

MARX ON BOURGEOIS LAW

Gary Young, MADISON, WISCONSIN

In the last few years there has been a resurgence (or perhaps simply a "surgence") of theoretical work on Marxist theory of the state and "superstructural" aspects of society generally (Gold et al., 1975). Presumably the starting point for such work should be Marx's own views on the "superstructure." Unfortunately, Marx gave these aspects of society little sustained analysis. The primary exception to this is to be found in his discussions of law. These are of two kinds. Most famous are Marx's abstract, programmatic statements about the place and function of law in social structure. Rarely studied are his accounts of a few relatively specific bourgeois legal institutions and laws. In what follows, I wish to ask to what extent the specific analyses exemplify the general statements, and by the way provide some suggestions for a Marxian theory of law.

Upon this inquiry I shall place several limits. First, I shall consider only the writings of Marx, not those of Engels. The view that Marx and Engels agree on all matters is to be proved, not assumed, and it cannot be proved until we know what each man thought in his own right. Second, I shall

Research in Law and Sociology, Volume 2, pages 133-167

Copyright © 1979 by JAI Press Inc.

All rights of reproduction in any form reserved.

ISBN: 0-89232-111-3

consider only Marx's mature writings, those produced no earlier than the initial elaboration of the theory of surplus value in the *Grundrisse* (1857–59). As we shall see, Marx's mature accounts of bourgeois law are unintelligible apart from that theory. There is no reason to assume that what Marx says before 1857 about law would still be plausible in the context of his post-1857 theory.

Third, I shall not elaborate upon difficulties in the theory of surplus value, the labor theory of value, or the theory of wages upon which Marx's analyses of law rest. I shall only assume that those difficulties are not insurmountable, so that an examination of the analyses is not a waste of time. Finally, I shall not question Marx's empirical claims, for instance regarding the Factory Acts, although he might have misread the evidence then available, or we might now have better evidence yielding different conclusions.

These limits will allow us to focus upon the theoretical relations Marx saw between law and the economic relations of society. They also mean that the conclusions we draw from Marx's texts might be open to challenge on empirical or theoretical grounds.

Current attempts at theorizing sometimes ignore difficulties that Marx saw, or treat as uniquely important a line of thought that in Marx's writings was but one of several within a complex analysis of law. At appropriate points, I shall suggest several ways in which Marx has the better in these disagreements. But I make no attempt to present a comprehensive critique of recent Marxist work on the state or even the law. My primary emphasis is upon the contours of Marx's own thought.

I. MARX'S ABSTRACT THEORY OF LAW

Marx's programmatic statements about law are few and brief. The most complete is perhaps also the best known:

[T]he guiding principle of my studies can be summarized as follows. In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or—this merely expresses the same thing in legal terms—with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in

the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic—in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production (Marx, 1970, pp. 20–21).

Here Marx distinguishes three aspects of the social structure: the production relations (the “economic structure,” the “real foundation”), the forces of production, and the legal, political, and ideological superstructure. He suggests that contradictions between the first two cause social change, and in particular cause changes in the superstructure. Elsewhere (Young, 1976), I have argued that this abstract formulation misrepresents the position found in Marx’s concrete theory of capitalist production, according to which the driving contradictions of capitalist production lie wholly within the production relations, not between those relations and the productive forces. The key to understanding the legal superstructure, therefore, lies within the production relations themselves. (We shall see below that there can be important interactions between the legal structure and the productive forces (Sect. IX). But that interaction is always mediated by the production relations.)

The production relations are defined in terms of the appropriation of unpaid surplus labor:

The specific economic form, in which unpaid surplus-labor is pumped out of direct producers, determines the relationship of rulers and ruled, as it grows directly out of production itself and, in turn, reacts upon it as a determining element. Upon this, however, is founded the entire formation of the economic community which grows up out of the production relations themselves, thereby simultaneously its specific political form. It is always the direct relationship of the owners of the conditions of production to the direct producers—a relation always naturally corresponding to a definite stage in the development of the methods of labor and thereby its social productivity—which reveals the innermost secret, the hidden basis of the entire social structure, and with it the political form of the relation of sovereignty and dependence, in short, the corresponding specific form of the state. This does not prevent the same economic basis—the same from the standpoint of its main conditions—due to innumerable different empirical circumstances, natural environment, racial relations, external historical influences, etc., from showing infinite variations and gradations in appearance, which can be ascertained only by analysis of the empirically given circumstances (Marx, 1967b, Vol. 3, pp. 791–92).

Production relations, in other words, are essentially class relations, between the class of those who control the means of production and the class of those who do not.

Marx says that law is “an ideological form in which men become conscious of this conflict [viz. between the forces and relations of production] and fight it out.” I have already suggested that this is misleading, in that generally Marx places the basic contradiction of capitalist production wholly within the production relations. It is also misleading because, as we shall see, the conflict of which people become conscious in law is not the economic contradiction within the production relations, but the conflict between class interests within the production relations. These two conflicts, though related, are distinct in Marx’s theory (see Young, 1976, pp. 232–33).

Assuming for purposes of what follows that these two corrections are justified, we have the following abstract picture. On one hand, phenomena and changes in the legal superstructure “arise from” phenomena and changes in class relations at the level of the social relations of production. On the other hand, law can affect those class relations in a twofold process. First, law is an “ideological form” by which people conceptualize and experience (correctly or incorrectly) the class relations they live. Second, law is a means by which people intend to maintain or alter those relations, usually but not always as they are already conceptualized in law.¹

This abstract theory is not much help in understanding particular legal institutions or laws. For this, we must turn to Marx’s analyses of specific legal institutions and laws. Just as most of Marx’s writings concern capitalist production, so nearly all of his remarks about specific aspects of law concern bourgeois law, and indeed English bourgeois law. Only three aspects of that law are given thematic treatment in Marx’s account of capitalist production: (1) the common law of contracts, (2) the Factory Acts, and (3) laws promoting the transition to capitalist production. If we wish to understand Marx’s notion of law as superstructure arising upon an economic basis, we must then ask: Upon what economic basis do these three aspects of law arise, and just what is their relation to that basis?

II. MARX’S PICTURE OF CAPITALIST PRODUCTION

Let us begin by reviewing some perhaps familiar features of Marx’s theory of capitalist production. Marx presents the rudiments of his picture of capitalist production by first raising a problem concerning the intelligibility of capitalist production (in *Capital I*, Chs. 4–7), and then offering his solution to that problem. The problem arises from two aspects of the process of exchange or circulation in capitalist production. On the one hand, commodities on the average exchange in proportion to their value. The value of a commodity is, roughly speaking, the quantity of labor-time expended in its production (here I ignore qualifications that would be important in other contexts). So if it takes twice as long to make a pair of shoes as to make a pair of socks, on the average two pairs of socks will

exchange for one pair of shoes, two pairs of socks will be worth one pair of shoes, and the price of two pairs of socks will equal the price of one pair of shoes. Marx (1967b, Vol. 1, Chs. 1–3, pp. 158f) holds that this “law of value” obtains in all systems of commodity production, including non-capitalist commodity systems in which all producers are self-employed and no one works for wages (see also Sweezy, 1942, Ch. 3).

But, on the other hand, in capitalist commodity production, a second feature appears which is hard to reconcile with the law of value: the capitalist makes a profit. The capitalist makes a profit by first purchasing for a certain amount of money the raw materials, tools, machines, and so forth that he needs to produce his product, and hiring workers to do his bidding, and then selling for a greater amount the products he produces with these factors of production. The value represented by this increment in money Marx calls “surplus value” (1967b, Vol. 1, Ch. 4, p. 150).

The difficulty lies in understanding how the law of value can obtain and yet the capitalist acquire surplus value. In other words, from where does surplus value come? Marx first argues that surplus value cannot arise from the process of exchange or circulation of commodities. By the law of value, commodities on the average exchange in proportion to their value; some deviations from exchange at value are possible, just so these balance each other out in the long run. Marx (1967b, Vol. 1, pp. 157–60) has little trouble showing that if commodities all exchange at their values, surplus value could not arise from exchange of commodities alone. But what if a capitalist is able to buy cheap and sell dear? What if he is consistently favored by those deviations from exchange at value that are consistent with the law of value? Might not this explain the origin of surplus value in exchange, without contradicting the law of value? This is the account capitalists often give of profits (Marx, 1967b, Vol. 1, pp. 540–41; Vol. 3, pp. 38ff, 43f). Yet Marx rejects it:

A sells wine worth £40 to B, and obtains from him in exchange corn to the value of £50. A has converted his £40 into £50, has made more money out of less, and has converted his commodities into capital. Let us examine this a little more closely. Before the exchange we had £40 worth of wine in A's hand, and £50 worth of corn in B's hand, a total value of £90. After the exchange we still have the same total value of £90. The value in circulation has not increased by one iota, it is only distributed differently between A and B. . . . The same change would have taken place if A had directly stolen [*gestohlen*] the £10 from B, without the form of exchange as a veil. The sum of the values in circulation clearly cannot be augmented by any change in their distribution (Marx, 1967b, Vol. 1, p. 163).

Surplus value is not merely an increment in the value in the hand of one capitalist, but an increment in the aggregate value within the capitalist system (see also Marx, 1971, Vol. 3, p. 20; 1974a, p. 424; Marx and Engels, 1969, pp. 207–9). Buying cheap and selling dear cannot augment total social

value. Henceforth, Marx therefore assumes that commodities always exchange at value.

The result of this analysis is that turn and twist then as we may, the fact remains unaltered. If equivalents are exchanged, no surplus value results, and if non-equivalents are exchanged, still no surplus value. Circulation, or the exchange of commodities, creates no value. . . . The owner of money, as yet only a caterpillar capitalist, must buy his commodities at their value, must sell them at their value, and yet at the end of the process must withdraw more value from circulation than he threw into it at starting. His transformation into a butterfly must take place both within the process of circulation and outside it. These are the conditions of the problem. *Hic Rhodus, hic salta!* (1967b, Vol. 1, pp. 163, 168).

In the next two chapters (6–7) Marx sets about solving the problem, within these conditions. First, in chapter 6, he turns to a transaction within the process of circulation that makes possible the metamorphosis of the money-owner into a capitalist. Then, in chapter 7, he turns to a transaction outside circulation that virtually completes the metamorphosis. The first transaction is the wage-exchange, the second the extraction of surplus value during the process of direct production.

We can understand Marx's argument at this point if we reflect upon the implications of the assumptions he has already made. Surplus value does not arise within the circulation process, where commodities are exchanged. It must therefore arise from the use of commodities, outside circulation.² The capitalist must employ a commodity whose use creates value. But by the labor theory of value, that can only be a commodity whose use is to labor. The only such commodity is the capacity to labor, or labor power. This is the commodity the capitalist must purchase, and he can purchase it only from its owner: the worker.³

Labor is the use, manifestation, or exercise of the capacity to labor, just as running is the exercise or use of the capacity to run. To purchase labor power, the capitalist must pay its owner—the worker—its value, as with any other commodity. But the value of labor power is just the quantity of labor required to maintain the worker for the duration of the employment contract and to contribute proportionally to the raising of future workers (Marx, 1967b, Vol. 1, p. 171). In return for this payment, in the form of wages, the capitalist acquires the right to use the worker's labor power for the duration. He orders his newly bought commodity to his factory or field and begins to use it. He uses it to the point at which its use has created value equal to that paid its owner in wages, and then he uses it some more. He makes the worker engage in "surplus labor." But this labor, just as much as that which preceded it, is the use of labor power the capitalist has purchased, and its product belongs to the capitalist too. The capitalist now owns products whose value is greater than that of the factors he used to produce them. If he sells those products at their value, or even below their

value but for more than his cost of production, he will have acquired surplus value in the form of money and made a profit.

In sum, there is but one explanation of the source of surplus value which is consistent with the labor theory of value and the law of value: the capitalist buys labor power and uses it to create more value than it itself is worth. Recalling the problem he had set himself earlier, Marx (1967, Vol. I, p. 194f) comments:

Every condition of the problem is satisfied, while the laws that regulate the exchange of commodities have been in no way violated. Equivalent has been exchanged for equivalent. . . . This whole process, the conversion of money into capital, takes place both within the sphere of circulation and outside it. It takes place within circulation, because conditioned by the purchase of labor power in the market. It takes place outside circulation, because what is done within circulation is only a stepping-stone to the production of surplus value, a process which is entirely confined to the sphere of production.

These are the rudiments of Marx's picture of capitalist production. Capitalist production as a whole comprises two processes, circulation and direct production. In circulation, which is governed by the law of value, or the law that commodities exchange according to their values, the decisive exchange is that of the worker's labor power for the capitalist's money. In direct production, the decisive transaction is the extraction of surplus value from the worker by the capitalist. These two transactions constitute the production relations between workers and capitalists; they constitute "the specific economic form in which unpaid surplus labor is pumped out of [the] direct producers." These two classes, defined by their relations, have conflicting interests: it is in the interest of capitalists (individually and as a class), but contrary to that of workers, for capitalists to control the means of production and extract surplus labor from those who do not.

III. LAW AS IDEOLOGY

Marx calls law one of the "ideological forms" in which people become conscious of class conflict and fight it out. He thereby attributes two functions to law: law is ideology and law is coercive instrument. The latter function of law is not difficult to grasp. Once we know what classes comprise society and what their respective interests are, we can understand in general what it is to say that one class uses the law as coercive instrument to foster its own interests. We shall see examples of this below (see Sects. VII–VIII, law halfheartedly aiding the workers, and Sect. XI, law resolutely aiding the nascent capitalists). Law as ideology is less accessible.

An ideological proposition (or systematically related set of propositions) is, in Marx's sense of ideology, defined by its function in furthering the

interests of a given class. For example, a proposition belongs to bourgeois ideology if and only if its acceptance by some or all of those in bourgeois society serves the class interest of the bourgeoisie (for a fuller discussion, see Young, 1978, Sect. VIII).

So defined, an ideological proposition must be capable of being believed. Now in a familiar, simple-minded view, the legal system uses words only to command. But commands are susceptible only of compliance or non-compliance, not belief or disbelief. In this view, the legal system therefore might seem to fall outside the sphere of ideology, to be reduced to purely coercive or regulatory institutions. Of course, the imperative theory of law has little plausibility, at least in this crude version. But it is worth briefly considering how the reasons for its implausibility are related to the function of law as ideology.

To begin with, even if legal language were wholly in the imperative mood, the employment of commands of law would normally presuppose that the referents of the substantives in those commands both exist and are correctly characterized in the commands. If a statute provides for sanctions against employers who make their employees work over twelve hours a day, then invocation of that statute (indeed, its very drafting) presupposes that there exist employers and employees, and that some of the former, if left to their own devices, will desire and be able to require their employees to work more than twelve hours daily. Moreover, the employment of such commands of law would also presuppose that invoking them is not wholly irrational given the way the world is, that there is some implicit justification or at least rationalization for their application to a given set of facts.

But the speech of law is not wholly in the imperative mood. Judges in their opinions rely upon express assumptions or findings about not only particular fact situations but also large-scale features of society. The policies and interests lawmakers seek to further in their laws are often stated in indicative preambles to their imperatives.

In these ways the legal system employs propositions whose acceptance can serve to further the interests of one class or another. To understand the bourgeois legal system, we must understand bourgeois ideology.

IV. PICTURES OF CAPITALIST PRODUCTION IN BOURGEOIS IDEOLOGY

Marx's account of the origin of surplus value is also an answer to the central problem posed by classical bourgeois political economy. That problem is, in Ricardo's words, to determine the laws which regulate the distribution of the produce of the earth among the three classes of the community: landowners, capitalists, and laborers.⁴ The kernel of Marx's answer—he

considers landowners only in *Capital III*—is that capitalists buy labor power from workers and then extract surplus value from them during direct production.

This answer probably strikes most of us as counterintuitive, even those of us who find Marx's theory persuasive or plausible. Readily apparent features of our society argue against it. The most important of these is that workers are usually paid by the hour. A worker's pay is calculated by multiplying his or her hourly wages by the number of hours he or she has worked, so that all hours worked are paid for. It therefore appears to us that workers sell hours of labor, not labor power.

This appearance, presented to us by our daily interaction in bourgeois society, is taken at face value by bourgeois ideology. No matter how bourgeois ideology answers Ricardo's question—and within that ideology, several different answers are possible—the answer is always affected by the unquestioned assumption that workers sell labor for wages.

We have seen that Marx, on the contrary, held that workers sell their labor power. So he regarded the appearance that wages buy labor as misleading or false, even though it arises from the very structure of bourgeois society. The causes of this "necessary illusion" within the structure of capitalist production relations need not be discussed here. Our interest is in the effect of this appearance upon bourgeois ideology, which accepts it uncritically. Upon this false appearance, Marx (1967b, Vol. 1, p. 540) says,

rest all juridical conceptions of workers as well as capitalists, all mystifications of the capitalist mode of production, all its illusions about freedom, all the apologetic shifts of the vulgar economists.⁵

The central role of this false appearance in bourgeois ideology becomes evident when we reflect upon the alternative accounts of distribution in general and surplus value in particular that are available to one who, wittingly or not, rejects Marx's view that wages buy labor power.

To begin with, one might suppose that surplus value is created by the workers during direct production, just as Marx does. Marx (1971, Vol. 1, pp. 86–88; Vol. 2, pp. 399–403, 417ff) ascribes this view to Smith and Ricardo, the two great classical bourgeois political economists. He even goes so far as to suggest (Marx, 1967b, Vol. 3, pp. 44, 243, 827; 1971, Vol. 2, p. 406; Vol. 3, p. 481; Marx and Engels, 1975, p. 179) that the ordinary capitalist had an "inkling" of the origin of profits in unpaid labor, at least when most surplus value was generated by lengthening the working day instead of increasing productivity. This inkling lay behind bourgeois opposition to the Factory Acts, which limited the length of the working day. But in Smith and Ricardo, as in Marx, this theory of the sources of surplus

value rests on the labor theory of value and the law of value, and the view that wages buy labor is inconsistent with these underpinnings. If wages buy labor, then in an average exchange, the value of the wage will equal the value of the labor the wage buys. But what can the "value of labor" be, on the labor theory of value? On Ricardo's view, says Marx (1971, Vol. 2, p. 400),

the value of labor is therefore determined by the means of subsistence which, in a given society, are traditionally necessary for the maintenance and reproduction of the laborers.

But why? By what law is the value of labor determined in this way? Ricardo has in fact no answer, other than that the law of supply and demand reduces the average price of labor to the means of subsistence that are necessary (physically or socially necessary in a given society) for the maintenance of the laborer. He determines value here, in one of the basic propositions of the whole system, by demand and supply— as Say notes with malicious pleasure.

Ricardo has, in fact, no other answer, because the only other possible answer is absurd:

If this principle [the labor theory of value] is rigidly adhered to, it follows, that the value of labor depends on the quantity of labor employed in producing it— which is evidently absurd (Bailey, quoted in Marx, 1971, Vol. 2, p. 401, and 1967b, Vol. 1, p. 535N1).

Marx never explains just in what this absurdity consists, but pretty clearly it is that to speak of the labor used in producing labor, where this is not just a misleading way to speak of the labor used in producing labor power, is to suggest that behind the apparent activity of labor lies another, secondary activity of labor which produces the first. If this makes any sense at all, which is doubtful, it seems to engender an infinite regress, for it is then the secondary activity which is really exchanged for wages, and we must therefore ask what its value is.

The labor theory of value and the law of value cannot coherently explain "the value of labor." Once we accept the legitimacy of the expression "the value of labor," we are driven to understand the value of labor in terms of supply and demand. On Marx's view, supply and demand merely affect the prices of commodities, making those prices fluctuate about an equilibrium price determined by the law of value. But the entry of supply and demand considerations into the very heart of the labor theory of value, in the account of labor, in the end reduces the labor theory of value to its opposite, a subjective utilitarian theory of value.⁶

The inclusion of the view that wages buy labor within the otherwise essentially correct accounts given by Smith and Ricardo thus renders their theories unstable and vulnerable to criticism not only by Marx (who attacks their claim that wages buy labor), but by later bourgeois theorists (most of whom reject the labor theory of value). It also kept Smith and Ricardo from

a clear awareness of the implications of their own accounts (Marx, 1967b, Vol. 1, p. 538).

Because of this theoretical difficulty, as well as the growth of a working class movement and the need this aroused for an uncompromising bourgeois ideology (Marx, 1967b, Vol. 1, p. 14f), the classical bourgeois account of surplus value came under attack. Available as replacements for the classical view were three analytically distinct accounts, which can be seen as departing increasingly from Marx's own theory.

First, without abandoning the labor theory of value, one could hold that profits are created by entrepreneurial labor done by capitalists (Marx, 1967b, Vol. 3, pp. 379–90; 1971, Vol. 3, pp. 355–58, 492–98). But in the context of the law of value and the labor theory of value, this first alternative requires us to reckon not only “the value of the worker's labor” but “the value of entrepreneurial labor.” And this leads to the same difficulty that Ricardo encountered.

Second, one could hold that surplus value is created in direct production, but not by human labor (capitalist or working class): the means of labor as such—machinery, raw materials, nonhuman energy sources, and so forth—not only transfer the value they embody but also create new value as they are used or incorporated in production (Marx, 1967b, Vol. 3, pp. 44, 825, Ch. 48; 1971, Vol. 2, pp. 69, 347; Vol. 3, pp. 481–85). This position is hard to understand, but it seems to involve an extended labor theory of value according to which the “labor” of machines (to take the simplest example), that is, their movements in the production process, creates the value that appears as profit, while the labor of workers creates the value of their wages. Even on this extended theory of value, however, Ricardo's difficulty arises, for we must still give meaning to the notion of the value of the worker's labor. (And are we now also to regard the sale of a machine as the sale of so much “machine labor”?) The only consistent way to give meaning to this notion seems to be to define the “value” of a commodity in terms independent of that commodity's production. “Labor” is not something that is produced; what is produced, if anything, is labor power, the capacity of the worker to work.

This explains the superiority of the fourth alternative, which abandons altogether the idea that the source of surplus value lies in direct production, and claims that surplus value arises in the circulation process, either as a result of individual capitalists buying cheap and selling dear, or (more plausibly) as a result of general features of exchange *per se* (see Marx, 1967b, Vol. 1, pp. 540–41; Vol. 2, p. 125f; Vol. 3, pp. 38ff, 43f; 1971, Vol. 3, pp. 20–22; 1974a, pp. 240f, 424; Marx and Engels, 1969, pp. 207–209). Opting for this last alternative requires a radical change in the notion of value, from that typical of Marx and (with qualifications) Ricardo, to that associated with, say, Marshall or Samuelson.

This last, Marx says, is the view embodied in bourgeois law, the dominant bourgeois economic theory (which Marx called “vulgar”), bourgeois democratic theory (liberalism), and the spontaneous consciousness of workers and capitalists alike.⁷ Perhaps the prevalence of this particular form of bourgeois ideology lies not only in its avoidance of Ricardo’s difficulty, but also in the fact that once one takes seriously the possibility that surplus value is created in direct production, it becomes hard to stop short of the view that it is created by the working class. It is hard to credit the view that surplus value is created by the entrepreneurial labor of capitalists (was Andrew Carnegie’s labor *that* creative?) or the mysterious view that machines and land create profits. In later sections I shall ignore the latter two positions.

Despite their important differences, each of these bourgeois theories of surplus value accepts at face value the appearance that wages buy labor.

The profit that the capitalist makes, the surplus value which he realizes, springs precisely from the fact that the laborer has sold to him . . . his labor power itself as a commodity. . . . But now, in order to justify profit, its very source is covered up (Marx, 1971, Vol. 1, p. 315).

Except for the unstable synthesis of Smith and Ricardo, each theory, though purely descriptive of capitalist production, pictures the creation of profits in such a way that a justification for profits thus created comes easily to mind. Profits belong to the capitalist because they are his wages for entrepreneurial labor, by which he created them, or because they were created by his “capital” (machinery, etc.), or because they came to him through a series of exchange transactions between free and equal parties. This normative attractiveness of the theories, from the perspective of the class interest of the bourgeoisie, derives from their common feature, their acceptance of the view that wages buy labor. When we replace this with the view that wages buy labor power, the justification of profits becomes much more troublesome.

V. CONTRACT LAW

In Roman law, the *servus* is . . . correctly defined as one who may not enter into exchange for the purpose of acquiring anything for himself (see the *Institutes*). It is, consequently, equally clear that although this legal system corresponds to a social state in which exchange was by no means developed, nevertheless, insofar as it was developed in a limited sphere, it was able to develop the attributes of the juridical person, precisely of the individual engaged in exchange, and thus anticipate (in its basic aspects) the legal relations of industrial society, and in particular the right which rising bourgeois society had necessarily to assert against mediaeval society (Marx, 1974a, p. 245).

Marx develops this theme in several places: bourgeois law is the legal expression of the commodity exchange relationship; it presupposes a

juridical person defined by the idealized characteristics of an individual engaged in exchange (see Marx, 1974a, p. 243; 1967b, Vol. 1, pp. 84, 176; Vol. 3, pp. 339–40). Juridical persons are free and equal, capable of owning property and alienating it voluntarily by exchange. Since the production relation typical of commodity exchangers lies precisely in their exchange of values (Marx, 1967b, Vol. 1, p. 79), bourgeois law mirrors those relations in idealized form. In commodity production, the exchange of values occurs by agreement or contract. Marx therefore directs this analysis primarily to bourgeois contract law, and derivatively to other areas of law with essentially the same structure and presuppositions as contract law.

Marx says (1967b, Vol. 1, p. 737) that, once established, capitalist-worker relations can exist independently of the legal superstructure. If so, then the primary function of contract law in bourgeois society, as applied to the wage-contract, would seem to be ideological, not coercive, regulatory, instrumental, or facilitative. What might the ideological function of contract law be? Contract law is homologous to the market, and therefore (one might argue) must exclude what is outside the market, including the extraction of surplus value during production. The exclusion of capitalist exploitation from contract law furthers capitalist class interests by directing attention away from the conflict of class interests. On this account, contract law would be part of bourgeois ideology as described in sections III and IV.

Cows give milk outside the market, however. Does that mean that contract law “excludes” the activities of dairy farms? Must a judge who is asked to enforce an agreement to sell dairy cows exclude from his or her mind the utility of cows? Why then must a judge applying contract law to a wage agreement ignore or be ignorant of the utility of labor power, that is, the extraction of surplus value, and do so because he or she is applying contract law, not merely because of some independent beliefs he or she happens to hold about society?

Marx could respond that contract law is committed to the presupposition that contracting parties must be equal, free from each other’s coercion, and understand the nature of their agreement, for their contract to be valid. But if the parties to the wage contract met these requirements, the contract would not result in exploitation: that is, there would be no wage labor. Workers would not knowingly and freely consent to be exploited. True, courts will not scrutinize the adequacy of consideration in individual contract cases. But here we have a *type* of contract which in virtually every instance commits the worker to being exploited. The reasons usually advanced for not looking at the adequacy of consideration (the parties are the best judges of value; such scrutiny takes excessive court time), however plausible in individual cases, are not persuasive here, where we are concerned with an entire class of contracts. Were the bourgeois legal system to recognize that the wage contract is inherently a contract for the extraction of surplus value, Marx could argue persuasively, that system would be hard

put and embarrassed not to invalidate that very *type* of contract, as essentially presupposing coercion, unequal bargaining power, or the worker's innocent failure to understand the nature of the agreement. Put another way, bourgeois legal approval of the type of transaction called "wage agreement" is possible only if bourgeois contract law is ignorant of the extraction of surplus value.

We can of course envisage a legal system in which contract law is not applied to the exchange of labor power for wages, despite its application to (say) consumer purchases or commercial agreements. (Consider contract law in a society in which all producers are self-employed, or all persons are either masters or slaves. In these societies, no wage earners would exist.) But insofar as a legal system applies contract law systematically to the wage exchange, it is reasonable to say that that system must assume that any exploitation of workers by capitalists is incidental, not part and parcel of the wage system. In this fashion contract law, as applied to the wage agreement, is necessarily ideological. It does not question the appearance of non-exploitation that is presented by the structure of bourgeois society itself.

Contract law is ideological in a second respect. Marx argues that if one considers the total transaction between the working class and the capitalist class, instead of the many transactions among individual workers, employers, labor unions, and the like, one sees from that perspective that the wage exchange is a false appearance, a merely apparent and not a real exchange. At the level of class analysis, there is really only an uncompensated extraction of surplus value from the working class by the capitalist class. By looking narrowly at the individual transaction between worker and capitalist, or bargaining unit and employer, contract law hides the real relation between the classes, thus again serving the capitalist class interests (see Young, 1978, Sect. VI).

To this point, we have considered the market form and ideological function Marx ascribes to contract law. It does not follow from these two features, however, that contract law "arises from" the economic basis of capitalist production. Function and formal similarity do not automatically explain existence. At least, function cannot explain existence when the function is hidden from the persons within the social institution to be explained. And Marx's insistence that capitalists themselves generally misunderstand the source of profits precludes him from treating contract law and bourgeois ideology generally as a conscious attempt by capitalists to mystify workers. What then is the economic basis of contract law? Marx never answers this question.

To be sure, Marx did regard contract law as a weapon of the rising bourgeoisie against the dominant classes in pre-capitalist societies. But this view does not entail that contract law "arises from" or is engendered by

capitalist production relations. It is consistent with this view that contract law not be applied to fully developed relations between workers and capitalists. However, contract law continued into established capitalist production, *inter alia* as a set of legal rules apparently governing capitalist-worker relations. We must explain the continuation of these rules under the new circumstances, and moreover explain their continuation as a result of capitalist production relations, if we are to validate the "basis-superstructure" model. Though the foregoing analysis might be thought to explain how those relations engender the market form and ideological function of contract law, even if correct it does not explain why that form and function crystallize in law, as opposed to (say) economic theory or the novel. Put differently, Marx gives an explanation of why, *if* there is law concerning the wage agreement, it is very likely to have this form and function. But he does not offer an explanation of why there *is* such law. Does the market in labor power by its nature require such law? Is the application of contract law to the wage agreement merely an accidental or rationalizing extension of contract law from other market relations that give rise to it?

Marx never set out to answer these questions; he never tried to present a complete theory of bourgeois law. But it is nonetheless true that even though he arguably has cast considerable light upon the relations between contract law and capitalist production relations, he has not displayed fully the "economic basis" of contract law. In this case, the promise of the "basis-superstructure" model has not yet been made good.

Some Marxian accounts of bourgeois law have stressed the market form of law excessively. In his early writings (before he developed the theory of surplus value), Marx himself sometimes centered his critique of capitalist production on the claim that the exchange relation is alienating.⁸ Pashukanis (1951) and Balbus (1977) present the homology between legal relations and exchange relations as the central thesis in Marxian legal theory. Both authors do attempt to include class conflict and exploitation within the scope of their accounts. But as a result of their focus upon market and exchange, they tend to see class conflict in terms of market relations only, and fail to grasp fully the ideological functions of law. Moreover, the mere homology between contract and idealized market does not demonstrate that contract law arises from production relations. These theorists rarely address the question of how (if at all) contract law is caused to exist by the economic basis. They tend to suggest an "Hegelian" view of causation as expressive totality: if A and B are homologous, they have the same cause (see Althusser and Balibar, 1970, p. 17 and *passim*).

Finally, not all bourgeois law fits the contract model. When a law (not a contract) results from the attempts of members of a class to increase their

share of surplus value, these theories cannot fully illuminate that law. Marx's analysis of the Factory Acts, to which we now turn, provides a better model for understanding such legislation.

VI. STATUTORY REGULATION OF THE WORKER-CAPITALIST RELATION

Under common law contract rules, parties are by and large to be left to work out the terms of their own contracts. Legal regulation of the content of the wage-exchange and the extraction of surplus value must therefore be sought primarily in statute law. Note, however, that statute may also function to reinforce the common law contract doctrines, as the Combination Acts had the effect of requiring individual bargaining between worker and employer (Marx, 1967b, Vol. 1, pp. 740f).

In analyzing the legislative regulation of the content or terms of the worker-capitalist relation, and the connection between such regulation and the "economic basis" or production relations, Marx begins with a distinction between two ways in which one can alter the quantity of surplus value extracted during a workday. First the length of the workday can be increased (or decreased). Then, assuming the value of labor power (and thus of wages) remains constant, the amount of time allotted to surplus labor will increase, as a result of the change in the *absolute* length of the workday. The reverse occurs upon a decrease in the hours in a workday.

Second, assuming that the length of the workday remains constant, the quantity of surplus value produced can be increased by increasing the *relative* amount of time spent in the day on surplus labor (Marx, 1967b, Vol. 1, p. 315). This could be accomplished by the introduction of more productive machinery or an increase in the intensity of labor (speedup) in the production of working class consumer goods.

Although these are, strictly speaking, two ways of *changing* the quantity of surplus value produced by a worker in a workday, Marx tends to speak of them as *kinds* of surplus value, as "absolute" and "relative" surplus value. This way of speaking does not lead Marx into any difficulty, however, and I shall adopt it here for sake of conformity and convenience.

Now let us ask what effect legislation might have upon the terms of contracts arrived at between workers and capitalists under prevalent market conditions and contract law rules. First, some statutes have the direct effect of altering the prevalent length of the workday. This was the primary effect of the nineteenth century English Factory Acts, which Marx discusses at greater length than any other aspect of the legal system. We shall look at his analysis of these acts below. Such statutes affect absolute surplus value.

Statutes can also affect relative surplus value by altering the proportion of the workday devoted to surplus labor. Statutory maximum or minimum

wages can be set (Marx, 1967b, Vol. 1, p. 737–41). The nonmonetary benefits to workers can be increased by statutory requirements of health, safety, or education (Marx, 1967b, Vol. 1, pp. 480–88; Vol. 3, pp. 86–91). The use of new means of production can be prohibited or encouraged by law (Marx, 1967b, Vol. 1, pp. 427–37). Conceivably, the intensity of labor can be regulated by law, although Marx does not discuss this.⁹

VII. THE FACTORY ACTS

Nothing is more characteristic of the spirit of capital than the history of the English Factory Acts from 1833 to 1864 (Marx, 1967b, Vol. 1, p. 279).¹⁰

Unlike earlier legislation regulating terms of employment, the Factory Acts, beginning in 1802, purported to establish a maximum rather than a minimum length for the workday. They also contained other provisions favorable to the working class, regarding industrial health measures, safety devices, and education requirements. The first Factory Acts applied only to the fabrics industries and limited the workday of those under 18 (and after 1844 of women of all ages). Before the 1833 Act, moreover, even these limits were unenforced for total lack of administrators and funds (Marx, 1967b, Vol. 1, pp. 278–79). By 1872, when Marx completed the second edition of Volume One of *Capital*, he could report the extension of the Factory Acts to a wide range of industries. But enforcement of the Acts still posed serious problems:

What strikes us, then, in the English legislation of 1867 is, on the one hand, the necessity imposed on the parliament of the ruling classes, of adopting in principle measures so extraordinary, and on so great a scale, against the excesses of capitalistic exploitation; and on the other hand, the hesitation, the repugnance, and the bad faith, with which it lent itself to the task of carrying those measures into practice (Marx, 1967b, Vol. 1, p. 494).

Enforcement of the Acts was hindered by several obstacles within the legal system. The factory inspectors, who enforced the Acts, were of a surprisingly high quality—if any single person is the hero of *Capital*, it is factory inspector Leonard Horner (Marx, 1967b, Vol. 1, p. 255N.). But inspectors were few and lacked funds (Marx, 1967b, Vol. 1, pp. 278, 278N.3, 494N.). Government officials in charge of the factory inspectors attempted to subvert enforcement of the Acts (Marx, 1967b, Vol. 1, pp. 288–89).

Courts, sometimes illegally composed of millowners (Marx, 1967b, Vol. 1, pp. 225N., 289, 739N., 740; Vol. 3, p. 89) and almost always hostile to the interests purportedly protected by the Acts, construed them as narrowly as possible. In the case *Ryder v. Mills* [3 Exchequer 853 (1850)], the Court of Exchequer unanimously gutted the 1844 Factory Act (7 Victoria

C.15). This Act was intended primarily to abolish the use by manufacturers of a system of individualized shifts, whereby each child or young person began and ended work at a different time from the others. As Baron Alderson remarked (3 Exchequer, at 863) during argument, “if these persons might work at different periods of the day, it would become a difficult matter for the inspector to know whether each young person had worked for the proper period.”

To rule out this “relay system,” section 26 of the act provided

that the hours of work of children and young persons shall be reckoned from the time when any child or young person shall first begin to work in the morning in such factory (7 Victoria C.15, S.26).

At trial, Mills was found guilty of violating this section by his use of the relay system. Yet the Exchequer Court quashed his conviction, answering in the negative the question before it:

Whether it is an offense against the Factory Acts, or any of them, to employ a young person in a factory for ten hours [since 1848 the legal maximum], and no more, in one day, such ten hours ending at a period which is more than ten hours from the time when another child or young person first began to work in the morning of such day in such factory, if such last-mentioned ten hours are counted consecutively from that time, omitting only the meal times (3 Exchequer at 867).

According to Baron Parke, writing for the Court, the legal rationale of the holding was that, as defendant had argued, the Factory Acts were penal, not remedial, statutes and thus the (supposedly) ambiguous words of the Acts, including section 26 of the 1844 Act, were to be construed in favor of the millowner. The crux of the opinion lies not in the use of this rule of construction, however, but in the underlying presumption regarding whose interests are more deserving of protection by law, those of the workers (women and those under 18) or those of the millowners.

Undoubtedly, if there was such an enactment [viz. to abolish the relay system], it would have the effect of securing to the children and young persons, whom it was most certainly the object of the legislature to protect against their own improvidence or that of their parents, the more effectual superintendence and care of the [factory] inspectors; without question it would more certainly prevent them from being overworked, and secure to them more completely the benefit of some education in public schools, which the legislature meant them to enjoy: it would advance the intended remedy; but then this result could only have been obtained by a larger sacrifice of the interests of the owners of factories; and we cannot assume that Parliament would disregard so important a consideration (3 Exchequer, at 869–70).

Apparently referring to this passage, Marx (1967b, Vol. 1, p. 291) says that the court

decided that the manufacturers were certainly acting against the meaning [*Sinn*] of the Act of 1844, but that this Act itself contained certain words that rendered it meaningless [*sinnlos*].

But Baron Parke nowhere admitted that the millowners might be acting against the *Sinn* of the Act. He said that Parliament, no matter how tender it felt towards working children, and no matter how it expressed itself in legislation, could not have intended to benefit them by sacrificing the interests of the millowners, which he presumed without inquiry to be "larger" than those of the children.¹¹

Thus far, I have reviewed various aspects of the Factory Acts that are reasonably clearly part of the legal system—their terms, judicial construction, and administrative enforcement. In describing these, as opposed to explaining them, Marx nowhere refers to the economic basis. I now turn to the connections Marx found between the legal system and basis. First I consider the origins of the Factory Acts in capitalist production relations, and then the effects of those Acts upon those relations.

VIII. THE FACTORY ACTS AND CLASS STRUGGLE

We see then, that, apart from extremely elastic bounds, the nature of the exchange of commodities itself imposes no limit to the working-day, no limit to surplus-labour. The capitalist maintains his rights as a purchaser when he tries to make the working-day as long as possible, and to make, whenever possible, two working-days out of one. On the other hand, the peculiar nature of the commodity sold implies a limit to its consumption by the purchaser, and the labourer maintains his right as seller when he wishes to reduce the working-day to one of definite normal duration. There is here, therefore, an antinomy, right against right, both equally bearing the seal of the law of exchanges. Between equal rights force decides. Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, i.e., the class of capitalists, and collective labour, i.e., the working-class (Marx, 1967b, Vol. 1, pp. 234–35, 270, 278, 283, 299, 409).

At the level of production relations, we find an irreconcilable conflict of interests between the working class and the capitalist class. Workers have an interest in reducing the amount of surplus labor they lose to the capitalists, and indeed in eliminating the worker-capitalist relation altogether. Capitalists have an interest in increasing the amount of surplus labor as much as they can. The most direct explanation possible of capitalist opposition to the Factory Acts, and attempts to subvert their enforcement after enactment, is therefore that capitalists realized that shortening the workday would reduce the quantity of surplus value they could extract from workers. And on the whole, this seems to be Marx's explanation.

We have already noted Marx's view that bourgeois opposition to the Acts was based on an "inkling" of the source of surplus value (see Sect. IV). The political economist Nassau Senior is Marx's favorite example of this:

[Senior] converts industrial profit into wages of superintendence. But he forgets this humbug as soon as it is a question, not of doctrinaire phrases, but of practical struggles between workers and factory owners. Thus, he opposes the shortening of the working-

day, because in a workday of say 11½ hours, the workers allegedly work only one hour for the capitalist, and the product of this one hour constitutes the capitalist's profit. . . . Suddenly here industrial profit is equal to the value added by the unpaid labor time of the worker and not to the value added by the labor which the capitalist performs in the production process of commodities (Marx, 1971, Vol. 3, p. 506; see also 1967b, Vol. 1, pp. 224–29, and 1974b, p. 79).

Marx says that Senior learned this from the Manchester millowners, and remarks that in the context of direct production by itself

the formation of surplus value by surplus labor is no secret. "If you allow me," said a highly respectable master to [a factory inspector], "to work only ten minutes in the day overtime, you put one thousand a year in my pocket." "Moments are the elements of profit" (Marx, 1967b, Vol. 1, p. 243; see also Vol. 3, pp. 44, 827).

The inkling that profits are created by unpaid labor is subject to the difficulties of Ricardo's theory (see Sect. IV) so long as the inklers also believe that wages buy labor. But that capitalists had such an inkling does explain how the economic basis gives rise to the opposition to the Factory Acts. That opposition is the organized action of a class of millowners to protect their perceived interests as capitalists, that is, as extractors of unpaid surplus labor, who will suffer from the shortening of the workday.

This cannot be Marx's general explanation of the basis-superstructure relation, however. With the exception of opposition to the Factory Acts, and perhaps by implication other cases in which the gaze of the capitalist falls only upon direct production, Marx holds that capitalists (as well as workers) are unaware of the origins of surplus value (Marx, 1967b, Vol. 1, pp. 74, 540–41, 550; Vol. 3, pp. 817ff; 1971, Vol. 3, p. 485; Marx and Engels, 1969, p. 209). But Marx has available an alternative account of the basis-superstructure relation which is compatible with this view. I shall describe first how this account applies to the case of the Factory Acts, and then the general theoretical grounds for it.

According to the dominant form of bourgeois ideology, which sees the origin of profits in exchange, profit is merely the excess of gross income over cost of production. Now, a shorter workday will have several effects upon profits. The amount of profit will be reduced proportionally to the decrease in the working hours, other things being equal; the cost of production will decrease, but so will the gross income of the firm, in the same ratio. But second, other things will not be equal; the profit rate is likely to decline too. To maximize the rate of profit in the face of depreciation from obsolescence in an era of technological innovation, the entrepreneur must run his factories as much as possible during the day (Marx, 1967b, Vol. 1, pp. 404–5). For both reasons, a shorter workday is likely to be opposed even by a capitalist who has no inkling that surplus value (or profits) arises from unpaid surplus labor.

There is a systematic relation between the capitalist's striving for profits, conceived by him as the excess of gross income over cost of production, and the increase of surplus value. What that capitalist conceives in market terms is in fact (Marx claims) a function of surplus value. The rate of profit, or ratio between profit and cost of production, is the ratio between surplus value and the sum of constant and variable capital.¹²

The actual process of production and the process of circulation intertwine and intermingle continually, and thereby invariably adulterate their typical distinctive features. The production of surplus-value, and of value in general, receives new definition in the process of circulation, as previously shown. Capital passes through the circuit of its metamorphoses. Finally, stepping beyond its inner organic life, so to say, it enters into relations with outer life, into relations in which it is not capital and labour which confront one another, but capital and capital in one case, and individuals, again simply as buyers and sellers, in the other. The time of circulation and working-time cross paths and thus both seem to determine the surplus-value. The original form in which capital and wage-labour confront one another is disguised through the intervention of relationships seemingly independent of it. Surplus-value itself does not appear as the product of the appropriation of labour-time, but as an excess of the selling price of commodities over their cost-price, the latter thus being easily represented as their actual value (*valeur intrinsèque*), while profit appears as an excess of the selling price of commodities over their immanent value (Marx, 1967b, Vol. 3, p. 44).

Thus to strive for profit is to strive for surplus value, even though the capitalist does the former knowingly and the latter unknowingly. The conduct of the capitalist, even though he is ensnared by the ideology of exchange, has results and goals that are nonetheless translatable into Marx's language of surplus value. This seems sufficient to bridge the gap between basis and legal system for the case of capitalist-influenced aspects of bourgeois law.

It is worth digressing to note that this problem of linkage and motivation pervades Marx's attempts to explain or illuminate legal phenomena in terms of capitalist production relations. Those within capitalist production relations, precisely because they are within those relations, whether capitalists or workers, spontaneously perceive those relations in a distorted fashion. Capitalist relations generally present workers and capitalists with only their market aspect, and hide their exploitative aspect (see footnote 5).

Given this general thesis concerning the self-knowledge of the agents of capitalist production, Marx has to choose between two alternatives when he tries to explain or illuminate legal phenomena in the light of production relations. First, he can explain legal phenomena purely in terms of the market system, including the "labor market," that aspect of production relations that is open to view from within the social structure. Thus one might hope to find the origin of contract law in the market system, even though the ideological function of contract law (to hide exploitation) is as hidden to workers and capitalists as exploitation itself.

Second, Marx can explain or illuminate legal phenomena in terms of the extraction of surplus value (with or without reference to the market system). If he takes this path, he must again choose: he must either view the people whose conduct affects the legal system as acting to further some goal conceived in terms of capitalist exploitation, or as acting to further a goal conceived in other terms. If he does the former, he must to that extent admit an exception to his general thesis regarding the self-knowledge of agents of capitalist production, and grant that at least sometimes capitalists or workers can come to know of the exploitation hidden behind social appearances. Marx makes this choice when he allows capitalists an “inkling” of the origin of surplus value, at least so long as the capitalists are restricting their vision to the process of direct production. If Marx does the latter, then he must explain how one’s class position, which one inhabits but does not understand, can affect one’s conduct with respect to the legal system. He can no longer view capitalists as simply trying to make the legal system advance and protect their interests as extractors of surplus value, because capitalists can no longer be assumed to perceive those interests. No longer can the capitalist serve as a direct self-aware link between extraction of surplus value and legal phenomena. The connection between the two now threatens to fall apart. In the case of the capitalist, this can be prevented by recourse to Marx’s view of the systematic relationship between the ordinary capitalist’s perceived interest (in profits, seen as excess of gross income over cost of production) and the capitalist’s interest *qua* capitalist (in surplus value). But profit is not the only form in which surplus value appears to capitalists and workers; it also appears as rent and interest. The return on land and money capital is, in Marx’s view, a part of surplus value, initially extracted from workers by industrial and agricultural capitalists and then passed on to landowners and lenders as rent and interest. The relation of law to surplus value now becomes even more complex. Surplus value affects law not as one but as three (or more) separate and potentially conflicting interests perceived by three theoretically distinct classes.

Whichever route Marx takes, allowing or disallowing knowledge of surplus value, he must also explain how the conduct of each capitalist expresses the interest of the class of capitalists as a whole. Even though each capitalist *qua* capitalist has the “same” interest, viz. in maximizing his extraction of surplus value, it hardly follows that those “same” interests do not conflict (Marx, 1967b, Vol. 1, pp. 316–19, 625–27, 763). The same is true regarding the solidarity of workers against their conflicting interests as individual workers. Given the centrifugal forces within each of the primary classes of capitalist production, we need an account of when and why either of those classes will achieve sufficient solidarity to affect the legal system in favor of the interests of the class (see Marx, 1977, pp. 1069–70; 1974b, p. 91; see also Olson, 1971, pp. 105–10).

Finally, what connects class interests and the personnel of the legal system, who—whatever their class background—are by hypothesis presently not members of either primary class? Why did Leonard Horner but not Baron Parke side with working class interests?

It is important to stress the need for solutions to the problems of motivation from a Marxian perspective, since that need has been denied by some “structuralist” accounts of the state. Representative is Poulantzas’s (1973, p. 243; see also Althusser and Balibar, 1970, p. 180) statement that “the distinctive criterion for membership of [*sic*] the capitalist class for Marx is *in no way* a motivation of conduct, that is to say the search for profit as the ‘aim of action’. . . . Marx’s criterion is the objective place in production and the ownership of the means of production.” The absurdity of this reckless formulation is shown by its compatibility with the assumption that *no* capitalist desires and strives for profits. The structure of capitalist production can affect the legal system only through the conduct of human beings, and one’s conduct cannot be explained merely by the position one occupies in the production relations, without reference to the perceptions one has of that position and the motivations that position encourages and discourages. Marx’s writings leave no doubt that he was aware of this obvious truth, and its express rejection by Poulantzas and Althusser is regrettable. The core of their view seems to be that by calling capitalists and workers *Träger* (bearers) of their class roles, Marx was removing from them all subjectivity. Rather, he was saying that their perceptions and motivations were to be understood in terms of their class position.

Returning now to our two accounts of capitalist opposition to the Acts, in terms of surplus value and of profit, we might surmise that working class support for the Acts arose from the perception by workers that the Acts would reduce absolute surplus value, or at least profits. But in this context, Marx does not allow workers an inkling of the origin of surplus value, nor does he explain their support of the Acts as an attempt to reduce profits. Rather, he says workers wanted a shorter workday because that would improve their health, security, and happiness (see Marx, 1974b, p. 78, 87; 1967b, Vol. 1, p. 278N.).

The health and security of workers was threatened precisely because the capitalist greed for surplus value or profit caused the extension of the workday in the first place (whether by means of statutory requirements or superior economic power), just as it later opposed efforts to curtail it. Since that greed has no limit (Marx, 1967b, Vol. 1, p. 592), the workers’ health would have required legal curtailment of the workday no matter how great the development of the productive forces, no matter how quickly and easily the worker could reproduce the value of his or her wages and then provide uncompensated labor for the capitalist. Just as it caused the opposition to

the Factory Acts, therefore, capitalist desire for profit gave rise to agitation by workers for the Acts. On each side, the superstructural effect arose from the economic basis.

Given the class struggle over the length of the workday, how did the workers happen to win? Why were the Factory Acts passed and enforced at all? The personnel of the legal superstructure—the M.P.'s, the factory inspectors, the Home Secretary, the judges—were as a whole by no means sympathetic to working class interest, even if it is a little too simple to regard the legal and political superstructure as merely the executive committee of the capitalist class.

Bourgeois support at times arose from the need of the bourgeoisie for an ally against the landed aristocracy (Marx, 1967b, Vol. 1, pp. 281, 283, 494; 1974b, p. 78). Those capitalists who were less able to exploit their workers, because of market conditions or partial enforcement of already existing legislation, advocated the passage and strict enforcement of restrictions on the use of workers in order to bring the practices of other capitalists into conformity with their own, and thus improve their competitive position (Marx, 1967b, Vol. 1, pp. 270N., 281, 292, 397, 490–91). Marx sometimes seems to suggest that bourgeois support came from enlightened self-interest, from the realization that the factories were destroying the workers, the source of labor for the capitalist class. But his final view seems to be that such opinions, though they might have existed, did not count for much (Marx, 1967b, Vol. 1, pp. 239, 265–66, 269–70, 270N., 489, 492; Marx and Engels, 1969, p. 225). Moreover, he ignores the rare cases of disinterested, principled bourgeois concern for the brutalization of the workers, especially working children, as found for instance in John Fielden.¹³ In the end, Marx thinks that the decisive reason for bourgeois acquiescence in the passage and partial enforcement of the Factory Acts was bourgeois fear of the working class, which was becoming ever more organized and threatening (Marx, 1967b, Vol. 1, pp. 239, 292). This acquiescence was naturally accompanied by the hope that mere passage of the Acts, without substantial enforcement, would alleviate the threat.

IX. THE FACTORY ACTS: EFFECTS UPON THE ECONOMIC BASIS

By limiting the workday, the Factory Acts prevented the increase of absolute surplus value. Any increase in surplus value henceforth had to be relative, that is, accomplished by a reduction of the time it took the worker to create the value he or she received in wages. Therefore, Marx suggests, capitalists increasingly turned to the new industrial technology and to speedup, two sources of relative value (Marx, 1967b, Vol. 1, pp. 409–17, 474ff). Marx does not explain this effect in terms of the capitalists'

“inkling” of the source of surplus value, however; he relies instead upon their desire for profit (Marx, 1967b, Vol. 1, pp. 312–16; Vol. 3, pp. 37–38; 1971, Vol. 2, pp. 204–6, 240f).

A result of industrialization, in turn, was that “a greater outlay of capital” became necessary to continue business (Marx, 1967b, Vol. 1, p. 475). In sum, the effects of the Acts fall both at the level of the forces of production (the technology and speed of the production process) and at the level of production relations (increased reliance upon relative surplus value, tendency towards larger concentrations of capital). But changes in the former are always mediated by changes in the latter, for example, increased industrialization results from attempts to increase profits within the context of a legal limit on the workday.

X. CONTRACT LAW AND THE FACTORY ACTS

Because they set limits to the terms on which certain workers could work for masters, the Factory Acts were subject to attack from within the framework of contract law ideology (see Sect. V). They were said to trench upon the freedom of individual workers (and, by the way, of individual masters) to contract as they wished (Marx, 1967b, Vol. 1, pp. 228N., 279, 282, 293, 296, 284–85, 396–97). Marx concludes his main account of the Factory Acts with an explanation of what this freedom to contract means:

It must be acknowledged that our labourer comes out of the process of production other than he entered. In the market he stood as owner of the commodity “labour-power” face to face with other owners of commodities, dealer against dealer. The contract by which he sold to the capitalist his labour-power proved, so to say, in black and white that he disposed of himself freely. The bargain concluded, it is discovered that he was no “free agent,” that the time for which he is free to sell his labour-power is the time for which he is forced to sell it, that in fact the vampire will not lose its hold on him “so long as there is a muscle, a nerve, a drop of blood to be exploited.” For “protection” against “the serpent of their agonies,” the labourers must put their heads together, and, as a class, compel the passing of a law, an all-powerful social barrier that shall prevent the very workers from selling, by voluntary contract with capital, themselves and their families into slavery and death. In place of the pompous catalogue of the “inalienable rights of man” comes the modest Magna Charta of a legally limited working-day, which shall make clear “when the time which the worker sells is ended, and when his own begins.” Quantum mutatus ab illo! (Marx, 1967b, Vol.1, pp. 301–2; see also pp. 176, 299–300, 741).

In one case, however, contract law allowed the possibility of state intervention in the private wage-agreement. Children are too susceptible to influence and coercion, from needy parents as well as greedy masters, and too unaware of their interests and unable to bargain, to be treated as voluntary parties to a wage-agreement. The common law recognition of their incapacity to contract left a space which paternalistic legislation could

enter to remedy abuses in the employment of child labor (Marx, 1967b, Vol. 1, pp. 396–97, 489; 1974b, pp. 88–89). Not surprisingly, the Factory Acts therefore began by giving protection to children and young persons, then extending protection, on the same paternalistic grounds, to women. As Marx notes, to give protection to minors and women, in the context of a division of labor in which adult males are unable to function by themselves, is to give indirect protection to adult males (Marx, 1967b, Vol. 1, p. 283). But none of the Factory Acts Marx discusses sets limits by its terms to the workday of adult males (see, for example, Marx, 1967b, Vol. 1, pp. 286, 300).

The rationale for these exclusions from the reach of contract rules lies in the fact that two of the usual justifications for applying those rules, the promotion of fairness and efficiency, make sense only if we presuppose that the parties to the contract satisfy certain background assumptions or requirements. These assumptions can be stated in a variety of ways. Marx tends to state them in terms of the market equality and freedom of the bargaining parties (see Sect. V). Here we need not consider how best to formulate them, but perhaps it will be helpful to remind ourselves of their relevance by means of an example.

If A can buy bread from no one but B, and A needs bread to survive, then A must buy bread from B, no matter what its quality or price, or else risk death. Now if A has no similar monopoly power over a commodity B requires, B can use his or her bargaining power to charge A much more for much poorer bread than would be possible if B had competitors. The result is an unfair bargain between A and B, and lack of inducement for B to produce better bread more cheaply. If the imposition of the rules of contract law is justified as a means to promote fairness and efficiency, those rules arguably should not be applied to the bargain between A and B. And certainly if relatively many transactions in society suffer this or similar defects, general imposition of contract rules is unjustified, at least on these two grounds.

Within contract law we can discern two tendencies with regard to these background assumptions. “Conservative” contract law tends to presume conclusively that parties to a contract satisfy the background assumptions that warrant application of contract rules to them. Parties will not be heard to say in a “conservative” court that they fail to meet those assumptions. From an extreme form of this perspective, the Factory Acts constituted an impermissible intrusion upon the freedom of contract of individuals who were conclusively presumed to satisfy all of the background assumptions. This seems to be the essence of the contract critique of the Factory Acts reported by Marx. Applied to a seven-year-old child dealing with a master, such a presumption is mere hypocrisy.

It is compatible with contract law, however, to recognize that the seven-year-old and his or her master are unequal in bargaining power. The

“reformist” tendency in contract law is willing to hear and find that a party fails to meet the background assumptions. Even a minimal reformist, if honest, would reach this result. The contract law response to this finding is simply to deny enforcement to the master. Contract law, narrowly (and properly) understood, does not provide any further remedy for the child. But the Factory Acts illustrate that the law has other means at its disposal to achieve fairness and efficiency when bargaining parties fail to meet all background requirements.

At least two such “quasi-contractual” means can be distinguished. The law can attempt to bring it about that the parties do meet the background requirements, so that their private agreements are thereafter enforceable under contract rules. Or the law can attempt to impose upon the parties a “contract” within neither party’s contemplation. Courts can imply terms in a contract they are asked to enforce; legislation can require or limit terms in special types of contracts. Such a strategy, unlike the first, foregoes entirely the essential aim of contract law to delegate conflict resolution and decision-making to private parties. However, it can be forced into a quasi-contractual perspective insofar as it is plausible that the state-imposed terms would have been accepted by both parties had they met all background assumptions.

The first of these means is exemplified by the Wagner Act, discussed briefly below. The second is arguably the strategy of the Factory Acts. Both these approaches are distinct from that of bourgeois contract law. The first is designed to ensure that the presumed equality and freedom of bargaining parties really exists. This prevents the hypocritical or blinkered approach of the conservative tendency of contract law, and extends the protection of contract rules to parties not within the scope of the reformist tendency. The second removes the power of decision-making (setting contract terms) from parties, making it irrelevant whether or not they meet the background requirements. Do these differences mean that these two approaches are immune to Marx’s critique of contract law as ideology?

No. The first approach simply attempts to create conditions for a valid wage agreement where none were before, and thus is subject to the critique of contract law in section V. This can be seen by looking at the Wagner Act, which gave the qualified blessing of law to collective bargaining, *inter alia* to equalize the bargaining powers of workers and employers. Though the Wagner Act came long after Marx’s death, his analysis of trade unions leaves little doubt of what he would say about it.

[T]he value of labour-power constitutes the conscious and explicit foundation of the trade unions, whose importance for the English working class can scarcely be overestimated. The trade unions aim at nothing less than to prevent the reduction of wages below the level that is traditionally maintained in the various branches of industry. That is to say, they wish to prevent the price of labour-power from falling below its value. They are aware, of course, that if there is a change in the relations of

supply and demand, this results in a change in the market price. But on the one hand this change is a very different thing from the one-sided claim of the buyer, in this case the capitalists, that such a change has taken place. And on the other hand, there is "a great distinction between the level of wages as determined by supply and demand, i.e. by the level produced by the fair operation of exchange that exists when buyer and seller negotiate on equal terms, and the level of wages which the seller, the labourer, must put up with when the capitalist negotiates with each man singly, and dictates a reduction by exploiting the chance need of individual workers (which exists independently of the general relations of supply and demand). The workers combine in order to achieve equality of a sort with the capitalist in their contract concerning the sale of their labour. This is the rationale (the logical basis) of the trade unions." What they purpose is that "the accidental immediate neediness of a labourer should not compel him to make do with a smaller wage than supply and demand has already established in a particular branch of labour" and thus depress the value of labour-power in a particular area below its customary level. The value of labour-power is "regarded by the workers themselves as the minimum wage and by the capitalist as the uniform rate of wages for all workers in the same trade." For this reason the unions never allow their members to work for less than this minimum (Marx, 1977, pp. 1069–70).

This account of trade unions must be set in the context of Marx's view of the capitalist labor market. Initially, in his analysis of capitalist production, Marx assumes for simplicity that labor power, like other commodities, sells at its value, at least on the average. That assumption is valid, says Marx, only absent a significant excess supply of (or demand for) the commodity (Marx, 1967b, Vol. 1, pp. 158, 537–38). Later in Volume One of *Capital*, however, he drops that assumption, arguing that capitalist production tends to produce unemployment, turning the labor market into a buyer's market and depressing wages below the value of labor power (Marx, 1967b, Vol. 1, pp. 431, 628–40). In Marx's view, trade unionism is an attempt to restore equality to the bargaining between worker and capitalist so that labor power sells at its value despite unemployment. Similarly the Wagner Act, if it were successful in redressing the imbalance of bargaining power between workers and capitalists, could do no more than make the wage exchange—taken in isolation from the extraction of surplus value—"fair." It could not, consistent with its contractualist intent, eliminate the extraction of surplus value, for that would be to eliminate the wage exchange itself.¹⁴

Unlike the first approach, the second does not attempt to modify the relation of the parties so they can then be set free to make their own enforceable agreements. Instead it simply makes "agreements," or partial agreements, for the parties, substituting legislation (or, as in the case of marriage, common law rules) for contract. Of course the actual offer and acceptance are left to the parties themselves. And typically, as in the Factory Acts, some terms of the agreement are left to the wishes of the parties. This leaves open the possibility that the stronger party will gain back in bargaining over those terms what he or she lost as a result of terms imposed by legislation. One result of the Factory Acts was a shorter but more intense workday.

Sometimes only the second approach is available. Child workers could not be made competent to contract merely by lowering the age of majority. To protect children, the Factory Acts had of necessity to impose upon masters and children some of the terms of any agreement they might make.

The quasi-contractual justification for the second approach is that if the parties had satisfied the background requirements, they would have agreed upon something substantially like what the state has imposed upon them. But if, as in the Factory Acts, the state has imposed upon the parties the terms of a wage agreement (subject to the offer and acceptance of the parties), then this approach, so justified, presupposes that a wage agreement would be legally acceptable if the parties met the background requirements. And this places the second approach, so justified, squarely within the fourth type of bourgeois ideology: legal approval of the wage agreement presupposes legal ignorance of the extraction of surplus value.

Thus both quasi-contractual approaches are subject to Marx's critique of bourgeois contract law as bourgeois ideology. To go beyond the limits of bourgeois ideology, law would have to acknowledge the existence of capitalist exploitation. Perhaps it is going too far to say that no legal system could make this acknowledgement (in judicial opinions, statutes, and authoritative statements of the law) and still approve of wage labor. But surely any legal system that did this would find it difficult to treat the wage relation as an exchange to be assessed by the ultimate values of fairness and efficiency. At the core of bourgeois legal treatment of the wage relation is the picture of that relation as essentially contractual, no matter how much it is overlaid with collective bargaining and state-imposed limits on permissible terms in agreements. The legitimation of that relation becomes extraordinarily difficult if not impossible the moment the legal system penetrates beneath the false appearance presented by capitalist production, that the worker and capitalist merely exchange values, to the underlying reality of exploitation. The legitimation of wage labor, when wage labor is seen as essentially involving exploitation, poses problems even more severe than those faced by the legal legitimation of slavery. Slaves can be seen at law as less than persons, and their status and treatment thus justified without formal sacrifice of the values of fairness or efficiency, which concern the benefits and burdens allotted to persons only. But workers are at once the sellers of their labor power (and therefore must be recognized as persons at law) and subjects of exploitation (and therefore must be recognized as less than persons). These two aspects of the worker, which comprise the two aspects of capitalist production relations, and are the poles of the fundamental contradiction of capitalist production, cannot both be coherently recognized at law.

It does not follow, however, that the working class does not *really* benefit from changes in the law that remain within the horizon of bourgeois ideology. The quantity of surplus value extracted from the working class,

and the way in which it is extracted, can be affected fundamentally by law, without going so far as abolition of wage labor altogether. And these goals can be consciously sought by capitalists or workers, under proper circumstances. (Recall Marx's discussion of the capitalist "inkling" of the source of profits; also recall for whom Marx was writing *Capital*, with its theory of surplus value.)

Moreover, Marx thought that working class efforts to improve the position of workers within the wage relation contained the seeds of that relation's supersession.

Capital is concentrated social force, while the workman has only his working force to dispose of. The contract between capital and labour can therefore never be struck on equitable terms, equitable even in the sense of a society which places the ownership of the material means of life and labour on one side and the vital productive energies on the opposite side. The only social power of the workmen is their number. The force of numbers, however, is broken by disunion. The disunion of the workmen is created and perpetuated by their unavoidable competition amongst themselves.

Trade unions originally sprang up from the spontaneous attempts of workmen at removing or at least checking that competition, in order to conquer such terms of contract as might raise them at least above the condition of mere slaves. The immediate object of trade unions was therefore confined to everyday necessities, to expediencies for the obstruction of the incessant encroachments of capital, in one word, to questions of wages and time of labour. This activity of the trade unions is not only legitimate, it is necessary. It cannot be dispensed with so long as the present system of production lasts. On the contrary, it must be generalized by the formation and the combination of trade unions throughout all countries. On the other hand, unconsciously to themselves, the trade unions were forming centres of organization of the working class, as the medieval municipalities and communes did for the middle class. If the trade unions are required for guerrilla fights between capital and labour, they are still more important as organized agencies for superseding the very system of wage labour and capital rule (Marx, 1974b, p. 91).

Just how trade unions can function as "organized agencies for superseding the very system of wage labor and capital rule" is a difficult question, especially in the light of the history of trade unions and working class parties. It is here, with the question of the extent to which (and the specific circumstances under which) a working class movement can utilize bourgeois legal institutions and forms to alter the fundamental relation of bourgeois society, that we reach the most important practical question confronting a Marxian theory of law.

XI. LAW DURING THE TRANSITION TO CAPITALIST PRODUCTION

The common law of contracts and the Factory Acts, the two examples we have considered, do not inherently involve the use of state power to repress the working class, though that is what one might have expected if one had

a crude view of the law as a bludgeon for use on the oppressed. Contract law serves primarily as ideology, at least after capitalist production becomes established, although the use of contract law does mean that the state is willing to stand by without exercising its power, letting the power relations between the contracting parties set the terms to their contracts. The Factory Acts were passed at least to make it appear that the state was trying to ameliorate the lives of the millworkers. So far as this was mere appearance, and to the extent that the Acts presupposed the legitimacy of wage labor, the Acts functioned as ideology. But so far as the Acts were enforced, they served the interests of the working class. The only directly coercive (as opposed to ideological) use of the law we have seen so far is in the service of the working class.

Though this might at first seem surprising, it is in accord with Marx's view that the bourgeois legal system is not used routinely to repress the working class:

The advance of capitalist production develops a working-class, which by education, tradition, habit, looks upon the conditions of that mode of production as self-evident laws of Nature. The organization of the capitalist process of production, once fully developed, breaks down all resistance. The constant generation of a relative surplus-population keeps the law of supply and demand of labour, and therefore keeps wages, in a rut that corresponds with the wants of capital. The dull compulsion of economic relations completes the subjection of the labourer to the capitalist. Direct force, outside economic conditions, is of course still used, but only exceptionally. In the ordinary run of things, the labourer can be left to the "natural laws of production," i.e., to his dependence on capital, a dependence springing from, and guaranteed in perpetuity by, the conditions of production themselves (Marx, 1967b, Vol. 1, p. 737).

But this was the result of a long development, at the beginning of which matters were quite different:

It is otherwise during the historic genesis of capitalist production. The bourgeoisie, at its rise, wants and uses the power of the state to "regulate" wages, i.e., to force them within the limits suitable for surplus-value making, to lengthen the working-day and to keep the labourer himself in the normal degree of dependence. This is an essential element of the so-called primitive accumulation (Marx, 1967b, Vol. 1, p. 737; see also p. 751).

Marx discusses three ways in which the legal system was used to promote the formation of a proletariat during the long transition from the manorial-town system to early capitalist production. First, the refusal to work (being a vagabond or beggar) was made a criminal offense punishable by whipping, loss of an ear, enslavement, or (for third offenders) death (Marx, 1967b, Vol. 1, pp. 734–37; 1974a, p. 507). This forced recruitment of a working class was supplemented by legal regulation of the terms on which they were allowed to work: statutory maximum wages and minimum length of the workday (Marx, 1967b, Vol. 1, pp. 738–41, 270–77). These laws were repealed only after capitalist production was sufficiently well established

that they were no longer needed. "They were an absurd anomaly, since the capitalist regulated his factory by private legislation" (Marx, 1967b, Vol. 1, p. 740), and the workers were forced to submit to this private legislation by "the dull compulsion of economic relations."

XII. MARX ON BOURGEOIS LAW

In his 1859 Preface, Marx asserted that: (1) The legal system "arises from" the economic basis, or production relations, of society, and changes as a result of changes in those relations; law is "superstructural." (2) The legal superstructure is an ideological form in which people understand and experience the class and production relations in which they live. (3) The legal superstructure is a means by which people fight out the conflict of class interests. At the end of our survey of Marx's specific analyses of bourgeois law, we can now remind ourselves of the extent to which those analyses exemplify the views expressed in this general theory.

First we must note that all of Marx's substantial specific analyses of bourgeois law are ancillary to his study of the wage relationship. In Marx's opinion, wage labor is not merely one among many social relations, it is the one from which any attempt to understand bourgeois society as a whole must begin. For that reason, the various modes of legal treatment of that relation are the primary subject matter of a Marxian theory of bourgeois law. This does not mean that Marxian accounts of other areas of bourgeois law are impossible to develop, but only that Marx's decision not to develop them first was not arbitrary.

We have looked at Marx's treatment of three specific examples of bourgeois law concerning wage labor, contract law, the Factory Acts, and the laws governing the transition from some pre-capitalist formations to capitalist production. The ideological and coercive functions of those forms of law need little further comment here. Contract law and even the Factory Acts provide Marx with illustrations of the ideological nature of bourgeois law, and the Factory Acts and transition law display law's coercive role in class struggle. The serious question left open by Marx concerns the extent to which the legal superstructure can be used by the working class not merely to improve its lot but to abolish wage labor altogether, given the present saturation of bourgeois law by bourgeois ideology.

That question concerns the possibility that law will work a fundamental change in production relations. Marx's thesis that law arises from those relations seems *a priori* to rule out such a possibility. But in light of Marx's analyses of specific bourgeois laws, that thesis must be rejected in its general form. None of Marx's analyses bears out that thesis. Even if Marx shows that the most important features of bourgeois contract law (its form and function) "arise from" capitalist production relations, he offers no reason to

suppose that capitalist production relations could not have existed without such law. Marx's account of the Factory Acts displays the sources of the Acts in class and production relations, but the subsequent downward effect of the legislation upon the economic basis (encouraging production of relative surplus value) seems just as important as the temporally prior upward effect of the basis on the "superstructure." Finally, when Marx considers the law affecting the transition to capitalist production, he provides an example of how law can play a key role in changing production relations from one form to another (see Althusser and Balibar, 1970, pp. 306–7).

The general thesis that law is superstructural should be expunged from Marxian legal theory. It plays no role in Marx's actual inquiries into bourgeois law. To my knowledge, Marx uses the term "superstructure" but once in Volume One of *Capital*, when in a footnote he quotes his own formulation from the 1859 Preface (Marx, 1967b, Vol. 1, p. 82N.). Though the absence of the term does not rule out the presence of the concept, it is significant. Expunging the thesis will not prevent us from considering the many ways in which class and production relations engender and affect law, but it will allow us to examine, as Marx does in his concrete analyses, the fundamental changes law can work on production and class relations.

If the thesis of superstructuality is rejected, there emerges a Marxian approach to bourgeois law which regards as an empirical question in every case the extent to which law has been created and molded by capitalist class and production relations, and the the extent to which the reverse has occurred. This approach lacks the aura of high theory that the word "superstructure" evokes, but it is both truer to Marx's own theoretical practice and more likely to result in an understanding of bourgeois law.¹⁵

FOOTNOTES

1. Here I ignore several other problems with Marx's abstract theory of law. What is the force of the word "determine" (*bestimmen*) in Marx's writings? (See McMurtry, 1973.) Doesn't Marx define the production relations in legal terms, as property relations? And if so, doesn't the distinction between production relations and legal system collapse? (See McMurtry, 1973; Cohen, 1970; Thompson, 1975, pp. 258–269). How does Marx distinguish the legal superstructure from other superstructures? Indeed, does he distinguish it from them? (This problem is raised at least by implication in Hirst, 1972).

2. This simplifies by ignoring the possibility that surplus value is created by entrepreneurial labor of the capitalist. See below, Sect. IV.

3. More precisely, what the worker "sells to the capitalist is not his labor but the temporary use of himself as a working power"; "what is bought and sold is the temporary use of labor power" (Marx, 1971, vol. 3, pp. 113, 110, but see 290). Thus Marx speaks of "the value of a day's labor power" (for example, 1967b, vol. 1, p. 193; see also pp. 193f, 196, 232f). Compare renting a car. What one rents is not the actual use of the car, but the "car power." The renter owes rent even if the car sits unused during the term of rent.

4. See the Preface to *On the Principles of Political Economy and Taxation*, in vol. 1 of Ricardo (1951), and the letter to Malthus, 9 October 1820, in vol. 8 of Ricardo (1962), p. 278f.

5. See also *Capital* (Marx, 1967b), vol. 3, p. 30, and *Theories of Surplus Value* (Marx, 1971), vol. 3, pp. 480f. Regarding the origins of this necessary illusion, see *Capital* (Marx, 1967b), vol. 1, pp. 541f; vol. 2, pp. 125ff; vol. 3, pp. 44f; "Results of the Immediate Process of Production," in Marx, 1977, pp. 1062–64.

6. Marx describes Ricardo as "disregarding the law of value of commodities and taking refuge in the law of supply and demand" (Marx, 1971, vol. 2, p. 403).

7. Marx, 1967b, vol. 3, pp. 44, 825, Ch. 48; 1971, vol. 2, pp. 69, 347; vol. 3, pp. 481–85. On the continuing dominance of this view, see Maurice Dobb (1973), chs. 7–8. Most of the currently fashionable accounts of the relation between the economy and the legal system accept this perspective.

8. For example, "Money and Alienated Man" (1844) (Marx, 1967a, pp. 265–77). "The essence of money is not primarily that it externalizes property, but that the mediating activity or process—the human and social act in which man's products reciprocally complement one another—becomes alienated and takes on the quality of a material thing, money external to man. By externalizing this mediating activity, man is active only as he is lost and dehumanized. The very relationship of things and the human dealings with them become an operation beyond and above man. Through this alien mediation man regards his will, his activity, and his relationships to others as a power independent of himself and of them—instead of man himself being the mediator for man. His slavery thus reaches a climax. It is clear that this mediator becomes an actual god, for the mediator is the actual power over that which he mediates to me. His worship becomes an end in itself. Apart from this mediation, objects lose their value. They have value only insofar as they represent it while originally it appeared that the mediation would have value only insofar as it represents objects. This inversion of the original relationship is necessary. The mediation, therefore, is the lost, alienated essence of private property, exteriorated and externalized private property, just as it is the externalized exchange of human production with human production, the externalized species-activity of man. All qualities involved in this activity are transmitted to the mediator. Man as separated from this mediator thus becomes so much the poorer as the mediator becomes richer" (pp. 266–67).

9. But see *Capital* (Marx, 1967b), vol. 1, pp. 409–17; "Wages, Price and Profit," in Marx and Engels, 1969, p. 223; and section IX of this paper on the effect of the Factory Acts on relative surplus value.

10. I regret that I have been unable to consult W.G. Carson and B. Martin, *The Factory Acts*, in preparing this and succeeding sections. For another approach to the Factory Acts, as well as references to other discussions of the Acts, see Howard P. Marvel (1977).

11. For another narrow construction of the Factory Acts, see Marx (1967b), vol. 1, p. 296n. Marx drew a political-revolutionary lesson from *Ryder v. Mills* in his "Instructions for Delegates to the Geneva Congress" (1866): "For the information of continental members, whose experience of factory law is comparatively short-dated, we add that all legal restrictions will fail and be broken through by capital if the period of the day during which the eight working hours must be taken, be not fixed. The length of that period ought to be determined by the eight working hours and the additional pauses for meals. For instance, if the different interruptions for meals amount to one hour, the legal period of the day ought to embrace nine hours, say from 7 a.m. to 4 p.m., or from 8 a.m. to 5 p.m., etc." (Marx, 1974b, p. 87).

12. Ignoring land and finance capital, and treating the remaining capital as an aggregate. See *Capital*, vol. 3. Variable capital is that expended upon wages; all other capital expended in direct production is "constant."

13. See E.P. Thompson (1963), pp. 760–61. Note that Marx relies upon Fielden's study of the factory system. See Marx (1967b), vol. 1, pp. 403, 412, 758.

14. For further discussion of the relation between contract and the Wagner Act, see Karl Klare, forthcoming. Klare argues that early judicial constructions of the Act failed both to

equalize bargaining power between workers and employers and also to realize the potential in section 8(a)(5) of the Act for imposition of a "reasonableness" limit upon the terms in collective agreements.

15. I am grateful to Piers Beirne for comments on an earlier version of this paper.

REFERENCES

- Althusser, Louis, and Balibar, Etienne, *Reading Capital*. New York: Pantheon, 1970.
- Balbus, Issac D., "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law." *Law and Society Review* 11 (1977): 571-88.
- Carson, W.G. and Martin, B., *The Factory Acts*.
- Cohen, Gerald A., "On Some Criticisms of Historical Materialism," *Aristotelian Society Supplementary Volume XLIV* (1970): 121-41.
- Dobb, Maurice, *Theories of Value and Distribution Since Adam Smith*. Cambridge: Cambridge University Press, 1973.
- Gold, David A., Lo, Clarence Y.H., and Wright, Erik Olin, "Recent Developments in Marxist Theories of the Capitalist State." *Monthly Review*, Vol. 27, nos. 5 and 6 (1975): 29ff and 36ff.
- Hirst, Paul Q., "Marx and Engels on Law, Crime and Morality." *Economy and Society* 1 (1972): 28-56.
- Klare, Karl, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness." *Minnesota Law Review*. (forthcoming).
- Marvel, Howard P., "Factory Regulation: A Reinterpretation of Early English Experience." *Journal of Law and Economics* 20 (1977): 379-402.
- Marx, Karl, *Writings of Young Marx on Philosophy and Society*, (Lloyd Easton and Kurt H. Guddat, eds.) Garden City, N.Y.: Anchor, 1967a.
- , *Capital*, 3 Volumes, New York: International Publishers, 1967b.
- , *A Contribution to the Critique of Political Economy*. New York: International Publishers, 1970.
- , *Theories of Surplus Value*, 3 Volumes, Moscow: Progress Publishers, 1971.
- , *Grundrisse: Foundations of the Critique of Political Economy* (Martin Nicolaus, tr.). New York: Vintage, 1974a.
- , *Political Writings*, volume 3 (David Fernbach, ed.), New York: Random House, 1974b.
- , *Capital*, volume 1, New York: Vintage Books, 1977.
- and Engels, Frederick, *Selected Works*. New York, 1969.
- , *Selected Correspondence*. Moscow: Progress Publishers, 1975.
- McMurtry, "Making Sense of Economic Determinism." *Canadian Journal of Philosophy*, Vol. 3 No. 2 (1973): 249-61.
- Olson, Mancur, *The Logic of Collective Action*. Cambridge, Mass.: Harvard University Press, 1971.
- Pashukanis, E.B., "The General Theory of Law and Marxism," in Hugh W. Babb and John N. Hazard (eds.), *Soviet Legal Philosophy*. Cambridge, Mass.: Harvard University Press, 1951.
- Poulantzas, Nicos, "The Problem of the Capitalist State," in Robin Blackburn (ed.), *Ideology in Social Science*, New York, 1973.
- Ricardo, David, *The Works and Correspondence of David Ricardo*, vols. 1, 8 (P. Sraffa, ed.), Cambridge: Cambridge University Press, 1951, 1962.
- Sweezy, Paul, *The Theory of Capitalist Development*. New York: Monthly Review Press, 1942.
- Thompson, E.P., *The Making of the English Working Class*. New York: Vintage, 1963.
- , *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon, 1975.

- Young, Gary, "The Fundamental Contradiction of Capitalist Production." *Philosophy and Public Affairs* 5 (1976): 196–234.
- , "Justice and Capitalist Production: Marx and Bourgeois Ideology." *Canadian Journal of Philosophy* 9 (1978).