea to publish them now. The larger project is dormant, and though these are no more than fragments, it seems at least possible that others will find them useful as starting points in trying to figure out how this particular ideological system managed to maintain the illusion of coherence.

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I. THE ROLE OF LAW IN NINETEENTH CENTURY AMERICAN POLITICAL ECONOMY¹

This Essay is a sketch of the way nineteenth century American classical economists dealt with the issue of the legitimacy of the income shares received by different economic actors. I wrote it with the idea of supporting two propositions. The first is that this body of economic thought is incomprehensible unless it is treated as an aspect of a larger totality. The most important non-economic element in that totality is legal thought. Second, the totality functioned ideologically: it operated as a legitimator of oppression.

I recognize that the very intelligibility of these propositions is problematic, but I will neither attempt to render them precise nor relate what I have to say directly to their proof or disproof. Indeed, I only mention my propositions because knowing that I hold to them, you may find my sketch less oddly sewn together than you otherwise would. In spite of its oddness, I have enough confidence in its intrinsic interest to forego any elaborate theoretical gloss.

Two qualifications and a quotation are my whole introduction. The first qualification is that the larger legal-economic totality subsisted both in spite of and because of the mutual ignorance of lawyers and economists. The totality was a latent one, not apparent to practitioners in either field. Second, I do not mean to deny that legal-economic thought has been the vehicle of profoundly important advances in human knowledge, as well as a legitimator of oppression.

My quotation is from Joseph Schumpeter's *History of Economic Analysis*:²

Marginalism came quickly to be considered the badge of a distinct school. And not only that: it even acquired a political connotation, growing, in the eyes of some, into a reactionary monster that stood ready to defend capitalism and to sabotage social reform. In logic, there is no sense whatever in this. The marginal principle per se is a tool of analysis, the use of which imposes itself as soon as analysis comes of age. Marx would have used it as a matter of course if he had been born fifty years later. . . . [I]t cannot have any bearing upon policy or social philosophy. . . . It is only the political or ethical interpretation that is put upon the results of marginal analysis which can have such a bearing. And, as has been pointed out before, Clark was not free from blame. He was, of course, within his right when, in a book on the *Philosophy of*

¹ This section was prepared as a paper for a panel discussion at the annual meeting of the American Economic Association in 1979.

² J. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1954).

Wealth, he expounded his ethical evaluations, though they were of a type that is apt to get on radical nerves. But he went further and asserted that distribution according to the 'law' of marginal productivity is 'fair.' And this, in the eyes of a profession, the large majority of which did not take kindly to theory in any case, created an association between 'Clarkian marginalism' and capitalist apologetics in the face of the refuting fact that this 'marginalism,' barring differences in technique, plays exactly the same role it played with Clark in the reasoning of scientific economists of socialist persuasion such as Professors Lange and Lerner. . . . In order not to have to return to this subject, let us use the opportunity to notice another factor that keeps that association alive. Reformers, like other people, are not above making mistakes. It is the duty of the professional economist to point them out. Now, if the economist in doing so uses 'marginal' methods, the criticized person's humanly understandable resentment will often take the form of complaints that he has been attacked by the reactionary monster called Marginalism. If there be in fact logical error on his part, he could in general be convicted of it without the use of this modest piece of apparatus. But not understanding theory, he is not aware of this and he naturally turns against these parts of the critic's argument which he understands least of all.³

To my mind what is valid in Schumpeter's attitude is the insistence that it is dumb or contemptible to reject a real discovery because it seems to cut against one's political preferences. What is wrong with his attitude, aside from its condescension, is this: Schumpeter was aware that the desire to defend capitalism motivated the particular discoveries we owe to the economists, and that as a matter of fact Clark wanted to show that "distribution according to the 'law' of marginal productivity is 'fair'." But he failed to give us any idea at all of how this motivation has shaped the pattern of discovery of valuable truths about the economy.

I believe that without adversion to this apologetic influence on the pattern of discovery -- in classical as well as neoclassical economics -- a great deal of what the economists wrote is unintelligible. More. My view is that modern economic thought in the United States is no less (though differently) apologetic in intent than its classical predecessor, and that its specific form is best understood as a re-legitimizing response to Marxist and institutionalist critiques of the Classics. I will not argue the latter propositions here, but it is well to keep them in mind, if only as a clue to the biases of your reporter.

But now to my material, which I will present in the form of a series

³ *Id.* at 869-70 & n.10.

of dogmatic general statements about American economic thought, epitomized here by Francis Wayland,⁴ Amasa Walker,⁵ Arthur Latham Perry,⁶ and Francis Bowen,⁷ leading figures of the period from 1835 to 1890.⁸ These are classical economists. Marshall,⁹ Menger,¹⁰ Jevons,¹¹ and Walras¹² revolutionized the field beginning in 1870, but Marshall's Principles were not published until 1890.¹³ Modern economics, as we know it, did not exist as a clearly distinct entity until the late 1930's, when Pareto,¹⁴ Hicks,¹⁵ and Samuelson¹⁶ had completed the process of unification and formalization begun around the turn of the century.¹⁷

The American classical economists were an undistinguished lot who differed among themselves in numerous particulars -- some were followers of Ricardo, others of Say and Bastiat; most were fanatic free-traders, a few were protectionists; they disagreed about currency reform and the legitimacy of strikes. Yet they had much more in common than their failure to contribute anything original or important at the level of pure theory. They were genuinely a school, with three characteristic analytical traits that distinguish them sharply from their successors. First, they conceived of economics as the science of the production and distribution of wealth (contrast the modern duality of the allocation of resources and distribution of income). Second, they adhered to the labor theory of value (contrast the modern "marginal utility" theory of value).

⁴ F. WAYLAND, THE ELEMENTS OF POLITICAL ECONOMY (4th ed. Boston 1851) (1st ed. Rhode Island 1837) [hereinafter referred to as F. WAYLAND. All footnotes are to the 1851 edition]. According to the frontispiece, Wayland was President and Professor of Moral Philosophy at Brown University.

⁵ A. WALKER, THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY (6th ed. Philadelphia 1872) (1st ed. Boston 1866) [hereinafter referred to as A. WALKER. All footnotes are to the condensed edition "for popular reading and use as a text-book," published in 1872]. According to the frontispiece, Walker was Lecturer on Public Economy at Amherst College.

⁶ A. PERRY, POLITICAL ECONOMY (1865) (18th ed. New York 1883) (1st ed. Boston 1865) [hereinafter referred to as A. PERRY. All footnotes are to the 1883 edition]. According to the frontispiece, Perry was Professor of History and Political Economy at Williams College.

⁷ F. BOWEN, AMERICAN POLITICAL ECONOMY (1870) [hereinafter referred to as F. BOWEN. All footnotes are to the 1870 edition]. According to the frontispiece, Bowen was Professor of Natural Religion, Moral Philosophy and Civil Polity at Harvard College.

⁸ See generally 3 J. DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1865-1918 49-82 (1949).

⁹ A. MARSHALL, PRINCIPLES OF ECONOMICS (1890).

¹⁰ C. MENER, PRINCIPLES OF ECONOMICS (J. Dingwal & B. Hoselitz trans. 1950).

¹¹ W.S. JEVONS, THE THEORY OF POLITICAL ECONOMY (1871).

¹² L. WALRAS, ELEMENTS OF PURE ECONOMICS (W. Jaffe trans. 1954).

¹³ A. MARSHALL, *supra* note 9.

¹⁴ V. PARETO, MIND AND SOCIETY (A. Bongiorno & A. Livingston trans. & ed. 1935).

¹⁵ J. HICKS, VALUE AND CAPITAL (1939).

¹⁶ P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947).

¹⁷ See generally B. SELIGMAN, MAIN CURRENTS IN MODERN ECONOMICS: ECONOMIC THOUGHT SINCE 1870 257-535 (1962).

Third, they held a theory of the gains in "wealth" that result for the parties to all kinds of "free exchange" (contrast the modern theory of the allocative efficiency of perfectly competitive markets).

These three analytic elements fitted together into a system, a total picture of economic processes that differed as substantially from the modern picture as did the individual parts. But there were two things that the classical system had in common with the modern that particularly concern us. The first is that the old as well as the new was supposed to be "lawful." The word lawful for the Classics expressed their commitment to economics as a science, to its supra- or extra-political character, its kinship with biology or physics, as opposed to politics or art.¹⁸ The second trait shared with the Moderns was that the systemic interlocking of analytic elements was accomplished by manipulation of the concept of exchange value or price.

We can reach an approximate understanding of the classical system if we rearrange our three analytic elements as follows. First, the production of wealth is another way of saying the creation of exchange value through labor. Second, the distribution of wealth is the outcome of the process of free exchange of values created in the production process. There emerges a picture of economic life as a process in which people labor to produce objects desired by others. The labor imparts market value. Each person then freely exchanges the products of his labor for the products of the labor of others.¹⁹

This total picture or model or paradigm of economic life was problematic for the Classics who held to it, in two ways. First, there was the question whether it was indeed the case that exchange value reflected labor expenditure. Second, there was the question whether it was indeed the case that all incomes reflected the labor contribution of the income recipient to the social process of production. I want to focus not on the way the Classics defended the theory, but on the way they chose to characterize the system after they had, to the best of their abilities, established its "lawfulness" by

¹⁸ F. BOWEN, *supra* note 7, at iii-iv, 10-12; A. PERRY, *supra* note 6, at 1-116; A. WALKER, *supra* note 5, at v-vii, 17-21. Wayland, writing before the Civil War, appealed to the norm of "wisdom," rather than science, but he still was committed to distinguishing political economy as sharply as possible from "politics." F. WAYLAND, *supra* note 4, at iii-v, 105-08.

¹⁹ F. BOWEN, *supra* note 7, at 27-37; A. PERRY, *supra* note 6, at 117-64; A. WALKER, *supra* note 5, at 23-34; F. WAYLAND, *supra* note 4, at 15-27. The following from Perry's *Political Economy* gives the flavor:

Laborers are every way the economical equals of capitalists. Laborers offer a service to capitalists, and capitalists offer a service to laborers. They stand man to man. They exchange to the mutual advantage of both, and one is as independent as the other.

A. PERRY, *supra* note 6, at 267.

meeting objections to the labor theory of value and the labor theory of income shares.

There are four notions that recur constantly in classical descriptions of the workings of the American economy. The Classics talk of "natural" values, prices, outputs and distributions. "Naturalness" is constantly associated with the "freedom" of economic processes, meaning the freedom of economic actors both to produce anything they want and to sell it for whatever price it will bring in the market. They advert to the "justice" or "fairness" both of the rule of freedom and of the "natural" outcomes of economic activity. Finally, they emphasize that these "natural, free, and just" outcomes make everyone better off than they could be under any "unnatural" (or artificial or distorted) system that might be created by interfering with freedom of production and exchange. The four concepts of naturalness, freedom, justice, and optimality combined to constitute a classical welfare economics that was vastly more self-confident and aggressive than any we are familiar with. Our immediate task is to understand how this characterization of the nineteenth century American economy was possible.

According to the labor theory of value, the long run equilibrium prices of commodities should be proportional to the hours of labor, measured in a standard unit, necessary to produce them. As a first rough approximation, these prices were "natural" because it would violate human nature for a buyer to pay more for a commodity than its labor value, since the buyer could produce the goods himself for that outlay of labor. This was a rough approximation because people differed in skill, so that the ideal standard of labor input could not apply to every individual transaction.

Moreover, the division of labor increased both skill differences and total productive capacity over those of individualized economic activity. It followed that the threat of each consumer to produce what he wanted on his own could not keep prices proportional to standard labor inputs. Instead, this role was performed by free competition. As long as the state interposed no restrictions on what a man could produce and what he could sell it for, competition from new entrants would prevent prices from diverging from the norm.

There are two things that it is crucial to keep in mind about this formulation. The first is the link between freedom and naturalness.²⁰ The assertion that relative labor costs determine relative

²⁰ The following quotations illustrate the link between freedom and naturalness:

If such be the facts; if God have given to all men faculties for labor; if he have made labor necessary to our happiness; if he have attached the severest penalties to idle-

prices was dependent on the existence of freedom. Any deviation from freedom would generate unnatural prices. Second, the Classics had a theory of free, not "perfect" competition. They had developed a theory of "natural monopoly" as an exceptional case, but they simply did not address themselves to market imperfections. They spent all their energies denouncing legal restrictions on competition, and none at all on what we call market failure.

The next step in the analysis was the theory of free exchange, or gains from trade. Picture all our independent producers, each with his commodity embodying his labor. If no exchange were permitted, there could be no division of labor, no consequent expansion of productive capacity, and total wealth must be small. But allowing exchange with consequent specialization did more than increase output: it made every individual producer better off than he could be without it. The reason was that no exchange would occur, under a regime of freedom, unless both parties desired it. And exchange would continue until the division of labor had been carried to the furthest point that still yielded a net saving of labor inputs. In the end, everyone would receive for his labor (embodied in commodities priced according to labor input) a quantity of products representing his proportional share of the largest output the society could possibly attain.²¹

ness, and have proffered the richest rewards to industry; it would seem reasonable to conclude, that all that was required of us, was, so to construct the arrangements of society, as to give free scope to the laws of Divine Providence. . . . [I]t would seem that our business must be, to give to these rewards and penalties their free and their intended operation. These, at any rate, should be the means first tried, in order to facilitate production

F. WAYLAND, *supra* note 4, at 107-08.

But society is a complex and delicate machine, the real Author and Governor of which is divine. . . . Man cannot interfere with His work without marring it. The attempts of legislators to turn the industry of society in one direction or another, out of its natural and self-chosen channels, . . . are almost invariably productive of harm. *Laissez faire*; 'these things regulate themselves,' in common phrase; which means, of course, that God regulates them by his general laws, which always, in the long run, work to good.

F. BOWEN, *supra* note 7, at 18 (emphasis in original).

Freedom is by far the most important of the conditions of production, because, where freedom is conceded, association and invention follow in time by laws of natural sequence.

A. PERRY, *supra* note 6, at 179 (emphasis in original); *see also id.* at 196-201.

²¹ The quotations that follow illustrate the classical perception of the outcomes of free exchange:

That both of us have been benefited by the exchange, is evident from that fact, that neither of us would make the exchange back again.

F. WAYLAND, *supra* note 4, at 170.

A man's possessions are his talents, faculties, skill, and the wealth and reputation which these have enabled him to acquire; in other words, his industry and his capital. In order that industry be applied to capital with the greatest energy, it is necessary that every man be at liberty to use them both as he will; that is, that both of them be free. . . .

The justice of the outcome, as well as its freedom, naturalness and optimality, followed immediately from this analysis. The outcome was just because each person was rewarded in proportion to his labor. Indeed, the share of each was simply what he put in. No one got back less than he contributed, and no one got more. Under the regime of free production and exchange, there was a natural harmony of social interests.²²

By allowing every man, therefore, to employ his industry as he chooses, every man will be employed about that for which is best adapted; and hence, the production of all will be greatly increased, because we thus avail ourselves of the peculiar productiveness of every individual If every man, therefore, be allowed to invest his capital as he will, the whole capital of a country will be more profitably invested, than under any other circumstances whatever.

Id. at 114 (emphasis in original).

Hence no law or encouragement is needed to induce any persons to trade; trade is natural, as any person can see who stops to ask himself why he has made a given trade; and on the other hand, any law or artificial obstacle that hinders two persons from trading who would otherwise trade, not only interferes with a sacred right, but destroys an inevitable gain that would otherwise accrue to two persons alike.

A. PERRY, *supra* note 6, at 103.

As soon as there is any difference of relative advantage, there begins to be a motive for an exchange, and a gain as the result; and the motive and the gain become stronger and greater as the difference increases; so that the gains of exchange are the greatest in that state of society in which the freest opportunity is allowed to every individual to employ his peculiar powers in work for which he is best fitted,

Id. at 177.

Do we not here discover the principle upon which the occupations of a people become diversified, and the ways in which this is brought about in an economical manner under the unobstructed operation of the laws of trade, without the smallest sacrifice on the part of any class or interest? It is the spontaneous expansion of a nation's untrammelled industry. . . . Each nation, in fact, works for the other at a more profitable rate than it could work directly for itself. With uninterrupted trade this must be true of all countries, at all times, and under all circumstances.

A. WALKER, *supra* note 5, at 97-98 (emphasis in original).

²² The following quotations show the Classics asserting that outcomes under free competition are just:

If this be so, it will be evident that the laws regulating wages depend upon circumstances beyond the power of capitalists or laborers. The rich cannot refuse to employ laborers without loss, and the workman cannot refuse to labor without loss. And the competition which naturally exists, in a free country, is all that is necessary to bring wages to the proper level; that is, to all that can be reasonably paid for them.

F. WAYLAND, *supra* note 4, at 303.

Production, thus far, has been charged with wages, . . . profits, interest, and rent. Between these parties the product is to be divided. This division is made by natural laws, which, if not interfered with by legal enactments or social customs, will secure to each its rightful share.

A. WALKER, *supra* note 5, at 275.

But competition is the general rule; and the effect of unrestrained competition is to distribute the value of a product equally among its various producers, leaving neither to any of them, nor to the consumer, any just ground of complaint. Each receives in exact proportion to the labor which he has bestowed; the labor of all was equally necessary to present the article in its finished state; and he who finally consumes it, therefore, justly pays all by rendering an equivalent amount of labor.

F. BOWEN, *supra* note 7, at 41. The following quotations assert the existence of a natural harmony of social interests:

It followed that collective attempts to make particular groups better off could succeed only by depriving some people of the products of their labor and bestowing those products on others. Such an unnatural course could be accomplished only by restricting the freedom either of production (state enforced monopolies of manufactures and labor unions) or of exchange (protective tariffs, minimum wage, or maximum hours legislation) or both. It would be unjust because it would be indistinguishable from theft. It would lead to suboptimal output because it would destroy, as theft always destroys, the incentive to work.²³

The classical notion of maximum output justly distributed bore only an oblique relationship to say, the Bergson social welfare function

Hence, we see that the accumulation of capital is more for the advantage of the laborer than of the capitalist. . . . Hence, the laboring classes are really more interested in the increase of the capital of a country, than the wealthy classes. Hence, when one class of the community repines at the prosperity of another class, they repine at their own mercies, and the means of increasing their own rate of compensation.

F. WAYLAND, *supra* note 4, at 125.

Wages are paid out of the joint products of the employers' capital and the laborers' industry; and when that industry is the best in quality and the steadiest in quantity, the product will be the greatest, and the part going to wages larger than ever. It is a pity that there is so much misunderstanding and ill-feeling between employers and skilled laborers whose interests are at bottom one, and whose relations ought to be so cordial. Most of the so-called labor-troubles have been between these two classes, owing in part to ignorance of economical truth on the part of both, owing sometimes to pride and petulance on the part of employers, and oftener owing to unreasoning jealousy and aggregated action on the part of laborers.

A. PERRY, *supra* note 6, at 231-32.

As labor and capital, in the natural exercise of their functions, are mutually dependent, and assist each other, we can see no cause for the misunderstanding and antagonism between them, except that they are too exclusively owned or controlled by different classes of persons.

F. BOWEN, *supra* note 7, at 116-17.

²³ Hence combinations among capitalists or laborers are not only useless, but expensive, and unjust. They attempt to change the laws by which remuneration is governed, and they must, by consequence, thus be useless. They expose capital and labor to long periods of idleness, and thus are expensive, they assume the power of depriving the capitalist of his right to employ laborers, and the laborer of his right to dispose of his labor to whomsoever and on what terms soever he pleases, and hence they are unjust.

F. WAYLAND, *supra* note 4, at 303; *see also id.* at 113-18.

Legislatures . . . are not wise enough, and never will be, to settle any of the great questions involved between capitalists and laborers; to settle, for example, how high wages any class of capitalists shall pay, or how many hours per day adult laborers shall work; and even to try to settle any such things as these by legislation is an economic abomination.

A. PERRY, *supra* note 6, at 248 (emphasis in original); *see also id.* at 233-48.

Whenever a population is sufficiently intelligent to understand its own interests, it should be left to direct its own labors. Its industry should never be interfered with by government. In all countries which may be considered as enlightened or civilized, like the European and Anglo-American, the people have no occasion to look to government for direction as to the business they shall engage in, or the manner in which they shall conduct it. Every branch of industry, in a normal state of society, grows spontaneously out of the wants and capacities of the people.

A. WALKER, *supra* note 5, at 79; *see also id.* at 291-311; F. BOWEN, *supra* note 7, at 18-22, 133-15.

analysis. The output in question was thought of in highly physical terms. The Classics had no notion at all that the comparative social valuation of two bundles of physical goods posed intractable problems of both a technical mathematical and metaphysical kind. Optimal to them meant simply "the most," not "the output that generates the greatest possible satisfaction once we have decided on the distribution of claims on satisfaction among potential consumers." They treated the justice of rewarding everyone according to his labor input as self-evident. It didn't even occur to them to spend time on the problem of whether one could or should characterize as "optimal" the quite different allocation of resources that would occur under a regime of theft or unfreedom.

This picture of a form of economics that had the pretension of demonstrating the lawfulness, naturalness, freedom, justice, and optimality of life under nineteenth century capitalist economic conditions may seem implausible. If so, I refer you to the textbooks. To some others of you, it may seem highly plausible, but only as an instance of the inveteracy of human error and the slowness of scientific progress. In this section of my talk I'm going to suggest that it was much more than that, a much more effective tool of legitimation of the status quo than it could have been if it had been pure error.

One way to do this would be to show the economists grappling with what seemed dangerous political implications of the system as applied to reality, adjusting and expanding it in order to keep it at the same time ideologically safe and logically coherent. The labor theory of value was, from the beginning, both hard to defend and liable to backfire. It was, for example, fine for the English Classics that it suggested that the income of landowners was either a theoretical anomaly or an unnatural rip off. The English Classics were bourgeois class enemies of the landed aristocracy. But in America, where land was part of the system of bourgeois property, the Classics struggled manfully to defend rent as the reward of labor. Marx tried to do to the return to capital what Ricardo was happy to do with rent. The Classics responded with abstinence theories of interest. I don't have time to describe the ideological battle in detail.²⁴ Instead, I want to say something about what seem the glaring methodological errors of the Classics, and to argue for my initial proposition that their system is unintelligible without an understanding of the legal thought of the period.

As my summary indicates, the Classics constantly used terms that

²⁴ See generally I. RUBIN, A HISTORY OF ECONOMIC THOUGHT Part 5 (D. Filtzer, trans. 1979).

modern economists regard as meaningless or as outside the domain of economic science. The Classic proofs of the validity of economic laws relied crucially on concepts like freedom and justice. They spent much of their time trying to persuade their readers not of the existence of particular facts but of the "naturalness," "fairness," or "optimality" of those facts. To our ears, this makes them sound preposterously biased. But they must have sounded much better to their contemporaries. There was not, in their time, any powerful distinction between natural science and ethics. The first American professors of political economy were moonlighting from jobs as professors of "Natural and Moral Philosophy." Within science, moreover, there was no clear distinction between a positive approach based on replicable observations of "facts" and the formal activity of generating models composed of elements with a merely logical rather than empirical interrelationship. In short, it was not at all obvious that freedom, justice, and naturalness were out of place in a discussion aimed at elucidating "lawfulness." The history of modern welfare economics has been largely that of the purging of freedom, justice, and naturalness from the vocabulary of the profession. The purpose of the purge was to sustain the scientific claim in a world grown self-consciously positivist, and, by no means incidentally, to repel the perennial argument that economics should be spelled apologetics. Only optimality still retains a place in the company of lawfulness, and that by virtue of radical transformation at the hands of Pareto. But to see this, we must first examine the legal presuppositions of the classical economic paradigm.

An order that claims to be natural and free may seem at first blush inconsistent with the existence of any state at all. In our political tradition, which was also theirs, the state is commonly viewed as both artificial and coercive, even when limited to "night watchman" functions. The most rudimentary code of criminal laws forcefully alters the balance between the physically weak and the physically strong. The choice of the legal institutions of private property and contract, as opposed say, to communal control of the means of production, provides the essentially coercive structure of capitalism.

In order to make their claims plausible, the Classics therefore had a double burden of explanation. They had to show that what government existed was somehow compatible with naturalness and freedom. And they had to show that there were principles that allowed them to discriminate an acceptable body of law from one that really would make economic outcomes artificial and unfree. The claim that the distribution of wealth was just, because it reflected the labor contributions of producers, ought also to have raised questions

about the role of the state. Unless the rules of property and contract were just in themselves, then it is hard to see how they could produce just results.

In short, the classical economists quite clearly needed a theory of law if they were to make good their basic claims about the nature of economic life. They presented no such theory in their books. True, it is impossible even to state the labor theory of value without at least implicit reference to legal property in commodities. The very notion of free exchange refers by way of contrast to state regulation of exchange. But the Classics were content with frequent allusions to the "sacredness" of property and to the disastrous consequences of "government interference with contracts." They took it for granted that "property" and "contract" were self-defining terms in need of no further explanation. Worse yet, in their detailed discussions of particular state policies, they offhandedly affirmed both the necessity of "absolute" property and contract rights, and the legitimacy of 'police regulations in the public interest."²⁵ It is important

²⁵ The union of capital and labor will be most effective, when each is sure of its just reward. If the rights of man as a holder of property are sacred, and his rights as laborer equally so, the greatest motive to production can be secured. If otherwise, the creation of wealth will be restricted. Men will not work or save, unless sure of their reward.

A. WALKER, *supra* note 5, at 76.

Government and the law are great agencies of production. Without them, however desirous people might be of wealth, and however capable of effort, little or nothing could be produced. Robbery and violence would scatter and destroy what already exists, and a universal waste would speedily follow.

Id. at 83.

All limitations of the rights and powers of capital or labor, not required by the public morality or security, are useless and mischievous.

Id. at 80.

[E]xchanges will be effected by the security or insecurity of the right of property. Hence, legislators can do much to promote the prosperity of a country, by the enactment of wholesome laws, by which contracts shall be enforced, wrongs redressed and injuries prevented.

F. WAYLAND, *supra* note 4, at 186-87 (emphasis in original).

But the division of property would be of no avail unless the right of property were enforced; that is, unless every one be protected in the undisturbed possession of whatever he has rightfully acquired. As no one will labor, unless he knows that he shall reap the fruit of his toil, so no one will take the pains to reap the fruit of his toil, unless he also know that he will be able to hold it, and appropriate it to the purposes of his own gratification.

Id. at 110-11 (emphasis in original).

Freedom is by far the most important of the conditions of production, . . . By freedom is meant the practical right of every man to employ his own efforts for the gratification of his own wants, either directly or through exchange. Each man's right of freedom is limited of course by every other man's right of freedom which he is not at liberty to infringe; and also in certain respects, by what is called the general good, of which the judge must be the government under which he lives.

A. PERRY, *supra* note 6, at 179.

to be clear why this now seems such a serious flaw in their analysis. The legal realists have taught us that "property" is an extraordinarily vague term.²⁶ The concept itself gives no clues as to what kinds of things can be "objects" of ownership, nor as to the particular rights, powers, privileges, and immunities that go along with ownership. "Property" is a catch all for an infinitely varied set of "bundles of rights." What can be in one of those bundles is a legal decision. Such a decision can be intelligibly justified only by reference to the legislative policy of the community.

"Contract" is no more clear cut.²⁷ The enforcement of a contract against the will of one of the parties is, like any other lawsuit, an instance of unfreedom or coercion. The exact kind and extent of state coercion that should occur in connection with private agreements cannot be deduced from the idea of contract itself. Judges or legislators or administrative agencies must weigh the conflicting interests, or claims to freedom, of contractual parties in different circumstances and choose one of a vast number of possible concrete meanings that might be given to the abstraction. Nothing could be less "natural" than the patterns of regulation that emerge from such processes.

Exchange rejoices in all diversity of advantage that is the birth of freedom, but reprobates with all her force advantage that is gained by artificial restrictions, because artificial restrictions always infringe on somebody's right to render services for a return; and the right to render services for a return is the fundamental conception in the right of Property.

Id. at 214.

Human labor . . . is the means; wealth is the product. . . . Thus [the worker] must feel secure in his employment -- secure against violence, robbery, or any improper or wrongful interruption of his labor. Government affords him this security. . . .

BOWEN, *supra* note 7, at 24.

The moral causes which most effectually stimulate labor and frugality, and thereby make capital accumulate most rapidly, are . . . [that] the laborer shall be sure of receiving the full amount of his wages, or shall be protected in the ownership of the values which he has produced.

Id. at 66.

[W]e can easily see how injurious it would be to the common welfare if the rights of property were not respected, and how surely such respect tends to an unequal distribution of the fruits of industry and frugality. As men are differently endowed by nature with faculties of mind and body . . . so their situations in life must differ. And it is the true policy of society to encourage the more valuable qualities; -- not to dishearten frugality by depriving it of its savings, nor to foster idleness by feeding it with the fruits obtained by the persevering toil of others.

Id. at 109.

²⁶ See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69-85 (J. Pennock & J. Chapman eds. 1980); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

²⁷ See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Llewellyn, *What Price Contract? -- An Essay in Perspective*, 40 YALE L.J. 704 (1931); Mensch, *Freedom of Contract as Ideology*, (Book Review), 33 STAN. L. REV. 752 (1981) (reviewing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)).

One can argue for each of these various regimes of property and contract on the basis of "real freedom" or in terms of justice. Yet each of them will generate a different allocation of resources and a different distribution of income. It is therefore simply nonsensical to claim that property and contract in the abstract define a regime that is free and just. Before we can even begin to assess such a statement, we have to know what property and what contract. Most of us will go so far as to demand to know the distributive outcomes of these specific arrangements before we pass judgment on them. Since they failed to deal with these questions, the classical economists now appear to have assumed away the very problem they purported to have solved.²⁸

Yet this assessment is distorted by the peculiar angle of hindsight. It is true that the classical analysis was radically flawed, but it was nowhere near as silly as it now appears. To see this, we need only look at contemporaneous legal thought. When we do so, we find a body of ideas that could support not only the labor theory of value and the notion of free exchange, but also the general characterization of life in civil society as natural, free, and just. This body of ideas was developing in America between 1850 and 1880, and achieved almost universal acceptance between 1890 and 1914. Like classical economics, it was under attack even in its heyday, and by the 1930's, when the modern neoclassical synthesis in economics came into full flower, it was rapidly losing ground to the diverse forces of sociological jurisprudence, legal realism, and the diffuse legal pragmatism of the New Deal. I will call it classical legal thought, rather than by the more common name of formalism, in order to emphasize its kinship with the economic ideas of the

²⁸ See Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). It is at least arguable that everything in this Essay and in that which follows is an elaboration of what Hale has to say in this Article and its brilliant sequellae, collected in R. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952). See also B. SELIGMAN, *supra* note 17, at 3-253. Yet the realists appear in this Essay in only one of what seem to me their three main guises. Here they are critics of formalism, developing and applying a repertoire of analytic techniques that have become a permanent part of American legal culture, and, arguably, distinguish it from Western Legalia generally. But the realists were also believers in Social Science, see Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980), and in the public interest, see, e.g., R. TUGWELL, *THE ECONOMIC BASIS OF PUBLIC INTEREST* (1968). Critical riffs are just plain different according to the context. That context included a reassuring grounding in science and a reassuring utopian vision of social harmony for even the most acerbic debunkers. For this reason, it seems to me quite possible that Hale would have rejected all or most of what I have to say here as insensitive both to the inherent social rationality and to the hopeful trend of liberal reconstruction through interstitial regulatory programs. More generally, the relationship between legal realism (and institutional economics) and critical legal studies is still obscure. At the least, critical legal studies is an "application;" at the most, it is a fundamentally new development, beyond rather than within realism and institutionalism. The truth probably lies somewhere in between, and I'm not sure it matters exactly what it is.

period.²⁹

Classical legal thought supported the fundamental analytic paradigm of classical economics in two ways: it offered a confused Lockean labor theory of property to complement the confused Ricardian labor theory of value, and it developed a will theory of contracts to complement the theory of the gains from free exchange. It responded to the problem of defining the proper role of the state in the economic system through the notion of legal science, a sharp distinction between public and private law, and a dichotomy within private law between the state as enforcer of property rights and the state as enforcer of private intentions.

Each aspect of classical legal thought has its complex history, and the moment of their synthesis was brief. I'm afraid I have to simply ignore this aspect here. It will have to suffice to say that, today, the categories of the system I am describing appear elementary and obviously valid, but of no use at all in solving real problems of what the rules of law should be. In 1880, on the other hand, they appeared to embody a striking advance in legal thought, and promised to clarify if not actually resolve a large number of difficult substantive issues. If we go back to 1830, this same set of ideas was undeveloped in law. Some of its important elements were familiar to those few lawyers who dabbled in political philosophy or had studied in Europe. But when the legal philosopher John Austin tried to apply them systematically to the mass of existing legal doctrine, his colleagues found him unprofessional and confused. Students stayed away in droves.

The basic organizing idea of classical legal thought was to distinguish sharply between public and private law (a procedure altogether foreign to Blackstone, writing in the mid-eighteenth century). Private law defined the rights of individuals as against one another, and provided a coercive mechanism that their bearers could use to enforce them. Public law specified the procedures by which state officials were permitted to intervene in society, whether by enforcing rights or performing a limited and exceptional set of associated functions, such as enforcing the criminal law, taxation,

²⁹ See generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920* in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70-110 (G. Geison ed. 1983); Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 *RESEARCH IN LAW AND SOCIOLOGY* 3 (S. Spitzer, ed. 1980); Mensch, *The History of Mainstream Legal Thought* in *THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 18-39 (D. Kairys ed. 1982); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Singer, *supra* note 26.

the exercise of the power of eminent domain, and national defense. Public law also regulated the political system.

The notion that the function of private law was to define and protect individual rights seemed enormously significant to classical legal thinkers. They believed that it gave them a basis for the scientific, or at least deductive, elaboration of the particular rules of the system. This was possible because they agreed that all the particular rules followed logically from two abstract rights: first, a right to respect for one's property; and, second, a right to the enforcement of one's agreements.

We are not concerned with the evolution of the classical legal theory of what could be an object of property, or of what were the "necessary incidents" of ownership. It is enough to say that they began by thinking of property in terms of objects, and ended by thinking of it, in very abstract terms, as ability to invoke state force to prevent interference with some position of advantage in the market system. Initially, they justified this legal protection by reference to "natural law," meaning a universal ethical sentiment that a man had a right to the product of his labor. During the period when the economists began to offer a pure supply and demand (marginal utility) theory of market value, the legal thinkers began to emphasize that anything that could have market value was property, and to deemphasize the labor theory.³⁰

The second right from which flowed particular rules of law was that of having agreements enforced. It was seen as very different from the property right, although similarly grounded in natural law. The difference was that the state enforced property rights without regard to the desires of the person restrained, whereas the enforcement of agreements was based on the prior consent of the person coerced. Property rights represented the will of the state; contract rights the will of the parties. Again, there was an evolution. The legal theorists became more and more conscious, as the century wore on, that contract rights were analogous to property rights, and simultaneously were more concerned that the judges avoid importing their own notions of fairness into private transactions. The notion was that the idea of individual freedom could be used to deduce a complete set of rules which would fully subordinate the state enforcers to the private intentions of the parties.³¹

³⁰ See Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 333-40 (1980).

³¹ Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510, 1534 (1980).

There was also a marked evolution in the attitude of legal thinkers toward the process by which these particular rules of property and contract were derived from the general principles of the right to labor products and the right to enter enforceable agreements. The element of deduction was always present, but its character changed. At first "legal reasoning," as a distinct and autonomous process, occurred only within the context of precedent, or with respect to a small number of highly technical legal conceptions. It was often submerged in direct appeals to community morality, or in elaborate discussions of the prudential or "policy" consequences of decisions. But legal "logic" won out, gradually, over both morality and instrumental rationality. By the end of the century, lawyers were making a claim about rule-making that was very like the economists' claims about the "lawfulness" of economic processes.

The lawyers took it as given that the actual rules in force were implications of the more abstract premises of the legal system as a whole. One could induce the premises from the data of the rules, and then deduce correct rules for new situations from the premises thus established. What they did in elaborating the system was, therefore, like what scientists did in developing scientific laws, and like what the economists did with the labor theory of value and the theory of gains from free exchange. As with the economists', the lawyers' claims seem absurd today, but this is because we have learned a set of distinctions that they were just beginning to develop.³²

We are now in position for a first view of the contribution of legal to economic theory. The classical legal thinkers provided crucial support for the labor theory of value by showing that the idea of respect for the labor of others could, all by itself, generate through the process of legal reasoning a vast, detailed code of particular rules about what could be property and about what constituted an actionable injury to property. They provided crucial support for the theory of free exchange by showing that the abstract notion of freedom could generate, also by the strictly rational processes of the law, an equally complex code of rules of contract, agency, corporations, and so forth.

The labor theory of value purports to explain the market value of commodities in terms of labor inputs. Commodities are, by definition, private property. If the objects of private property are legally defined as things that are the repository of labor, it becomes more plausible that labor determines their value. The theory of the gains

³² See Grey, *supra* note 29.

from free exchange is that we know people are made better off by trade because if they weren't made better off they would have no reason to engage in the activity. Contract is the legal vehicle for exchange. If it can be shown that the coercive legal rules of contract all flow from the principle of preserving the autonomy of the parties, it is more plausible that their willingness to trade shows that it benefits them.

But this is only half of it. Classical legal thought supported the classical economists' claim that the outcome of economic processes was "natural" by showing that state intervention could be organized in accord with natural law, rather than as a distorting activity. If all rational men must agree, not only that property was sacred and *pacta sunt servanda*, but that a code could be deduced from those abstractions, then state activity in enforcing the code could hardly be described as artificial.

If the cardinal principle, the legal foundation of capitalism, was that the state must respect the will of private parties concerning property and contracts, and if the cardinal principle rigidly controlled the particular subrules, then it was much more plausible to describe the economic process as "free." True, state coercion was omnipresent, since there is no occasion for a lawsuit to enforce a contract if both parties are happy to comply. But it was coercion justified and strictly limited by prior consent -- coercion in the service of freedom.³³

Granted the claims to naturalness and freedom, that of justice follows almost as of course. Classical legal thought conceived the legal system as designed to guarantee everyone that they could safely embody their labor in commodities and freely exchange them. This idea was essential to the classical economists' claim that the distributive process merely compensated economic actors for their labor inputs. But it was also sufficient to establish this claim. And if justice meant rewards according to contributions, it followed that the distributive process of capitalism was just. Classical legal thought did more than show that the existence of the state was compatible with the harmonies of economic theory. It showed that the state was essential to the translation of those harmonies from the realm of theory into that of social fact.

This revelation was full of dangers for the very claims it seemed to support. Once it had occurred, the force of the ideological message of naturalness and freedom was inextricably tied to the lawyers' ability

³³ See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745-48 (1976).

to generate codes from vague abstractions. But for the moment we are dealing with the halcyon days of apparent analytic omnipotence, when legal science seemed hardly less good an investment than theoretical physics. And law had made itself an ideal ally because it played such a passive role. It was essential, but it was not in any sense formative. It guaranteed economic results that should have existed in any case. It coerced people, but only toward the natural and free results the economists had intuited without giving law a thought.

It seems unnecessary to belabor the ideological message of classical legal-economic thought. Bentham stated it concisely before the end of the eighteenth century: equality does not figure among the legitimate goals of the legal system.³⁴ The elaborate theoretical constructions of the nineteenth century merely developed two applications of this general idea, both designed to block social reform through change in the structure of private law rules. First, any other legal rules than those defining and protecting property in labor inputs must reduce the incentive to labor, thereby reducing wealth. Such rules also allowed one person (or all people) to appropriate the labor of others. They ratified theft through the coercive power of the state.

Second, any other rules of contract law than those dictated by the general principle of freedom must inhibit exchange. But every exchange foregone makes both potential parties worse off than they would otherwise have been. If this state-imposed reduction of wealth is carried out under the delusion that it benefits one party at the expense of the other, it is but another instance of theft. Free exchange permits the economic system to reward people according to labor inputs. The unnatural pattern of unfree exchange can help one party only by robbing the other.³⁵

Classical public law theory³⁶ was the capstone of the classical edifice. It went beyond the recognition of these "scientific" truths, and

³⁴ See J. BENTHAM, *THE THEORY OF LEGISLATION* 119-22 (Ogden, ed. 1931). "Here is one proof, among a thousand others, of the folly and ignorance of those who cry out against the institution of property and call for an equal distribution of all the wealth of a community among all its members." F. BOWEN, *supra* note 7, at 4; *see also id.* at 14, 107-09; A. WALKER, *supra* note 5, at 309-10, 386; F. WAYLAND, *supra* note 4, at 109-10.

³⁵ See the passages quoted *supra* notes 22, 23, and 25 which discussed classical perception of outcomes of interference with operation of natural laws in regime of free competition.

³⁶ See C. JACOBS, *LAW WRITERS AND THE COURTS* (1954); B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT* (1942); Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantive Rights Against the State*, 31 *BUFFALO L. REV.* 381 (1982); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 *J. AM. HIST.* 970 (1975).

attempted to enforce them against the state as constitutional limitations. The lawyers accomplished this by carrying toward its logical conclusion their belief in the possibility of deriving particular legal sub-rules from high level abstractions. The state and federal constitutions forbade deprivations of property or liberty without due process of law. Property and liberty has been transformed, during the classical period, into the fountains of all particular rules. It followed that legislative changes in those rules violated property or liberty, and were therefore unconstitutional. Of course, the syllogism was never taken quite so far. The economists defending the labor theory of value had to deal with counterinstances like rent or the value of diamonds, and the lawyers had similar problems with the doctrine of "police regulations in the public interest." But deal with them they did, and there was at least a brief period when they did so convincingly. The classical structure is now before us in all its grandeur. The basic message of the whole was very simple: there were laws of economic life, analogous to the physical laws of nature; the natural operation of those laws brought about just outcomes; most of the proposals of social reformers involved coercive modifications of those outcomes and could only work if economic laws were somehow suspended. So long as they continued in operation, the egalitarian impulse to redistribute wealth by manipulating the legal system inevitably involved both injustice and a counterproductive reduction in total wealth.

II. THE ROLE OF LAW IN NEOCLASSICAL ECONOMICS

The classical structure succumbed to a critique of its apologetic character. That critique provided the elements from which modern economists constructed a welfare economics paradigm from which they scrupulously purged all the "value judgments" of the Classics. Each of the basic analytic elements of the classical system has gone through a transformation that has obvious political significance.

First, the labor theory of value has given way to the marginal utility or supply and demand theory of price. Labor inputs figure in establishing supply curves, but economists no longer believe that they have a unique status in "causing" value. Second, the classificatory opposition of production and distribution of wealth has become the distinction between the allocation of resources and the distribution of income. The goal of economic processes is to maximize the human satisfactions those resources generate. Third, the theory of the gains from free exchange has given way to the theory of the allocative efficiency of perfect competition. This theory lists a

series of factual and institutional conditions that are supposedly sufficient to generate an outcome of economic processes such that no owner of a factor of production can be made better off without making another worse off.

The theory of efficient allocation is radically less ambitious than that of "the most possible wealth" I have ascribed to the classical system. First, the Moderns make clear that the efficiency of perfect competition is a property of a static not a dynamic analysis. The theory assumes fixed resources and offers no hypothesis as to how they might be increased. Second, an efficient allocation generates not a maximum of wealth in the abstract, but merely a maximum of what the people with purchasing power want produced. Whether this particular pattern of productive activity maximizes wealth or maximizes waste and immorality is a question the economist refers to others.

The length and character of the list of the conditions of an efficient allocation of resources make it abundantly clear that efficient outcomes are not "natural" in any of the senses in which the Classics used the word. The new theory is self-consciously embodied in a model; it is not an empirical description of the workings of any actual social process. The prices and incomes that prevail in an efficient universe are natural only in the sense that one of the things influencing them is the endowment of natural resources. The others, including technology, the initial distribution of wealth and abilities among persons, and the tastes of those with purchasing power, are decidedly artificial and manipulable. Moreover, the institutional arrangement of perfect competition is an aberration rather than the norm in the real world. Indeed, a society that desired to maintain a condition approximating perfect competition in all markets at all times would have to mandate such constant and intense state intervention that it would be hard to distinguish it from a fully planned economy.

Supposing that all the conditions of an efficient allocation of resources were met, would the outcome be "just," in the sense that the Classics thought the outcome of the free market economy was just? Modern welfare economics makes no such assertion. The distributive outcome of economic activity in a perfectly competitive economy is strictly dependent on the initial distribution of factors of production among the participating individuals. For each imaginable distribution of assets, there will be a different efficient allocation of resources (a different product mix) and a different final distribution of income. In order to decide among these, the modern economist

recognizes that we must have recourse to a "social welfare function" whose content is no part of economic science.

At first, the Moderns appear to have rejected "freedom" -- the fourth and final attribute of the economic system as the Classics conceived it -- just as they have rejected "the most wealth," naturalness, and justice. To begin with, they understand economic activity in terms of supply and demand schedules built upon the premise of "maximizing behavior," rather than in terms of free choice. Maximizing behavior and the declining marginal utility of successive increments of a commodity are concepts carefully designed to evade metaphysical issues about free will and autonomy.

Second, in the model of the perfectly competitive efficient economy, market structure eliminates all play for strategic behavior by buyers and sellers. They face the absolute compulsion of take-it-or-leave-it competitively determined prices. The outcome of economic activity is free only in the sense of "consumer sovereignty." People are free to consume what they want subject to the rigid constraints imposed by the pricing of commodities at their efficient prices and by their initial resource endowment.

What is the role of law in this vision? Curiously, it seems in many ways analogous to the role law played in the classical synthesis. As far as I can tell (I am very far from the milieu of neoclassical economics),³⁷ overt mention of law in neoclassical welfare economics occurs in only two places. First, it is a condition of the theory of the efficiency of perfectly competitive markets that all valued experiences are commodities, and that there is no interference with exchange. Second, the model is often the basis for elaborate liberal arguments in favor of legislative reform designed to compensate for the inefficiency generated by deviations in the real world from the norm of competition.

In the specification of the theory of perfect competition, economists seem to assume that the premise that all valued experiences are commodities will generate a specific legal background. Likewise, the idea that there are no interferences with exchange presupposes that there is a particular legal regime that corresponds to exchange without interference, or free exchange. In other words,

³⁷ Cards on the table: my descriptions of the very general framework of modern economic theory and of the role of law therein are based on my undergraduate and brief graduate studies in the Harvard Economics Department in the early 1960's. That was a long time ago, and I've kept up only very indirectly, by reading the law and economics literature (not what I'm talking about here) and by inquiring from time to time of economists about how things have or have not changed. If the description in the text is wrong, which it might well be, as to the present, then the Essay as a whole will be valid, if at all, only for the "modern economics" of 20 years ago.

modern economists assume that someone else, presumably the lawyers, has already taken care of the problem of "externalities" -- whether costs or benefits -- by providing for their assignment or appropriation by the state's enforcement of particular private property rules. Likewise, someone else has already taken care of the problem of excluding fraudulent transactions and/or transactions under duress from the universe of the perfect competitors.

If it is possible to specify the legal regime that corresponds to full commodification and freedom of exchange, it makes sense to say that there is a determinate efficient outcome for a perfectly competitive regime, given a resource endowment, tastes, and an initial distribution of factors of production. The problem is that the legacy of legal realism, for legal theory, is loss of faith that either the idea of property (which is just the legal name for a commodity), or that of free contract, is enough to generate a unique legal regime. Most legal theorists believe that there are many possible specifications of a commodity (private property) regime and many possible specifications of a contract regime based on the idea of freedom.

Before I describe briefly the sources of the indeterminacy of property and contract as governing ideas for a legal code, let me suggest a preliminary consequence of this indeterminacy for neoclassical welfare economics. It means that, for any given specification of tastes, natural resources, and factor endowments in a perfectly competitive economy, there will be not one but many possible outcomes -- indeed one outcome for each possible legal regime that meets the formal criteria of commodification and free exchange. These will differ both as to the allocation of resources (the product mix) and as to the distribution of income.

The reason for this is that the bundle of legal rights that goes along with an abstract "factor endowment" has a powerful impact on how much that endowment is worth in the competitive struggle. Different legal regimes will generate "wealth effects" on the allocation of resources because legal rules are a constitutive dimension of the wealth that factor endowments define.

The idea of a completely commodified economy runs up against the problem of conflicting uses, or externalities. The idea of the commodification of valued experiences just can't tell us what to do when my valued experience generates anti-values for you. This is the familiar problem of nuisance law, but it goes far beyond the familiar. The idea of a commodity embodies two opposite elements, and neither of them can be taken to its logical extreme without annihilating the other. One element is that of security of the commodity

owner in the enjoyment of his thing or experience. The other element is that of freedom to use the thing for his own enjoyment regardless of the consequences for others. The property owner thinks of herself as able to do what she wants with her land, but also as able to prevent others from doing things that interfere with her "quiet enjoyment" of her land.³⁸

Because the idea of the commodity combines both of these elements, it can't tell the lawyer what to do when *a*'s use interferes with *b*'s enjoyment. Yet problems of conflicting use will exercise a dominating, controlling effect on the actual outcome of interaction in a competitive (indeed any market) economy.

The free exchange problem is just as serious. Free exchange presupposes that we can define coercion and fraud. The whole idea of efficiency is that when we have it one person can't be made better off without injuring another. But if the exchanges that have led us to a given Pareto superior point are tainted with force or fraud, it is wrong to claim that the parties have been made better off as they contract.³⁹ Here the difficulty is that the mere idea of "freedom" or "no coercion" or "no fraud" does not tell us what bargaining tactics are and are not permissible.

To begin with, an unsophisticated definition of freedom of contract leads to contradiction: every enforcement of a contract is an instance of coercion, as remarked above, and prevents the bound party from dealing with an alternative contract partner, or at least deters such dealing. But supposing that we say it is permissible for people to bind themselves, we have to decide a series of questions of degree. Can workers strike? Picket? Engage in secondary boycotts? Do sellers have to disclose the hidden properties of their goods? The idea of freedom is just too vague to settle the code of bargaining interaction, but this code will influence powerfully how much factor owners can get for their economic contributions.⁴⁰ Because neither the idea of a commodity nor the idea of free exchange can answer the question of what legal rights you have in a perfectly competitive economy, there will be multiple efficient solutions depending on the choice of a legal regime.

The small number of modern economists who have thought about the actual content of the private law background regime that defines commodities and free exchange have tried to cure this problem of

³⁸ See Donahue, *The Future of the Concept of Property Predicted from its Past*, in PROPERTY, NOMOS XXII 28-68 (J. Pennock & J. Chapman, eds. 1980); see also *supra* note 26.

³⁹ See Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 787-95.

⁴⁰ See Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196 (1946); see also *supra* note 27.

indeterminacy. Their strategy has been to set the background regime by defining the content of property and exchange through the efficiency calculus itself. Thus they develop efficiency arguments about contract damages, the law of fraud, or the choice of whether to permit property rights in body organs.⁴¹ If this worked, we could ask what the efficient allocation would be under a given set of resources, technology, distribution of endowments, tastes, and an efficient background regime.

For a number of reasons, too complicated to go into here, it doesn't work. First, there is no single set of property and contract rules that will generate an efficient outcome in every case, no matter what other conditions of the economic system.⁴² Second, if we take two complete legal regimes and try to compare them as overall solutions to a given overall economic situation, the efficiency calculus requires an impossibly complex empirical inquiry that would, in any case, have no relevance beyond the moment.⁴³

The more modest solution of taking a given rule in a given situation, and trying to see whether we could change it to make everyone involved better off, is perfectly coherent in principle and indeed a valuable form of activity. But it can't yield us, by accretion, a complete "efficient code." There is no reason to believe that summing a series of valid partial equilibrium exercises will yield a valid general equilibrium solution.⁴⁴ There just seems to be a kind of black hole, or Derridean "trace," in the middle of the standard discussion of the efficiency of perfectly competitive markets.

But why does it matter that there are multiple efficient outcomes even after we've specified resources, distribution, tastes, technology and market structure? Because the idea that there is an "efficient market solution" to any given allocation problem is at the core of the remaining apologetic or ideological aspect of modern economics. This ideological aspect is a particular structuring of discourse about the economy around linked dualities: the free market vs. regulation, and efficiency vs. equality.

Modern economics structures discussion around these dualities by presenting economic problems so that these appear to be *the*

⁴¹ Representative works are G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970) and R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

⁴² See Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274 (1983); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

⁴³ See Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980).

⁴⁴ Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 1191 (1980); Kennedy, *supra* note 43.

choice. Unlike classical economists, the Moderns do not purport to be able to indicate scientifically or rigorously which way to go in any given situation. They merely claim to be able to work out in a way that is analytically (if not empirically) scientific and rigorous what the basic trade-offs are. The apologetic effect comes from the framing of the issue, rather than through the kind of claim to ethical closure that was typical of the Classics.

Yet the effect may be more powerful for having shed its too obviously contestable pretensions. Behind the dualities lies the stereotypical, but almost universally shared, idea that in the nineteenth and early twentieth centuries, we had something called a "free market system." This system was highly efficient (*cf.* the rapid growth of the American economy) but inequitable (*cf.* immigrant slums and robber barons). Since the turn of the century, we have been responding, rationally, to this problem by regulating the economy in the name of equity or equality: "the big trade-off."

The basic question, according to the dominant view shared by both liberals and conservatives, is "how far to go" in this direction, given that every increase in regulation threatens overall wealth (because of inefficiency). Since we've changed the free market system a lot by regulatory overlays, it seems plausible that we're in danger of killing the goose that lays the golden eggs. Maybe we should be cutting back. In this view, every regulatory initiative has to "prove itself," meet a "burden" that arises from the presumptive allocative superiority of the market.

The judge-made private law rules that define the market are really just the common law as it stood at some hypothetical moment in the nineteenth century. But these rules have a peculiar, almost sacred status as symbols of "the efficient market solution." Most economists don't seem to have or to feel the need for any knowledge of their content, or of the reality of their supposed inner responsiveness to the ideas of property and contract. They appear as a neutral background in everyone's interest (efficiency), that is constantly threatened by the more partial, political, interest-group based or ideologically based initiatives of legislatures.

But in fact the particular private law regime of the late nineteenth century was not the efficient market solution to the problem of economic allocation; it was just one of many possible background regimes. Each background regime would have led to a different distributive/ethical outcome. Because of the indeterminacy of the concepts of property and free exchange, we cannot say that the private law regime that nineteenth century judges adopted was peculiarly

faithful to those concepts. Many regimes could have been plausibly described as based on property and contract. We cannot say, a priori, that the outcomes under these alternative regimes would have been less efficient than the outcomes that occurred under the peculiar set of specifications of those concepts that prevailed in fact. We could only answer the question of comparative efficiency of background rules through an empirical inquiry of staggering complexity, an inquiry that would not, in any case, yield a result we could extrapolate to the present.

There was never, in the late nineteenth century or at any other time, a determinate "free market regime" that embodied the legal/economic requirements for efficient resource allocation. The reason is not that in "the real world" there were always imperfections and shortfalls, but that there is no such thing as the efficiency-inducing free market solution. There is rather a congeries of solutions, each one of which can only be understood as a regulatory intervention by the state. This is as true of the common law of fraud as of the rules laid down by a modern public utility commission.

The only way the nineteenth century judges could choose, and the only way we can choose a background regime is by making a vast multiplicity of detailed distributive and other ethical choices about right and wrong in human interaction. The actual choice of the supposed "free market regime" of the late nineteenth century just could not be justified, then or now, on the basis of economic or legal science. The choice of that particular free market system over the other possibilities was inescapably political.

The late nineteenth century rules were judge-made rather than administrative or legislative, and they used a somewhat restricted repertoire of regulatory techniques. But each set of judge-made rules was no less an intervention in the market than, say, the National Labor Relations Act (NLRA). Indeed, the state and federal courts could have developed the NLRA, in many of its crucial aspects, consistently both with the hopelessly indeterminate pre-existing body of labor law and with what we know about actual empirical efficiency effects without violating any canon of legal science. If that had happened, a judge-made NLRA would have been the "free market solution," and the current proposals to institute "freedom" (from unions, for employers) would look like a regulatory intervention inconsistent with free enterprise.

In short, as the institutional economists and legal realists taught us fifty years ago,⁴⁵ "there is no such thing as a free market." (Sayings of J. Frug). The market, as an analytically distinct approach, collapses into regulation once we take legal rights seriously. And when this first duality goes, there is not much left to the idea that the choice between the existing (or late nineteenth century) common law rules and a regulatory scheme is one between efficiency and equality.

It is true that there are important institutional differences between regulating through courts and regulating through a combination of legislation and administrative agency procedures. Judicial opinions are usually easy to distinguish from detailed codes, or shifting bodies of administrative regulations. Adversary lawsuits are usually easy to tell apart from legislative or administrative hearings. And so forth. But the choice is one between regulatory strategies. The institutional forms are infinitely malleable so that one forum's activities shade into those of the other. Choosing between common law and administrative law is important, but it is not a choice between efficiency and equality of distribution, because both efficiency and equality considerations play out on each side of the choice.

You could construct a background regime of labor law entitlements, designed to be relatively self-executing, or executed through normal judicial processes, that would lead to outcomes far more egalitarian than those that occurred either under the late nineteenth century rules or under the NLRA. For example, one could simply reverse all the intensely anti-labor rulings of state and federal courts, legalize all forms of picketing, strikes, the closed shop, and the secondary boycott. You could sharply downplay the associational rights of nonunion workers and employers, and play up those of actual and prospective union members.

Such a "market" solution might have made the NLRA altogether superfluous, and it is hard to doubt that it would have vastly changed the face of American industrial life. This alternative course cannot be shown to be either illegal or inefficient, just different. The choice to develop conservative background rules was not one in favor of efficient markets and against egalitarian regulation; it was one for a particularly inegalitarian common law agenda and against a more egalitarian one.

⁴⁵ I am referring here to T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937); J. CLARK, *STUDIES IN THE ECONOMICS OF OVERHEAD COSTS* (1923); J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924); R. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914); R. HALE, *supra* note 28; T. VEBLEN, *THE THEORY OF THE LEISURE CLASS* (1899). See generally B. SELIGMAN, *supra* note 17, at 3-253.

In the best of all possible worlds, a successful demonstration of the impossibility of generating the efficient common law background regime for a free market economy would have two effects. First, it would discourage the "privileging" of market solutions in general over regulatory solutions in general. There is no rational "burden" on regulation, because regulation is no more and no less presumptively efficient than a common law regime. Second, it would open our imaginations to devising "market" solutions with radically different distributive consequences than those we are familiar with. For example, we might approach plant closings as follows. Abandon legislative-regulatory solutions, which run the narrow gamut from compulsory advance notice of closing through government loans and technical assistance for workers who want to buy out their former employers. Why not a nondisclaimable obligation on the employer to give the plant to the workers if he wants to go out of business?

A first response is likely to be that such an approach would be somehow illegal or unconstitutional, and a second is that it would create perverse incentives to keep inefficient plants in operation. Both objections typify the mistakes and the ideological/apologetic slant I've been attributing to modern economic thinking. But that's for another time.

My point has been that law plays the same apparently minor and clear cut, but in reality major and obscure role in neoclassical as in classical economics. As before, it reinforces the status quo through an ideological/apologetic message. In classical economics, the role of law was to make it plausible that income shares were equivalent to labor inputs, and that unregulated exchange made all parties better off than they could otherwise be. In neoclassical economics, the notion of a determinate background legal regime of property and contract makes it plausible that we can and have to choose between efficient market and egalitarian or equitable regulatory solutions. It doesn't wash in either case.

III. AN ESSAY ON MARX'S THEORY OF THE FETISHISM OF COMMODITIES⁴⁶

A. Introduction

In Volume I of *Capital*,⁴⁷ Marx defines the fetishism of commodities as follows:

it consists simply in the fact that the commodity reflects the social characteristics of men's own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things. Hence, it also reflects the social relations of the producers to the sum total of labour as a social relation between objects, a relation which exists apart from and outside the producers. (pp. 164-65).

This brief passage is extremely puzzling. The full text of Marx's discussion of the fetishism of commodities is about fifteen pages long, and seems to me one of the most puzzling in all the work Marx published in his lifetime. This Essay is an interpretation of the famous definition and of Marx's accompanying discussion. It is based on study group discussions rather than on an attempt to master the exegetical literature.⁴⁸

A first basic difficulty arises as to what the word fetishism should be interpreted to mean. There is a tendency among contemporary leftists approaching the text for the first time to interpret it as meaning "worship," with a derisory overtone suggesting that the object of worship is a false god. The fetishism of commodities then means the worship of commodities as though they were gods. And Marx's supporting text would then be a description of the evils of materialism, of the isolated individual obsession with owning things. People become slaves to their commodities. Moreover, phrases like "the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things" (p. 165) suggest a critique of the tendency of people under capitalism to treat other people as things, and even to understand themselves as thing-like. The fetishism of commodities would then encompass an attack on materialism in the sense of consumerism, an attack on the violations of Kantian ethics that occur when people treat others in

⁴⁶ This Essay was prepared for the students in the Theory Seminar at the Legal Services Institute, Jamaica Plain, Massachusetts, in 1981. I want to thank the Institute staff and express my solidarity with their work.

⁴⁷ I. K. MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (B. Fowkes trans. Vintage Books ed. 1977). Page references in the text are to the Fowkes translation.

⁴⁸ In preparing this article for publication I made a quick review of extant discussions in English of commodity fetishism. Far and away the best thing I found was an essay by Catherine Colliot-Thelene, appended as an Afterword to I. RUBIN, *supra* note 24.

the economy as things rather than as people, and an attack on the tendency of the alienated individual to treat himself as a thing and therefore to prostitute his talents.

This cultural interpretation is also a psychological one: the mechanism of fetishism is unconscious. Throughout the discussion, Marx talks about it as a form of error, of delusion, of misperception (pp. 163, 166-67). The language often suggests that the error of misperception is even analogous to an optical illusion (pp. 165-66). The fetishism of commodities then appears as a kind of false consciousness -- one of the mind-fucks of capitalism -- that will vanish when a socialist regime permits more human values to flourish and removes the causes of the collective neurosis.

I don't think this has much to do with what Marx intended. Indeed, I think this interpretation is completely, not just partially, wrong.⁴⁹ It may be true that the critique of modern capitalism for materialism, treating people as objects, prostitution of talents and false consciousness is true, and that it is the most profound critique we can make of our society, but my view is that Marx was making an altogether different point. He was arguing instead that both the masses and the bourgeois social scientists believe something about the economic system that is untrue. They believe that under capitalism, decisions about what to produce and how to distribute it are determined "naturally" by the "values" of the commodities to be produced and distributed. Both the masses and the political economists, therefore, tend to believe that any different set of production and distribution decisions would be in some sense "unnatural."

According to Marx, this is false. It is the people as a whole that makes production and distribution decisions, and the people as a whole could make the decisions in any number of other ways than that represented by the commodity system. Moreover, with the commodity system itself there is nothing inevitable or natural about the outcome. In short, the fetishism of commodities consists of believing that "nature," with all its overtones of the necessary and the desirable, plays a much larger role in how the economy works than it really does. People understand much that is really the product of [*970] social decision to flow ineluctably from the physical properties of objects.

⁴⁹ In the *Economic and Philosophical Manuscripts* (1844), WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 283-337 (Easton & Guddat eds. 1967), Marx develops a critique of capitalism like the one just rejected as an interpretation of commodity fetishism. I believe that he developed the latter theory as a way to fortify and empower the general cultural critique. Further, it is difficult to understand commodity fetishism otherwise than against this background. Thus I think the two critiques are intimately connected (indeed, one motivates the other). But they are not the same. For an interesting treatment of the relation between the young and the mature Marx, see L. ALTHUSSER, FOR MARX (B. Brewster trans. 1969).

B. The Commodity Economy vs. the Capitalist Economy

The commodity economy in which fetishism arises is quite different from the full model of a modern capitalist industrial economy. Marx describes it in terms of production by individuals (or possibly family units), each of whom owns the means of producing the commodity in question. The commodity economy is thus fully specialized: everyone is dependent on the market to supply all commodities other than the one he produces himself. On the other hand, there is no wage labor, and therefore no issue of exploitation of labor. There is division of labor, but each of the component elements in the division is a separate entrepreneur bringing his component to a market, rather than a worker within an integrated enterprise.

It is important to keep in mind that commodity fetishism exists in this particular environment, because people are often tempted to think it has to do with the exploitation of the worker -- Marx's major theme in the later parts of *Capital* -- whereas in fact it is a "petty bourgeois" rather than a proletarian phenomenon. It has to do with the perception of the economy "naturally" held by people who own the means of production, produce a commodity, and live by using the proceeds of sale to buy the commodities of others similarly situated.

C. The Analogy to Religion

A good deal of the burden of explaining what is meant by commodity fetishism is carried by the analogy to religion. Marx asserts that the commodity purchaser is like a religious person. Polytheistic religions posit gods analogous to commodities, treat them as having a real existence, and attribute to them events that occur in the human world.⁵⁰ In fact, the gods are figments of human imagination.

⁵⁰ Marx's discussion of "pre-Christian religion" displays his somewhat Victorian evolutionist/historicist understanding of world history, with the European bourgeoisie of which he was a member as the most advanced social class the world had yet produced and the prior history of culture as a series of steps leading up to its accomplishments. He is not much better than the bourgeois economists he makes fun of in this regard. He gives no privileged status to the present only because it is on the point of being superseded by the future. Like the bourgeois he mocks, he sees the course of history as a unilinear progress from barbarism to civilization. In fairness, he also differs from the bourgeois social theorists in emphasizing the brutality of the modern order's destruction of the feudal/peasant order and in that he recognized that modernization destroyed an earlier culture that had much to be said for it. It is only in the last analysis that he rejoins Hegel's conception of the "cunning of reason," which has somehow made even the crimes of bourgeois annihilation of the expropriated turn out for the long term good.

The analogy goes a step further: in some forms of religion, the god is believed to inhabit a physical object, a totem or fetish, like the golden calf or graven idol. Like these idols, commodities exist in the real world of physical objects. The fetishism of commodities consists of attributing to these physical objects powers that they do not possess. Further: in the case of the graven idol, the powers attributed are often powers that belong as a matter of fact to the people who create and believe in the fetish. For example, people attribute to the gods embodied in the fetishes responsibility for social harmony, for the creation and exercise of crafts and skills, for discoveries, for defeats and victories, for fertility and infertility, and for virtue and vice in the community. This is the notion (derived from Feuerbach) that in religious practice people "alienate" their own powers, by attributing them to imaginary entities outside or even opposed to themselves.

By analogy, those who suffer from commodity fetishism attribute to commodities powers to regulate relations among people that belong only to the people themselves. In religious fetishism people believe that spirits inhabiting the fetishized objects determine the mode of social organization and events in their lives. Marx is saying that in a commodity economy people believe that events they themselves bring about through concrete social activities are the necessary or natural consequences of the properties of the commodities they produce.

There are lots of problems raised by describing the fetishism of commodities as analogous to religious fetishism. One is: if these are human powers attributed to imaginary entities, what determined how the human powers were exercised? The fetishist explanation is gone, since we can no longer believe that we lost the battle because our fetish was "weaker" than their fetish. Likewise, we can't believe that the outcome of economic life was "determined by the value of the commodities we produced." But if we say that the outcomes are inescapably within our human power, and if we have been attributing that power to imaginary entities that could not possibly have been exercising the power (since they don't exist), then what has been determining those outcomes?

Marx devotes the body of *Capital* to showing how the outcome of social interaction in the economic sphere can be highly determinate, and comprehensible, even though the people who are engaging in the activities and bringing about the outcomes believe it's all being

determined by imaginary entities. In other words, Marx in *Capital* provides a model of how people actually exercise powers they don't know they have, of how that unconscious exercise of powers can lead eventually to the discovery of the powers, and of how the discovery of powers can make it obvious that we should exercise them consciously to achieve the goals we have.

Finally, if we look at the outcomes that occur when people exercise these powers unconsciously, attributing the determination of events to imaginary entities (commodities and their value), we will notice an actual pattern of distribution that favors a small group of capitalists at the expense of the mass of workers, and a pattern of production that underproduces some things people want badly (community, creative opportunities, love) and overproduces other things that are incompatible with these experiences. This combination of unfair rewards for capitalists with an evil distortion of the true priorities of production (according to Marx's aristocratic/upper bourgeois/elite notion of the purpose of life) is something we will certainly want to change when we collectively realize that we can produce anything we want (within the limits imposed by nature) and distribute it any way we want as well.

But none of what I said in the last two paragraphs appears in the section on the fetishism of commodities. These ideas are drawn from what Marx says later in *Capital* and in his other works. In the section on the fetishism of commodities he says almost nothing about how a system will work if all are commodity producers and all believe in the impersonal necessity of the outcomes that occur naturally in such a system. He just asserts that it is fetishism to believe that the outcome is natural and necessary. This is not surprising, since in the later sections he will want to insert wage labor and capital into the model, and develop his specific theories of the technical evolution of manufacturing. It is only when these elements are added that the model is specific enough so that he can predict what people who suffer from the fetishism of commodities will end up doing. In other words, fetishism exists as soon as we have a commodity economy, even without wage labor. But Marx doesn't predict specific results for production and distribution until he has added these further specifications of exactly how the commodity economy will work.

D. The Contrast with Feudalism, Patriarchy, and Utopia

Aside from the analogy to primitive religion, Marx has another didactic device for explaining what he means by the fetishism of

commodities: he compares it with the way people experience other regimes of production and distribution. He brings in three of these: feudalism, the patriarchal family (which was a current image of how society was organized before the Graeco-Roman development of the city state), and the post-revolutionary future society of independent, associated producers owning the means of production in common.

Marx's image of feudal economy was brilliant, and has had a lot of influence on subsequent theorizing about that form, although probably his picture of it was basically wrong. This is irrelevant to the question of whether it is a useful way to understand, by contrast, how people experience economic outcomes in a commodity economy. His basic notion is that in the feudal economy, production and distribution were organized through networks of personal obligation, running from vassal to lord, from lower lord to higher lord, and from lord to king. Alongside this simple hierarchy, there were complicated institutions like the Church, which had its serfs but also its autonomous bureaucratic organization, and the State. But the basic point for Marx in this passage is that under feudalism people engaged in particular productive activities because they had obligations to superiors who told them to engage in those activities. If they refused to do what they were told, why then their superiors used force to compel them to obey. In a feudal economy, if you asked a serf why the economic outcome in his region was the production of x bushels of wheat and the building of x miles of road, he would, Marx imagines, answer that these things happened because the lords decided they wanted them to happen, and had enough power to make them happen.

It is important to note that in this discussion Marx says nothing about what determines the lord's decisions about how much wheat to grow and how many miles of road to build or repair with his *corvée* labor. He offers no model of how outcomes are determined in a feudal economy, just as in this section he offers no model of how outcomes will be determined in a society of commodity producers afflicted by the fetishism of commodities. Moreover, he says nothing about whether his nonfetishized feudal serf perceives the lord's powers and the lord's decisions as legitimate. For all we can tell, the serf believes that he has validly alienated his powers of participation in economic decision making when he or his ancestor became a serf, and is fully in agreement that the lord should make all decisions of this kind, and that his duty is to work for as long as the lord wants him to on whatever tasks the lord thinks are appropriate, for whatever rewards happen to be customary or to be imposed at the

time. Marx's point has nothing to do with the issue of what would happen under feudalism and whether serfs viewed it as legitimate.

His point is rather that the serfs would correctly attribute the outcome to decisions made by human beings, rather than to the extra-human (natural and/or necessary) workings of the commodity system based on the intrinsic values of objects. The serf is nonfetishized because he is aware that we could do production and distribution in a number of ways, and that the choice among the alternatives is made by human beings according to human criteria.

The same is true in the patriarchal family. Imagine that within that family, say of twenty loosely related people, the group produced exactly the same mix of objects, and distributed them in exactly the same way as would occur in a commodity economy composed of the same people. We could achieve this similarity if we made sure that the patriarch in the family was the largest property owner in the commodity economy, and that the other people were given just enough property to let them earn the share they earned under the old regime. Marx is arguing that in the patriarchal economy the members explained the pattern of production and distribution by saying things like: "Father decided that we should plant wheat rather than barley this year," or, "the age cohort of adolescent males decided to do thus and so."

It might be that these decisions were wrong, or that they were made by consulting oracles or even real fetishes (as opposed to the analogical commodity fetishes) or that the Father was understood to be himself a divine oracle. None of this matters. The essential point is that in the patriarchal family no one would dream of explaining the particular outcome with respect to the choice between wheat, barley, and shoes as the necessary and natural consequence of the relative value of those things. The concept of value would be superfluous, given the direct experience of the decision making process, even if that process was dictatorial or claimed mystical legitimation.

Marx's final example of an unfetishized economic system is his idea of the future: the association of independent producers who decide collectively what to produce and how to distribute it. This system differs both from feudalism and from the patriarchal family in that it is based on voluntary association and the idea of democracy. There is neither a system of feudal personal obligations dividing people into classes of lords and serfs, nor a pseudo-natural arrangement of familial roles, such as father, wife, and child. People who are free to do it any way they want to, and know they can do it

any way they want to, get together and decide how they want to do it.

This utopian future situation has a number of things in common with feudalism and patriarchy that differentiate all three from the commodity economy. Most important, people are fully aware that questions of production and distribution are solved socially, and that there is nothing either natural or inevitable about the outcome of the social process. This is an experience of human freedom, even in the feudal and patriarchal regimes where most people are oppressed.

Second, each of the three alternatives to the commodity economy displays a communal ideology, and this may contribute to their purely intellectual superiority of fully comprehending the social as opposed to natural or necessary character of economic decisions. But only under the utopian post-revolutionary regime do people act on the basis of equality and without the political and religious myths that are as incapacitating within hierarchical communal regimes as the fetishism of commodities is within the individualist property regime.

E. The Nature of the Commodity Economy

The analogy to religion and the contrast with feudalism, patriarchy, and utopia are all useful in understanding commodity fetishism. But they don't tell us directly what it is. Marx insists that it arises from the peculiar conditions of the commodity system, so we need to have a clear definition of that system before we can understand the mode of thought that is supposedly peculiarly appropriate to it. Three passages early in chapter one of *Capital* give an idea of what Marx means by the commodity economy:

He who satisfies his own need with the product of his own labor admittedly creates use-values, but not commodities. In order to produce the latter, he must not only produce use-values, but use-values for others, social use-values. (And not merely for others. The medieval peasant produced a corn-rent for the feudal lord and a corn-tithe for the priest; but neither the corn-rent nor the corn-tithe became commodities simply by being produced for others. In order to become a commodity, the product must be transferred to the other person, for whom it serves as a use-value, through the medium of exchange.) Finally, nothing can be a value without being an object of utility. If the thing is useless, so is the labour contained in it; the labour does not count as labour, and

therefore creates no value. (p. 131) (footnote omitted).⁵¹ This division of labour is a necessary condition for commodity production, although the converse does not hold; commodity production is not a necessary condition for the social division of labour. Labour is socially divided in the primitive Indian community, although the products do not thereby become commodities. Or, to take an example nearer home, labour is systematically divided in every factory, but the workers do not bring about this division by exchanging their individual products. Only the products of mutually independent acts of labour, performed in isolation, can confront each other as commodities. (p. 132).

In a society whose products generally assume the form of commodities, *i.e.*, in a society of commodity producers, this qualitative difference between the useful forms of labour which are carried on independently and privately by individual producers develops into a complex system, a social division of labour. (p. 133).

The language of these quotations is seriously misleading as to the essential characteristics of a commodity economy, because it suggests an almost physical notion of "mutual independence" "for others" "performed in isolation" "privately" by "individual producers." The internal evidence of the passages makes clear that physical distance or proximity has nothing to do with the characteristics of a commodity economy. It is easy to imagine commodity producers producing in the greatest intimacy.

It is true that if two producers are working on the same, indivisible object, that object cannot be a commodity as between the two of them. They will settle in advance somehow the manner of division of the joint product, or the law will settle it for them. But it isn't true that everything except joint products are commodities, as Marx makes clear with the example of factory production, and Engels with that of the corn-tithe (p. 131). The examples shows that workers who are producing completely separate physical objects -- parts of a machine, say -- may not be producing them as commodities, in spite of total division of labor.

What makes a commodity a commodity is independence, separateness, individuality or privateness not in a physical, but in a legal sense. The point about commodities is that they are objects produced under a regime in which the worker "owns" his labor, his tools and raw materials, and also the product he makes from them. He then exchanges his commodity for money, and the money in turn for a whole range of other people's commodities. What is important

⁵¹ The passage belongs to Marx, save the parenthetical, which Engels as editor inserted into the fourth German edition.

about the commodity system is its *legal structure*, rather than the physical or technological arrangement of the productive process.

It may be that the legal arrangement known as commodity production can only come into existence in a given technological and physical situation of production, and that it will inevitably cease to exist when and if that technological/physical situation changes, but that's a different matter. The point is that when Marx talks about the commodity production model, he is talking about a socio-legal, not a technological/physical model:

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 alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. (p. 178) (footnote omitted).

The first way in which an object of utility attains the possibility of becoming an exchange-value is to exist as a non-use-value, as a quantum of use-value superfluous to the immediate needs of its owner. Things are in themselves external to man, and therefore alienable. In order that this alienation . . . may be reciprocal, it is only necessary for men to agree tacitly to treat each other as the private owners of those alienable things, and, precisely for that reason, as persons who are independent of each other. But this relationship of reciprocal isolation and foreignness does not exist for the members of a primitive community of natural origin, whether it takes the form of a patriarchal family, an ancient Indian commune or an Inca state. The exchange of commodities begins where communities have their boundaries, at their points of contact with other communities, or with members of the latter. However, as soon as products have become commodities in the external relations of a community, they also, by reaction, become commodities in the internal life of the community. Their quantitative exchange-relation is at first determined purely by chance. They become exchangeable through the mutual desire of their owners to alienate them. In the meantime, the need for others' objects of utility gradually establishes itself. The constant repetition of exchange makes it a normal social process. In the course of time, therefore, at least some part of the products must be produced

intentionally for the purpose of exchange. From that moment the distinction between the usefulness of things for direct consumption and their usefulness in exchange becomes firmly established. Their use-value becomes distinguished from their exchange-value. On the other hand, the quantitative proportion in which the things are exchangeable becomes dependent on their production itself. Custom fixes their values at definite magnitudes. (pp. 181-82).

The point of juxtaposing these long passages is that it is easy to jump to the wrong conclusion from the first one. It sounds as though Marx is treating legal concepts as determined by the economic system, as epiphenomenal in the orthodox marxist sense. But that isn't it at all. Quite the contrary, his whole definition of commodity production is in terms of and therefore presupposes the legal concepts of private property and contract. The legal categories are built into the definition of the "social formation" or "mode of production."

When he speaks of the "content of the juridical relation" being determined by the economic relation, I think he just means that within a property system the content of peoples' contracts with one another is determined by their economic relations, *i.e.*, the terms of exchange are not fixed by the legal system, but rather the legal agreement is fixed by the economic system. This interpretation is compatible with the notion that the commodity system itself can only be conceived in terms of the categories of property and contract.

It does not follow from this interpretation that we have to reject the notion that the state and the legal system are epiphenomenal in relation to the economic system. That the economic system is defined by the fact that actors act as though they are property owners linked by contract does not mean that there has to be either a state (in the sense of central power, sovereign, whatever) or a legal system (in the sense of rules followed by officials applying state force). Those are institutional forms. The commodity system could exist without them, so long as the actors conceived themselves in terms of the legal concepts of property and contract. It is therefore still possible to believe that a commodity mode of production will determine a bourgeois state and a nineteenth century legal system (since those institutional forms are supposedly "syntonic" with or "meet the needs of" a commodity regime).

For myself, it seems obvious that state actors and legal actors often try to and sometimes succeed in transforming the mode of production, so that it doesn't make much sense to speak of one-way

causation between base and superstructure. The more interesting point is that the base itself is defined not in terms of technology but in terms of consciousness -- in terms of the way "men agree tacitly to treat each other" -- so that the evolution of the base begins with something that the orthodox supposed to be part of the superstructure.

In a footnote at the end of the fetishism of commodities section, Marx puts forward his view of the relationship between economic and other social forms:

My view is that each particular mode of production, and the relations of production corresponding to it at each given moment, in short 'the economic structure of society', is 'the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness', and that 'the mode of production of material life conditions the general process of social, political and intellectual life.' In the opinion of the German-American publication, this is all very true for our own times, in which material interests are preponderant, but not for the Middle Ages, dominated by Catholicism, nor for Athens and Rome, dominated by politics. . . . One thing is clear: the Middle Ages could not live on Catholicism, nor could the ancient world on politics. On the contrary, it is the manner in which they gained their livelihood which explains why in one case politics, in the other case Catholicism, played the chief part. For the rest, one needs no more than a slight acquaintance with, for example, the history of the Roman Republic, to be aware that its secret history is the history of landed property. And then there is Don Quixote, who long ago paid the penalty for wrongly imagining that knight errantry was compatible with all economic forms of society. (pp. 175-76, n.35).

I don't think this passage is inconsistent with what I have just been saying. In context, "the manner in which they gained their livelihood" refers to the socio-legal form of production, not to whether the people in question were engaged, say, in agriculture as opposed to mining. And it was "landed property," not dirt, that was the theme of Rome's secret history.

F. Fetishism in the Minds of the Producers Themselves

Marx begins his explanation of the phenomenon of fetishism with another invocation of the "private" and "independent" character of production in a commodity economy:

Objects of utility become commodities only because they are the products of the labour of private individuals who work independently

of each other. The sum total of the labour of all these private individuals forms the aggregate labour of society. (p. 165).

It is this legal arrangement of production that, in the next sentence, accounts for the peculiar phenomenon of fetishism:

Since the producers do not come into social contact until they exchange the products of their labour, the specific social characteristics of their private labours appear only within this exchange. In other words, the labour of the private individual manifests itself as an element of the total labour of society only through the relations which the act of exchange establishes between the products, and, through their mediation, between the producers. (p. 165).

Marx obviously does not mean the phrase "social contact" in the colloquial English language sense of friendly relations between people. I think he means that people do not get together to plan the process of production in advance. Each person simply goes ahead and produces his commodity, trusting that he will be able to sell it, and then uses the money from the sale to buy the commodities he wants from others. In spite of the fact that no one is planning the total pattern of production and distribution, it is nonetheless true that a total pattern is emerging through the separate actions of the individual commodity producers. The producer becomes aware of this pattern only through the act of exchange, which presupposes the existence of other producers, the desirability to others of the producer's own commodity, and the existence of the commodities produced by others:

To the producers, therefore, the social relations between their private labours appear as what they are, i.e. they do not appear as direct social relations between persons in their work, but rather as material [*dinglich*] relations between persons and social relations between things. (pp. 165-66).

In the process of exchange between legally independent commodity owners, people who are in fact partners in a collective enterprise of producing what people want to consume, experience their own activity as determined externally, as something imposed on them by the nature (value) of objects rather than as something freely chosen. Their relations are therefore material, or "thing-like," meaning mechanical and involuntary. The "social relations between things" is a tricky way of describing exchange itself, and the process of valuation by comparison that precedes it. The labor that is embodied in commodities is compared and valued by traders in markets, and that valuation determines the set of social relationships, *i.e.*, the actual distribution of income and decisions about production,

of which the producers themselves appear to be mere appendages.

Marx provides only a sketchy description of how this process of determination of production and distribution comes about in a commodity economy. But the basic outline of the mechanism is clear: production of commodities for the market ties the producer into a complex social system in two ways. First, the producer must direct his labor in such a way that it will "satisfy a definite social need," or no one will buy what he offers for sale (p. 166). Marx has already explained that the commodity producer will be rewarded only to the extent that his commodity has utility and is produced using the smallest feasible amount of labor time (p.129). Thus the price mechanism "has already to be taken into consideration during production" (p. 166). Second, the producer is now dependent for his satisfaction on other people producing a desirable mix of commodities for which he can exchange his speciality, and his behavior will be affected, therefore, by what is on the market as well as by the price he can command for his product (p. 166).

Although decisions about how to deploy labor time between different productive activities and how to distribute the product are inherently social, commodity producers experience the processes that determine these outcomes as outside them and beyond their control:

What initially concerns producers in practice when they make an exchange is how much of some other product they get for their own; in what proportion can the products be exchanged? As soon as these proportions have attained a certain customary stability, they appear to result from the nature of the products, so that, for instance, one ton of iron and two ounces of gold appear to be equal in value, in the same way as a pound of gold and a pound of iron are equal in weight, despite their different physical and chemical properties. The value character of the products of labour becomes firmly established only when they act as magnitudes of value. These magnitudes vary continually, independently of the will, foreknowledge and actions of the exchangers. Their own movement within society has for them the form of a movement made by things, and these things, far from being under their control, in fact control them (pp. 167-68).

The notion here is that people regulate their activities as commodity producers according to the prices of those commodities, changing the quantities and the objects in order to make as much money as possible. But they don't have any idea what causes the prices to fluctuate. Marx has earlier pointed out that exchange values

"[change] constantly with time and place. Hence exchange-value appears to be something accidental and purely relative . . ." (p. 126). But it is also true that the sum of the decisions that producers make in response to prices constitutes the social decision about what the society should produce. Moreover, the labor embodied in commodities determines (according to Marx) exchange value, which in turn determines the distribution of the total socially produced pie of commodities among producers. What this means is that producers who are controlled by the price system, but experience it as arbitrary and contingent, are in the position of generating social outcomes without being aware of it.

Marx characterizes the actual control mechanism in very broad terms:

[A]ll the different kinds of private labour (which are carried on independently of each other, and yet, as spontaneously developed branches of the social division of labour, are in a situation of allround dependence on each other) are continually being reduced to the quantitative proportions in which society requires them. The reason for this reduction is that in the midst of the accidental and ever-fluctuating exchange relations between the products, the labour-time socially necessary to produce them asserts itself as a regulative law of nature (p. 168).

Marx has mentioned twice already the regulative mechanisms that constrain producers to produce what society wants, and to do so in an efficient way, but he has not gone into them in any detail. They are essentially mechanisms of competition, which ensure that inefficient producers can't sell their goods for inflated prices because they will be undersold by the efficient, and that people who don't produce what people want can't sell their goods at all. But the whole point is that these "laws of nature" can do their regulative work in spite of the fact that no one is aware of them. Marx conveys this through an image and a footnote:

In the same way, the law of gravity asserts itself when a person's house collapses on top of him 'What are we to think of a law which can only assert itself through periodic crises? It is just a natural law which depends on the lack of awareness of the people who undergo it.' (p. 168 & n.30).⁵²

The notion here is that when people produce too much or too little, in their unconscious way, as they busily try to make as much money as possible, then there will be a crash, a depression or economic

⁵² The portion of the passage in quotes is an editorial comment of Engels; the rest is Marx.

panic which will force production back into line with the law of value. In the same way, people can build houses successfully without understanding the law of gravity, although the success will be largely due to chance or to developed rules of thumb not theoretically grounded. If a person happens to build wrong, or misapplies a rule of thumb, the law of gravity asserts itself by collapsing the house. The end result is that all houses are built in conformity with the law of gravity, although there may be no one in the society who could explain what that law is or how it works. Likewise, the production of commodities conforms itself to the law of value in spite of the fact that no one knows what it is or could say how it regulates production.

It is important to keep in mind that Marx has not described exactly how the "labour time socially necessary to produce [commodities] asserts itself as a regulative law of nature" whose effect is to "reduce" the different kinds of labor "to the quantitative proportions in which society requires them" (p. 168). Nor has he said anything before this point about what it means for society to "require" something, or how the requirement is expressed. In modern neoclassical economic theory, all this happens through the mechanism of supply and demand: the quantity of a commodity is determined by increasing production up to but not beyond the point at which it costs more to produce another unit than that unit is worth to the buyer who will pay most for it. If new units cost more than earlier ones, but are worth less (increasing marginal cost, decreasing marginal utility of commodities), the market process will determine an outcome.

But this apparatus didn't exist in Marx's time. The economists of his day, and Marx himself later in *Capital*, remained vague about the mechanism that fixed actual outputs. The illusion called commodity fetishism is not a failure to understand an as yet nonexistent neoclassical synthesis. It is more primitive than that. In its first stage, it consists of believing simultaneously that value is intrinsic to commodities, and that the quantity of value is arbitrary. The consequence is that the actual total pattern of economic activity appears almost random.

G. Fetishism in the Minds of the Bourgeois Economists

But there is a second stage of fetishism, which concerned Marx as much as the first. That is the stage of the economists, who have advanced far beyond the producers, but still remain thoroughly mystified. The advance of economists was to discover the law of

value: that the exchange value of a commodity is determined (in the long run) by the amount of labor "congealed" in it, as a proportion of the totally available labor time of the society. Marx was insistent that this was a "scientific conviction," a form of thought that was "socially valid, and therefore objective, for the relations of production belonging to this historically determined mode of social production" (pp. 168, 169). He had high praise for Ricardo and the early English Classics (p. 96). But he was clear that their accomplishment had its limits:

Political economy has indeed analysed value and its magnitude, however incompletely, and has uncovered the content concealed within these forms. But it has never once asked the question why this content has assumed that particular form, that is to say, why labour is expressed in value, and why the measurement of labour by its duration is expressed in the magnitude of the value of the product. These formulas . . . appear to the political economists' bourgeois consciousness to be as much a self-evident and nature-imposed necessity as productive labour itself. Hence the prebourgeois forms of the social organization of production are treated by political economy in much the same way as the Fathers of the Church treated pre-Christian religions. (pp. 173-75) (footnotes omitted).

At this point, it is important to distinguish between Marx's critique of the political economists, much respected discoverers of the labor theory of value, and his critique of vulgar economy -- the degeneration of political economy as class conflict began to turn it into an apologetic instrument of the bourgeoisie rather than a branch of science. Marx is here talking about the greats, including Ricardo (p. 173, n.33). His point is that even after the discovery that "value" determines exchange value, and is in turn determined by labor time, the economists believed that value is intrinsic to the object, a quasiphysical or natural property of the object, an aspect of its thingitude. In fact, according to Marx, the value that men attribute to the object is just another way of expressing a social decision that we want to produce a given amount of it and reward those who produce it with a particular share of the total pie of commodities produced by society as a whole:

The determination of the magnitude of value by labour-time is therefore a secret hidden under the apparent movements in the relative values of commodities. Its discovery destroys the semblance of the merely accidental determination of the magnitude of the value of the products of labour, but by no means abolishes that determination's material form (p. 168).

The belated scientific discovery that the products of labour, in so

far as they are values, are merely the material expressions of the human labour expended to produce them, marks an epoch in the history of mankind's development, but by no means banishes the semblance of objectivity possessed by the social characteristics of labour. Something which is only valid for this particular form of production, the production of commodities, namely the fact that the specific social character of private labours carried on independently of each other consists in their equality as human labour, and, in the product, assumes the form of the existence of value, appears to those caught up in the relations of commodity production (and this is true both before and after the above-mentioned scientific discovery) to be just as ultimately valid as the fact that the scientific dissection of the air into its component parts left the atmosphere itself unaltered in its physical configuration (p. 167).

Now listen how those commodities speak through the mouth of the economist:

'Value (i.e. exchange-value) is a property of things, riches (i.e. use-value) of man. Value, in this sense, necessarily implies exchanges, riches do not.'

'Riches (use-value) are the attribute of man, value is the attribute of commodities. A man or a community is rich, a pearl or a diamond is valuable . . . A pearl or a diamond is valuable as a pearl or diamond.'

So far no chemist has ever discovered exchange-value either in a pearl or a diamond. The economists who have discovered this chemical substance, and who lay special claim to critical acumen, nevertheless find that the use-value of material objects belongs to them independently of their material properties, while their value, on the other hand, forms a part of them as objects. What confirms them in this view is the peculiar circumstances that the use-value of a thing is realized without exchange, i.e. in the direct relation between the thing and man, while, inversely, its value is realized only in exchange, i.e. in a social process (p. 177) (footnotes omitted).

Commodity producers adjust their activities according to the market values of commodities, and those prices determine the distribution of income. If price or market value is intrinsic to commodities, then commodities are, so to speak, regulating both their own production and their own distribution through their intrinsic properties. The belief that this is how the economy works is the fetishism of commodities, and it is no less fetishism after the discovery that market prices are, over the long run, determined by labor inputs.

What, exactly, is wrong with this picture? Marx does not say with any specificity. He is very definite in refuting the notion that exchange value is inherent in commodities as objects:

The objectivity of commodities as values differs from Dame Quickly in the sense that 'a man knows not where to have it.' Not an atom of matter enters into the objectivity of commodities as values; in this it is the direct opposite of the coarsely sensuous objectivity of commodities as physical objects. We may twist and turn a single commodity as we wish; it remains impossible to grasp it as a thing possessing value (pp. 138-39) (footnote omitted).

[T]he products of labour become commodities, sensuous things which are at the same time supra-sensible or social. In the same way, the impression made by a thing on the optic nerve is perceived not as a subjective excitation of that nerve but as the objective form of a thing outside the eye. In the act of seeing, of course, light is really transmitted from one thing, the external object, to another thing, the eye. It is a physical relation between physical things. As against this, the commodity-form, and the value-relation of the products of labour within which it appears, have absolutely no connection with the physical nature of the commodity and the material . . . relations arising out of this. It is nothing but the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things (p. 165).

Commodities have prices only as a consequence of a set of human practices that are social -- a set of human customs of interaction. Commodity prices are determined by the amount of labor time it takes to produce them only because of this same set of human practices. If the practices were different, there might be no commodities, or commodities might exchange at rates that were not determined by labor time. So long as men follow those social practices, however, the effect of the commodity economy is that the exchange process "reflects the social relation of the producers to the sum total of labour as a social relation between objects, a relation which exists apart from and outside the producers" (p. 165).

It may seem that there is a contradiction between the notion that commodities "embody" socially useful labor, that their value represents "congealed" labor time, and the notion that "the commodity-form and the value-relation of the products of labour within which it appears, have absolutely no connection with the physical nature of the commodity and the material . . . relations arising out of this" (p. 165). Marx insists endlessly that exchange value represents value and that value represents physical units of labor time that have been "incorporated" into the physical body of the commodity. Then he turns around and denies that value is in any way intrinsic to the commodities that embody it.

In fact there is no contradiction. Marx affirms that real people do real physical work that produces material objects that are then consumed. The issue is whether exchange value reflects an "inherent" or "natural" property of objects, or just a set of decisions about how many of them to make and who to give them to. Marx has already shown that, within his own definition, the exchange value of a given physical object can change suddenly and radically. The object itself is one and the same -- no iota of its physical self has changed -- but in its "commodity-self" it has suddenly doubled in value, or lost half its value. This happens whenever technological change increases or decreases the proportion of the total available labor that is necessary to produce a given number of objects of the given type. Those objects already in existence when the change occurs undergo a radical change in value, though all new objects will have from the beginning the "new value" corresponding to the new technological situation (pp. 144-46).

Marx has also shown that a change in or miscalculation of tastes can suddenly reduce or increase the value of objects already in existence. If it turns out that an object does not "fill a definite social need," then no one will buy it, and it will have no market value at all (p. 166). The labor embodied or congealed in it is simply wasted (pp. 129-31). In other words, both technological change and change in tastes can affect the value of an object without having any impact at all on its physical nature. Value can come into existence where there was none before, and value can be utterly extinguished. It seems to follow just as a matter of logic that value is not "in" the object in any physical sense. Market values are more like tags or signs that people put on objects that give directions about what to do with them, except in this case the sign on a particular object tells us not only who is supposed to consume it, but also how commodity producers are supposed to proceed with producing other like objects.

None of this undermines the "law of value." So long as independent producers try to maximize profit under a competitive regime, it will be true in the long run (according to Marx and his contemporaries) that market prices will be determined by standard labor inputs. The point is that it is the maintenance of a commodity system that makes this the case, rather than the qualities of the objects produced. Marx is concerned only with the illusion that the actual pattern of production and distribution is a necessary one, and not at all with the issue of its justice or injustice. Indeed, he can make his point on the assumption that a defetishized future community of producers would choose a pattern of production and distribution

similar to that which occurred under an earlier fetishized regime:

Let us finally imagine . . . an association of free men, working with the means of production held in common, and expending their many different forms of labour-power in full self-awareness as one single social labour force The total product of our imagined association is a social product. One part of this product serves as fresh means of production and remains social. But another part is consumed by the members of the association as means of subsistence. This part must therefore be divided amongst them. The way this division is made will vary with the particular kind of social organization. . . . We shall assume, but only for the sake of a parallel with the production of commodities, that the share of each individual producer in the means of subsistence is determined by his labour-time. Labour-time would in that case play a double part. Its apportionment in accordance with a definite social plan maintains the correct proportion between the different functions of labour and the various needs of the association. On the other hand, labour-time also serves as a measure of the part taken by each individual in the common labour, and of his share in the part of the total product destined for individual consumption. The social relations of the individual producers, both towards their labour and the products of their labour, are here transparent in their simplicity, in production as well as in distribution (pp. 171-72).

IV. CONCLUSORY AFTERWORDS

My Essay on American classical economic thought attempted to apply and develop Marx's analysis of the fetishism of commodities. Writers like Wayland, Walker, Bowen, and Perry⁵³ were, it seems to me, just the people Marx was attacking when he spoke of the persistence of fetishism even after Political Economy had revealed the law of value.⁵⁴ And it also seems his attack on them for naturalizing the social world of production and distribution was justified when one looks in detail at what they wrote. What follows are speculations on the impact of Marx's critique, and on its limitations as a model for understanding the role of ideology in social life.

A. Neoclassical Economics as a Response to the Marxist Attack on Classical Economics

Here is a tentative working hypothesis based on general reading.

⁵³ See *supra* notes 4-7 (citing works of these classical economists).

⁵⁴ See *supra* pp. 983-985.

I have neither fleshed it out nor tried, as yet, to document it.⁵⁵ I've stated it dogmatically here just to avoid repetition of qualifiers. The hypothesis is that the particular form of the modern neoclassical synthesis, with its much chastened but still apologetic version of welfare economics, should be understood as, in part, a liberal response to the Marxist (and the derivative institutionalist)⁵⁶ attack on classical political economy.

By the end of the nineteenth century, there was a spectrum of positions about the status of the capitalist economy. At one end were the classical political economists I described in the first Essay above. At the other were the Marxists, who argued that capitalism was unnatural, coercive, unjust, and (in its later crisis-ridden phase) destructive of social wealth. They also argued, on the grounds already discussed, that mainstream economics was an apologetic pseudoscience. A true understanding of the laws of capitalist development lead to the conclusion that capitalism would follow its inner logic straight to its own demise.

In the middle were the institutionalists, who saw as clearly as the Marxists the dependence of particular outcomes on the socially contingent legal/political structure of capitalism, but didn't believe in very general laws of economic life, either of a classical or a Marxist variety. They also didn't believe in revolution, but rather in socialist or social-Christian reform. They were akin to, the economist equivalents of the pragmatists in philosophy and the realists in legal theory.

The Marxist/institutionalist critique of the naturalist and apologetic character of classical political economy was a real threat to those swimming in the mainstream. It was an intellectual challenge, but also a political, specifically left-wing challenge. It came at a time when mainstream economists were developing, simultaneously, the marginalist analytic technique and the model of general equilibrium. These enormously important theoretical advances at first seemed to make it possible to refute the Marxist/institutionalist position, by showing, as Schumpeter put it, "that distribution according to the law of marginal productivity was 'fair'".⁵⁷

At the same time, the development of the apparatus of neoclassical economics was itself part of a general development toward positivism

⁵⁵ I presented a longer, very tentative version of this section as a paper at the University of Wisconsin in 1978. My main sources were J. SCHUMPETER, *supra* note 2, and B. SELIGMAN, *supra* note 17, at 3-253. My main intention here is to describe the general themes of the story that Seligman tells in meticulous detail.

⁵⁶ For references to the institutionalists, *see supra* note 45.

⁵⁷ J. SCHUMPETER, *supra* note 2, at 870.

in the social sciences. A major tenet of that movement was that concepts like freedom, justice, and nature should play no functional role in social scientific analysis, because they were inherently "value-laden," "subjective," or "metaphysical." Furthermore, many of the new economists were liberals (as opposed to Marxist revolutionaries, reforming socialists, or conservatives). This group played the card of science, to complex effect, against everyone else.

Against the Classics, they argued for a version of marginalism and general equilibrium theory that was uncompromisingly positivist. This meant accepting some important elements of the Marxist and institutionalist critiques, and abandoning freedom, justice, and naturalness altogether. Yet a much more modest welfare economics, based on a rigorous definition of efficiency, could still powerfully legitimate liberal reforms of the market that the conservative Classics had condemned as contrary to natural law.

Against the institutionalists, the neoclassics argued that their highly abstract and rigorous form of economics was much more like science, much more powerful than a mushy situational calculus based on the infinite plurality of empirical social and legal relations. Besides, the institutionalists were persistently guilty of making objective-sounding arguments about things like the public interest. Like the Classics they criticized, the institutionalists hadn't decisively split their social ethics from their positive analysis.

Against the Marxists, the neoclassics argued that their laws were analytically superior, going head-to-head on the terrain of science. At the same time, neoclassical welfare economics, for all its modesty, could be made to suggest strongly that there were deep, inherent advantages to a regulated mixed market economy over a totally planned one, even conceding that inequality was a bad thing.

The point of all of this, for my purpose here, is that neoclassical economics was a political reaction, both against the reactionary character of classical political economy and against the particular left-wing attack that rolled together criticism of the classics for being analytically wrong, for being unscientific, and for being apologetic. Marxism (and institutionalism), in this view, created neoclassical economics, by creating the situation of jeopardy for mainstreamers that the neoclassics responded to. Marx's Essay on the fetishism of commodities was one of the most important moves in this process.

It remains true, as Schumpeter said, that neither marginalism nor general equilibrium theory was in any sense the cause of the remaining apologetic content of neoclassicism. These techniques were materials out of which a partially relegitimizing new picture of the

economy could be created. I think it quite true that Marx would have used them, to his quite different purposes, had they existed in his time. But they were also much more than "just" analytic advances. They were means brought into being as part of an overall project that shaped their content.

In the neoclassical synthesis, the effacement of the role of the legal system, the modeling of economic life on bland assumptions of commodification and free exchange, and the consequent privileging of an abstract "market solution" over particularized, inefficient but equitable "regulatory" solutions, fitted both the program of making economics look as much as possible like physics or mathematics, and the program of legitimating liberal reformist responses to the social problems of capitalism. Had the innovating, resynthesizing, mainstream economists had different political motives, they might have plunged into the legal/institutional substructure of the market, rather than abstracting from it. We would have a different economic science, and, I think, a more useful one.

B. The Role of Law in the Theory of Commodity Fetishism

The short version of the fetishism of commodities is something like this: There is a "commodity mode of production" that has both a technical and a legal/conceptual element (people understand one another to be "owners"). Producers in this mode develop a form of consciousness, or understanding of their productive and distributive activities, that is appropriate to their situation. At first, they see the world governed by the value of commodities, but experience the fluctuations of value as arbitrary deviations from custom. Then they grasp value as congealed labor, and understand the fluctuations as reflecting changes in necessary labor time (or in "social needs").

This form of consciousness is fundamentally mistaken -- it is a false consciousness -- because in both its forms it naturalizes outcomes that are in fact contingent on the peculiar mode of social organization of production through commodity ownership. The key mistake is thinking that value is an attribute of the commodities themselves, rather than grasping that the values placed on commodities are a coded version of social decisions about what to produce and how to distribute it.

False consciousness is more than just a mistake; it blocks cognitive access to real possibilities of the situation. Because of it, people don't think of, or reject as unnatural or unworkable, alternative ways of organizing the economy that would be more humanly satisfying and more just. Because the error of fetishism blocks access to alternatives,

it is in an important sense a cause as well as an effect of the mode of production. This completes the dialectical circle: thought constitutes as well as being constituted by the social world it seems merely to reflect.

In this general form, Marx's analysis was an extraordinary accomplishment, and there is a sense in which it set the agenda for critical inquiry right to the present day. Much of the following commentary on commodity fetishism merely elaborates points Marx made elsewhere in his writing. Other parts reflect a twentieth century modernist critique of nineteenth century social thought in general, and are therefore as applicable to writers like Maine and Mill as to Marx. My quarrels are interstitial, meant to push the analysis along rather than to trash or derail it.⁵⁸

As I pointed out in some detail above, a set of legal conceptions, though no particular set of legal institutions, is part of the definition of the commodity mode of production. "The guardians [of commodities] must therefore recognize each other as owners of private property" (p. 178). Thus, law is at the center of the analysis of the mode of production, and the particular way we understand law will have an effect on how we understand the economy. But before looking at the conception of law that is implicit in Marx's discussion, it is well to note again that his approach in this Essay just doesn't fit the

⁵⁸ What follows is my version of a collective enterprise. Without trying to allocate credit for particular bits of the analysis, some contributions are: H. COLLINS, *MARXISM AND LAW* (1982); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Balbus, *Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law*, 11 *LAW & SOC'Y REV.* 571 (1977); Gabel, *Reification in Legal Reasoning*, in 3 *RESEARCH IN LAW AND SOCIOLOGY* 25 (S. Spitzer, ed. 1980); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 *MINN. L. REV.* 601 (1977); Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Kennedy, *Antonio Gramsci and the Legal System*, *ALSA F.*, Winter 1982, at 32 (1982); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205, 362-63, n.56 (1979); Klare, *Law-Making as Praxis*, *TELOS*, Summer 1979, at 123; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *TEX. L. REV.* 1307 (1979); Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981); Tushnet, *A Marxist Analysis of American Law*, 1 *MARXIST PERSP.* 96 (1978); Tushnet, *Marxism as Metaphor* (Book Review), 68 *CORNELL L. REV.* 281 (1983) [most of what I have to say is already in here]; Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"* (Book Review), 1977 *WIS. L. REV.* 81 (reviewing L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973)).

The main Marxist influences on this body of work appear to be E. GENOVESE: *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974); A. GRAMSCI, *PRISON NOTEBOOKS* (Q. Hoare & G. Nowell Smith ed. & trans. 1971); D. HAY, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (1975); E. PASHIKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* (1980); E. P. THOMPSON, *WHIGGS & HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975); G. Lukacs, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* (1968). See also M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* 78-108 (1980); A. GOULDNER, *THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY* 32-63 (1979).

notions of materialism and of economic determinism that are often attributed to him.

Marx does say that legal institutions and the state are superstructural, growing out of and depending on the base, which is the social mode of production. But legal concepts are built into the base itself, and legal concepts are anything but material. Indeed, the belief in the formative power of legal concepts is often ridiculed as an archetypical form of idealism (*i.e.*, of belief that ideas rather than material conditions drive history). Furthermore, if economic determinism is supposed to mean that economics determines society and culture, then to make Marx an economic determinist we have to exclude legal consciousness from culture, since a particular form of legal consciousness is an aspect of the economic base.

None of this means that a Marxist materialism is impossible. But such a position requires its proponent to develop a theory of how the truly material elements in the mode of production, such as technology, geography, and natural resources, lead producers to develop a particular legal consciousness. Marx himself, in the Essay under discussion, argues that "[t]he exchange of commodities begins where communities have their boundaries," and that they then, "by reaction, become commodities in the internal life of the community" (p. 182).

This doesn't sound to me like a developed materialist theory of why a community will treat its excess products as private property when dealing with a foreign community, or of why the internal "reaction" is inevitable once it does so treat them. There are many known examples of exchange between communities that are not based on private property notions, the "potlatch" being the most famous example. But maybe materialist explanations for the presence or absence of property consciousness under particular material circumstances are already available, and I'm just not aware of them (I doubt it).⁵⁹

According to Marx, once we have the commodity mode of production, with its constitutive legal consciousness, all we need is the social institution of competition for the law of value to become a scientific truth. And it is the naturalization of the law of value that is the essence of commodity fetishism:

Something which is only valid for this particular form of production,

⁵⁹ *But see* G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (1978), cogently criticized in Cohen, *Book Review*, 79 *J. PHILOSOPHY* 253 (1982) (reviewing G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (1978)). *Cf.* J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 25-42 (1971).

the production of commodities, namely the fact that the specific social character of private labours carried on independently of each other consists in their equality as human labour, and, in the product, assumes the form of the existence of value, appears to those caught up in the relations of commodity production . . . to be just as ultimately valid as the fact that the scientific dissection of the air into its component parts left the atmosphere itself unaltered in its physical configuration (p. 167).

In this respect Marx is just as different from the bourgeois economists as he thinks he is. They really did take law "for granted," as though property and contract were background facts like the geography of a region. They ignored the possibility that property and contract might have a humanly determined, formative impact on the outcomes they thought were natural.⁶⁰ The defetishization of commodities amounted to making law causally salient, and then emphasizing its human determination. This exposed the supposedly natural outcomes of the commodity economy as social artifacts.

As is always the case with the dereifying enterprise, the goal was to show that we can do things in a number of different ways, and ought consciously to choose among them, rather than merely submitting to the status quo. In this particular case, the dereifying enterprise achieved its goal, since all modern economists, including the neoclassical mainstreamers, have renounced naturalness and recognized the necessity of making some set of assumptions about the legal structure of production.

Yet when we look at the conception of law Marx chose when he brought law to the fore, it is strikingly similar to that of the classical political economists. Marx thinks he knows just what he means by property and contract, that by denominating them as the fundamental

⁶⁰ See the first Essay, *supra*, *passim*. In case you've forgotten, here is a last quote from Perry:

The natural laws of Production are inexorable in their operation. It is best for men to find out what these are, and then to conform to them their own economic action. If custom or legislation thwart these laws, they will take their revenge without pity, and lapse of time will only exhibit transgressors more clearly as firmly held in the grip of violated law. Nature prescribes to men the way to reach the best economic ends, by giving to all a consciousness of rights and impulses to maintain them, though it must be owned that there are impulses, too, to infringe upon rights, and also by giving that common sense by which mistakes are perceived and a sound experience gained; and the result of the play of all these for countless generations is expressed in such maxims as, Live and let live, A fair field and no favor, Honesty is the best policy, It takes two to make a bargain, and *Laissez faire*. Still, each generation shoots up a lusty crop of foolish and selfish men, foolish because selfish, and selfish because foolish, who think *they* know, how things had best be done, how Nature can be improved upon, and how those who trust themselves to *them* will be better off than if they trusted to their own sense of fair and right. . . .

A. PERRY, *supra* note 6, at 196-97 (emphasis in original).

principles of the consciousness of commodity producers he has told us the key fact that will allow us to know the content of the mode of production. The regime of property and contract is, for him as for the Classics, a single block, something you have or don't have, an "it" of sorts, albeit one of strictly human creation. Once we have it in place, it has its own interior logic, and that interior logic is what gives definition to the commodity mode.

For the Classics, the implicit legal background was the judge-made, common law regime of private law rules, understood as an inherently rational product of the evolution of custom, and at the same time as the coherent expression of first principles. For Marx, the background regime was the Continental, romanist system of codified property and contract rules, thought to represent the same first principles with the same inner coherence.

Like the Classics, Marx was perfectly aware that legislation was going on all the time. But, also like them, he was able to conceive this as a kind of embroidery on the surface of the essential structure. There was a sharp distinction between the conclusory discussion of contract and property consciousness as characteristics that define the commodity mode of production, and the various discussions of what Americans call police regulations in the public interest. The commodity mode remained itself through time because it embodied first principles in a coherent way, however much marginal adjustments might spoil the superficial symmetry of the facade.

Thus, Marx conceived the legal structure of the commodity mode of production as a coherent whole, with detailed subrules flowing rationally from the first principles (the whole modified in an episodic and superficial way by specific legislative interventions). It was therefore plausible just to take it as a given in analyzing economic changes within the history of that mode.

As with the Classics, the consequence of treating the background rules as a single coherent block was that Marx missed the crucial realist/institutionalist insight: there are many different regimes of specific legal subrules that are consistent with the indeterminate general notions of property and free contract. The law of value, the pricing of commodities according to labor inputs, will work differently according to which one of the alternatives the lawmakers select. Every modification of a ground rule of economic struggle modifies all allocative and distributive outcomes.

In short, Marx was a formalist (it's hard to see how he could have been otherwise, given the time at which he wrote). He defetishized commodities by revealing the dependence of the law of value on a

particular legal structure, but only partially defetishized law itself. He denaturalized it, in the positivist mode, by emphasizing its human origin, without cracking its appearance of coherence.

As a consequence, he could only partially denaturalize the law of value. In fact, there is not one but a multiplicity of different laws of value, depending on the detailed content of the background regime. And the choice among background regimes, and consequently among allocative and distributive outcomes, is an inescapably social choice, like the decision to have a commodity regime in the first place.

This brings us to a final consequence of applying a realist/institutionalist understanding of law to the theory of the fetishism of commodities. It is not only that the choice of specific definitions for all the subrules that compose the mode of production is a social choice. It is also that this choice can only be made ad hoc.

The legal system itself, no matter how firmly committed to the twin principles of property and contract, just does not supply us with the rational apparatus we would need in order to elaborate it in response to new cases. What this means is that the mode of production, essentially dependent as it is on its legal/conceptual component, cannot determine "on its own," so to speak, its own shape through time. In this respect, legal principles are just like commodities.

When new cases arise, legal practitioners deal with them through the techniques of interpreting precedent and interpreting first principles. Sometimes everyone agrees that a particular outcome is "legally correct." The system has enough closure so that it is proper to speak of a different outcome, under the circumstances, as a "legal mistake," or as evidence of bad faith in the law maker.

But it will often be the case, and often in the cases that have the greatest consequences for the future course of allocation and distribution, that the practical manipulation of the system does not produce closure. The rules of precedent point in two directions at the same time. The supposed first principles turn out to be circular, contradictory, or just so vague that an equally good argument can be made on either side.

Over and over again, historical actors, particular men and women, decide the content of the background regime of legal rules without determining guidance from the internal criteria of the legal system. They act with a measure of existential freedom, according to the complex of legal, ethical, and political factors, including class interests and historical and social stereotypes, that contribute to any decision

of a matter of importance in their particular culture. In this specific sense, law reduces to the subjectivity of the law makers.⁶¹

There is nothing abstract about this subjectivity, nor is it in any sense unconditioned. It is always in relation to a situation that is experienced as given. It does not transcend history, or even what the judge had for breakfast. But it is people choosing what to do; why flinch from calling it a species of freedom?

The way I've just put it has placed the emphasis on "lawmakers," on those who have institutional power to determine legal norms. But once we abandon the idealism (present in this respect just as much in Marx as in Hegel) that attributes particular rules to general principles, it is clear that lawmaking is often a process of struggle. Organized social groups make law all the time, in combat with other organized social groups. Official institutions deploy the manipulable rhetorical resources of legal reasoning to rationalize outcomes, *faits accomplis* of struggle, as often as to predetermine them. Sometimes, at the extreme, our best understanding of what happened will be in terms of the balance of raw force. What gets rationalized is the superior firepower of the Pinkertons, or the superior punching ability of battering husbands.⁶²

Breaking up the "law block," by recognizing the internal incoherence of legal doctrine, and the contingent constitutive role of law makers at all levels, eliminates an obstacle to understanding what happens when oppressed groups gain concessions through the legal system. These are not anomalies or deviations from the inner logic of capitalist law, but rather an inflection of the course of a moving

⁶¹ Studies of this process at work include C. SABEL, *WORK AND POLITICS*; Kainen, *supra* note 36; Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiating the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1 (1983); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635 (1982); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Vandavelde, *supra* note 30; Note, *supra* note 31.

⁶² There is nothing materialist about such a view; even when we refer to the force deployed as "raw," we are making a social judgment about where it falls on a scale, rather than a reference to nature or matter. The firepower of the Pinkertons, like the fist of the battering husband, is a thoroughly mediated physicality, by which I mean that the social and social-psychological contexts exert all kinds of influences on both the aggressor and the victim, decreeing for example that the battered woman be untrained in self-defense, that the crowd of workers lack a secret arms cache. See Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. REV. 623 (1980); see also H. Sitkoff, *THE STRUGGLE FOR BLACK EQUALITY: 1954-1980* (1981). It is a smug and ultimately empty Marxism that privileges lawmaking through physical confrontation over lawmaking through bourgeois institutional forms, on the mere ground that force is somehow closer to the "base." On the other hand, the failure of academic lawyers to acknowledge social organization, say, of workers, blacks, and women, as a constitutive force that makes law, is even worse. It suggests that concessions the oppressed wring from the ruling class with their blood are spontaneous emanations of the benevolent spirit of our laws.

project. They destroy the "symmetry" or "coherence" of law only for those on the right and the left who start with a mistaken conception of how legality works. There is neither a built-in limit to how far concessions can go, nor an inevitable process of unraveling if they go too far.⁶³

It is important to distinguish this sense of the subjectivity of law from two familiar radical notions. There is a long Marxist tradition of characterizing the state under capitalism as the executive committee of the ruling class, thereby reducing executive, legislative, or judicial action to a raw expression of class interest. There is also a long tradition of insisting that executive officers and judges under capitalism often twist, or plain break the rules in order to do in oppressed groups, thereby furthering their class interests.

Each of these critiques of legal institutions presupposes the existence and current functioning of something called the capitalist mode of production, understood to be a coherent system that is in a meaningful sense "in force." Indeed, it is against the background of this system, of its general and specific rules (*e.g.*, that judges should find facts in a neutral manner), that the critics assail the class bias of state officials.

The subjectivity to which the realists called attention, which they revealed through their critique of conceptualism, was and is of a different character. We are now talking about the rules seen as constituting the mode of production. The legal system does not come to bear on the working economy of capitalism through general principles, but through particular rules applied in particular cases.

The legal component of the mode of production is, in so much as it actually functions in the world, the collection of particular rules, not the general principles. Inescapably subjective or political decisions in cases (often very important cases) where the system fails of closure represent not biased deviations from the norms of capitalism, but the subjective reconstitution of those norms. This would not be a very interesting point if we could say that the principles, while not coming directly to bear on the cases, come to bear indirectly. Indeed, in the formalist mode of understanding law, every functioning rule of the legal system is closely linked to the defining

⁶³ Two valuable studies of how this process of gaining concessions works are Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, PAST & PRESENT Feb. 1976 at 30; Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, PAST & PRESENT Feb. 1971 at 76; see also Sugarman & Rubin, *Towards a New History of Law and Material Society in England, 1750-1914* in LAW, ECONOMY AND SOCIETY, 1750-1914; ESSAYS IN THE HISTORY OF ENGLISH LAW 1-123 (G. Rubin & D. Sugarman eds. 1984).

notions of property and free contract by the process of deduction (or more sloppy derivation) of particular from general propositions.

In this understanding, it is perfectly appropriate to see the commodity system as the same thing through time, since the general principles assimilate new cases through new particularizations that leave its "essential character" unchanged. So long as its basic principles are property and contract, we have "the commodity mode of production," no matter what content those principles have assumed to fit the variety of possible concrete situations. And if the commodity mode is the same through time, it is not implausible that we can discover the laws that govern its evolution.

But the whole point of recognizing the element of subjectivity, of nonclosure in the legal system according to its own criteria, is that we sometimes can't identify, in the new cases, which decision actually enforces the norms of property and contract, because there are two quite opposite plausible arguments as to what those concepts mean here. The gradual accretion of decisions that are in this way ungroundable in first principles is also the gradual reconstitution of the mode of production, as it exists practically at any given moment in time.

But don't the general principles provide enough general guidance, as well as enough specific, tightly derivable outcomes, so that we can regard the subjectively based, ungrounded decisions as mere interstitial filling in of a well established outline? I don't think this question can be answered in the abstract.

For some purposes, for example purposes of contrast with Inca civilization, it seems perfectly reasonable to treat the legal system of the United States as "essentially the same" today as it was in 1685, and as "essentially the same" as the legal systems of France and Germany. Furthermore, for this purpose it seems reasonable to characterize all these systems as the commodity mode of production, on the ground that they are all recognizably organized around property and contract notions that were not present among the Incas.

On the other hand, suppose that we are anxious to discover the laws of development of the capitalist economy. It doesn't seem at all plausible to me that we will want to ignore the massive differences between these commodity regimes, each of which is or was, at least arguably, equally faithful to the guiding abstractions of property and contract. In other words, I would assert that the indeterminacy of the internal criteria of legality is great enough as a matter of fact so that, for purposes of the kind of social theory Marxists are interested in, we must regard the notion of the commodity form as hopelessly imprecise.

The commodity form in a particular economy is an artifact of a flexible human practice of legal adaptation that is adrift in time, so to speak, rather than directed along definite lines by guiding abstractions. The degree of drift is great enough so that, if we are interested in the distribution of income or the allocation of resources, we must be attentive to its particular course, accepting its historical contingency when viewed from the point of view of the aspiration to science in social theory.⁶⁴ And though we may learn to

⁶⁴ On this point, see J. SARTRE, *CRITIQUE OF DIALECTICAL REASON* 15-41 (A. Sheridan-Smith & J. Ree trans. & ed. 1976). The single best formulation I have seen is that of Colliot-Thevenet, *supra* note 48, at 426-29, which I will quote at some length, since it does not seem to be familiar to American readers interested in this subject:

But, however different the implicit paradigm of the Marxian approach may be in comparison with the formal models inspiring political economy today, it shares a major hypothesis with them. When it is applied to the sphere of socio-economic relations, the Marxian paradigm imposes on them the form of a closed totality endowed with 'natural' laws, that is, laws independent of possible interventions of the political, juridical, or social instances. Marx has taken up, without hesitation, the postulate from bourgeois political economy according to which the world of socio-economic relations is inhabited by a spontaneous dynamic, is regulated by an immanent order. . . . It was indeed a deep conviction of Marx himself that it should be possible in principle to clear away the semantic wool surrounding the concept of 'natural' and to isolate a *purely theoretical* meaning of the apologetic interpretations. For him the great merit of classical political economy was to have recognized the 'Naturwuchsigkeit' of the processes of commodity-producing economy; its main defect was to have ignored its historical character. But we must emphasize this: the 'Naturwuchsigkeit', the quality peculiar to the phenomena of commodity-producing economy, is the means by which those phenomena can be the subject of reflection within a closed system of scientific laws. Or again, the form which scientific study *ought to take* -- the deployment of explanation starting from a single founding law -- is determined by the supposed property of the object which Marx calls its 'Naturwuchsigkeit'. As a result, to acknowledge this property meant the limitation, right from the start, of the possibilities of the *critique* of political economy. Doubtless this critique could reveal the sociological presuppositions of bourgeois economic theory. There was no great difficulty in showing that the behaviours of economic agents, which that theory took to be the expression of natural passions (in particular the search for the maximization of profit), are imposed on them by the specific historical structures of capitalist commodity production. But it was not possible to go beyond the stage of putting into historical perspective the capitalist system of production and the internal arrangements of the economic theory it permitted. In particular, after having posited that the system of capitalist commodity relations was endowed with a law of internal regulation, it was quite out of the question to demonstrate that its destructuring was inevitable.

One wonders whether the supposed autonomy of the field of the Economic, that is, the attribution to the sphere of economic relations of an intrinsic legality which isolates it in an abstract way from the other modalities of social relations (in particular, the juridical and political modalities) is not an excessively narrow interpretation of the theses of historical materialism as they are presented in the first part of *The German Ideology* or in the classic formulation in the *Preface to A Contribution to the Critique of Political Economy*. . . . Now these relations of production are defined as entailing juridico-political (even ideological) conditions as well as economic ones. The free subjects who meet in the act of exchange of commodities or in the labour contract (a particular form of exchange), are free only through the agency of a legislation and a

understand that course of drift better than we now do, it won't be through the refinement of the notions of property and contract that define the commodity regime in the abstract.

I conclude that a realist/institutionalist understanding of law destabilizes Marx's notion of the commodity mode of production in much the same way that it destabilizes the law of value. As I have interpreted it, this understanding of law is the enemy, in our understanding of social and economic life, of false necessity, in the same way that Marx's analysis of commodity fetishism is the enemy of false necessity.

power which appear in this light to be just as much conditioning as conditioned. Marx in fact is on occasion ready to recognize that certain types of relations of production can have extra-economic constraints as their condition of existence. . . . The concept of commodity fetishism, once again, had the task of accounting for the reifying mystification undergone by the relations of production in the commodity producing economy. Yet how are we to understand this mystification? If the 'naturalness' of economic laws is definitely illusory, the critique of political economy must deny the very existence of the object of political economy and not simply its claim to validity for all historical epochs. On the contrary, by according the categories of bourgeois economy an objective validity, even if a relative one (*Capital*, I, pp. 80-81), it may be that Marx himself has in the end fallen into the trap of the ideology secreted by the functioning of capitalist society, an ideology which assigns to the Economic precisely that place where the discourse of *Capital* is still situated.