

Fall 2021

## Past Prescient

Christopher Tomlins

Follow this and additional works at: <https://scholar.law.colorado.edu/lawreview>



Part of the [Law and Economics Commons](#), [Law and Philosophy Commons](#), and the [Philosophy Commons](#)

---

### Recommended Citation

Christopher Tomlins, *Past Prescient*, 92 U. COLO. L. REV. 1129 (2021).

Available at: <https://scholar.law.colorado.edu/lawreview/vol92/iss4/12>

This Article is brought to you for free and open access by the Law School Journals at Colorado Law Scholarly Commons. It has been accepted for inclusion in University of Colorado Law Review by an authorized editor of Colorado Law Scholarly Commons. For more information, please contact [lauren.seney@colorado.edu](mailto:lauren.seney@colorado.edu).

# PAST PRESCIENT

CHRISTOPHER TOMLINS\*

INTRODUCTION .....	1129
I. AGAINST BASE-SUPERSTRUCTURE .....	1131
II. THE LEGAL NATURE OF THINGS .....	1139
III. AWAKENING AND ACT .....	1145
CONCLUSION.....	1149

*Capital is dead labour which, vampire-like, lives only by sucking living labour, and lives the more, the more labour it sucks.*<sup>1</sup>

*Truth may not convince, knowledge passes in the act.*<sup>2</sup>

## INTRODUCTION

Our times are times of crisis, states the circular announcing this Symposium. They are times “of malaise, of exhaustion and immobilization, of impotence.” In such times, it asks, what should critical legal theory become? The circular emphasizes *becoming*, a refusal of what it terms nostalgia for something “vastly more capacious,” a yearning for new knowledge, new meaning.

Our times are new, but the yearning is not. Forty years ago, for example, Critical Legal Studies (CLS) promised its own new dawn for critical legal theory premised on jejune rejection of what had sustained critical thinking across the previous century, dismissed by the new high priests as so much “evolutionary functionalism.”<sup>3</sup> Marxism was top of their list; between 1977 and

---

\*Elizabeth Josselyn Boalt Professor of Law, The University of California, Berkeley, School of Law.

1. KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 342 (1990) [hereinafter MARX, CAPITAL].

2. JACQUES LACAN, AUTRES ÉCRITS 305 (2001), reprinted in ALAIN BADIOU, LACAN: ANTI-PHILOSOPHY 3, 7 (2018) [La vérité peut ne pas convaincre, le savoir passe en acte].

3. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57–71 (1984).

1983, adherents of CLS became increasingly disdainful.<sup>4</sup> This was an error. Whether born of hostility, or indifference, or an excess of caution, CLS's sectarian approach to critical theory's history would ensure its adherents' isolation, immobilization, and impotence. After not much more than a decade of activism, as a serious intellectual movement CLS was dead.<sup>5</sup>

In order to revitalize critical legal thought in a time of crisis, it is entirely appropriate to cast one's net wide, haul in new, fresh, and imaginative ideas. But it is also important to acknowledge that there is no such thing as an immaculate conception, a moment of pure origin to which prior history is irrelevant. Particularly in times of crisis, as Machiavelli well realized, it is essential to secure one's intellectual base by remaining true to its history:

The original meaning of the term *revolution* . . . implic[s] a return to some previously occupied position and not an overturning of all that has gone before. At the outset of modernity Machiavelli could still speak of revolution as a *ridurre ai principii*, that is, the periodic revitalization of civic life that can only come through a return to its original principles.<sup>6</sup>

To that end, I propose in this Essay to remind critical legal thinkers of the continuing importance of Marx to their work. I do so not in the service of nostalgia, but of renewal. The Marx I have in mind is not the Marx parodied and rejected by CLS for his devotion to a "base-superstructure grid" of determinations that would consign legal rumination to the "derivative realm of the superstructural."<sup>7</sup> Rather, he is a Marx for whom law plays a role of central importance. For that reason alone, he is a Marx who should be of interest and use to those who now once again hold that law is a proper forum for the development of modes of critical thought appropriate to times of crisis. This is a Marx who identifies the legal logics of capital and so lends critical legal theory a necessary discipline.

---

4. See, e.g., Morton J. Horwitz, *Mark Tushnet*, *Legal Historian*, 90 GEO. L.J. 131, 131–35 (2001).

5. John Henry Schlegel, *CLS Wasn't Killed by a Question*, 58 ALA. L. REV. 967 (2007).

6. Steven B. Smith, *Hegel and the French Revolution: An Epitaph for Republicanism*, in *THE FRENCH REVOLUTION AND THE BIRTH OF MODERNITY* 221 (Ferenc Feher ed., 1990).

7. Horwitz, *supra* note 4, at 131–32.

But this Marx is not enough. Another Marx also addresses our now, this one also abandoned by CLS. Alongside the Marx of *Capital*, critic of political economy, we should heed the Marx of the *Manifesto*, the revolutionary.<sup>8</sup> Critique should heed this Marx for his “unsurpassed depiction of modern capitalism. . . . as powerful and contemporary a picture of our own world as it might have appeared to those reading it in 1848.”<sup>9</sup> If it is the scientist of *Capital* who shows us *what* is to be done, it is the Marx of the *Manifesto* who urges us to do it.

If indeed, as the Symposium’s announcement states, “everywhere it seems what was recently solid is melting,” we should recognize that this is not unprecedented; we have been told this before:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind.<sup>10</sup>

It is worth our while to ponder whether the call to action of 1848 remains relevant now.

In what follows, I begin in Part I by considering and criticizing the orthodoxy of base-superstructure Marxism. I continue in Part II by examining the place of law in Marx’s thinking. In Part III, I ask how this refreshed Marxism can enliven our quest to reestablish law as a site for critical theory.

## I. AGAINST BASE-SUPERSTRUCTURE<sup>11</sup>

Nowhere in the work of the mature Marx and Engels is law made a direct object of study. Consequently, those interested in

---

8. In fact, as William Clare Roberts has shown, the Marx of *Capital* was engaged not simply on the critique of political economy, but on the development of a radical and republican conception of human freedom. See WILLIAM CLARE ROBERTS, *MARX’S INFERNO: THE POLITICAL THEORY OF CAPITAL* (2017).

9. Gareth Stedman Jones, *KARL MARX AND FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO* 5 (2002).

10. *Id.* at 223.

11. The first part of Part I is a reprise (and modest revision) of Christopher Tomlins, *Marxist Legal History*, in *THE OXFORD HANDBOOK OF HISTORICAL LEGAL RESEARCH* 519–23 (Markus Dubber & Christopher Tomlins eds., 2018).

discovering Marx's "theory" of law have relied upon extrapolation and interpretation of fragmentary sources within an extensive corpus of writings. Certain texts have long loomed far larger than others in that work of construction, none more so than Marx's "Preface" to *A Contribution to the Critique of Political Economy* (1859). G. A. Cohen identifies the Preface as the essence of historical materialism,<sup>12</sup> the text in which Marx summarizes the essential conclusions he has reached in "the course of my study of political economy" in the matter of social determination of human existence and consciousness. Here, to be sure, Marx appears to distinguish "base" from "superstructure" in the fashion of which CLS was so critical. The key paragraphs are 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

---

12. G. A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* vii–viii (Expanded ed. 2000).

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. No social order is ever destroyed before all the productive forces for which it is sufficient have been developed, and new superior relations of production never replace older ones before the material conditions for their existence have matured within the framework of the old society.<sup>13</sup>

“The tenor of the passage is unmistakable,” wrote Paul Phillips in his 1980 commentary, *Marx and Engels on Law and Laws*. “The material forces of production are primary and any change in the superstructure merely reflects a previous change in the base.”<sup>14</sup> This was also CLS’s conclusion, and the reason for its dismissal of Marxism’s relevance to its project. So we should ask, is this indeed what Marx tells us?

Let me elaborate. At any given stage in the development of the material forces of production, the “economic structure of society” is constituted by the totality of relations of production appropriate to that stage.<sup>15</sup> In turn, relations of production operate within a definite legal framework, which is determinative of those relations of production to such an extent that conflict (or harmony) between material productive forces and relations of production is “the same thing” as conflict (or harmony) between material productive forces and legal (property) relations.<sup>16</sup> The one is the other. Thus, we may conclude that Marx would not disagree with the proposition that legal property relations constitute “the economic structure of society, the real foundation.”<sup>17</sup> Entry into these relations is involuntary, which is to say they

---

13. KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (1977), available at <https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm> (last visited Oct. 27, 2020) [<https://perma.cc/WL24-EYSB>].

14. PAUL PHILLIPS, MARX AND ENGELS ON LAW AND LAWS 197 (1980).

15. MARX, *supra* note 13.

16. *Id.*

17. *Id.*

are not subject to individual determination. Rather, these relations are socially determined. Social consciousness, hence social determination, ordinarily corresponds to prevailing production relations because "the mode of production of material life"—that is, of human existence as such—"conditions" (note that it does *not* determine) "the general process of social, political and intellectual life."<sup>18</sup> Thus, Marx describes an equilibrium built on a foundation of prevailing property relations.

But the equilibrium is not static. Material productive forces (tools, raw materials, population characteristics)—what contemporary macroeconomics calls factor endowments—*develop*. "At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production";<sup>19</sup> that is ("the same thing"<sup>20</sup>) they come into conflict with the prevailing framework of property relations. The disequilibrium between material productive forces and prevailing property relations registers—as one would expect—in the "legal and political superstructure" erected on the real foundation of society's economic structure in the form of a disturbance in prevailing property relations.<sup>21</sup> "Then begins an era of social revolution"<sup>22</sup> fought in the superstructure, where it gains idiosyncratic<sup>23</sup> expression in the various "ideological forms" (legal, political, religious, artistic, philosophic) "in which men become conscious of th[e] conflict" between material productive forces and prevailing property relations.<sup>24</sup>

Marx carefully distinguishes "the material transformation of the *economic conditions* of production," which we can assume is constant (i.e., transformation is dynamic), from the actual conflict which that transformation engenders between the forces of production and the relations of production at the point where the latter cease to facilitate the further development of the former and instead constrict (fetter) that development.<sup>25</sup> It is that con-

---

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Men's consciousness of the conflict arises "from the contradictions of material life." But consciousness per se is not a good guide to the true nature of the transformation that gives rise to the conflict. MARX, *supra* note 13.

24. *Id.*

25. *Id.* (emphasis added).

flict, fought out in the superstructure, that will work the transformation of the economic structure by generating “new superior relations of production”; that is, a new framework of property relations.<sup>26</sup> The “economic conditions of production” are simply a material substrate whose continuing transformation (autonomous development) *below* the economic foundation—“which can be determined with the precision of natural science” (e.g., geology, hydrography)<sup>27</sup>—is the clock that ticks towards the moment when the relations of production cease to accommodate the forces of production and disequilibrium begins.<sup>28</sup> This moment is protracted: “No social order is ever destroyed before all the productive forces for which it is sufficient have been developed, and . . . never replace older ones before the material conditions for their existence have matured within the framework of the old society.”<sup>29</sup>

---

26. *Id.*

27. *Id.* These conditions, “conventionally understood as material and as the ‘external’ setting for humans,” instate the “realm of actuality, where materiality and sociality intersect in practical . . . ways,” where actuality is “the developmental [historical] trajectory of human productive industries.” TERRELL CARVER & DANIEL BLANK, MARX AND ENGELS’S “GERMAN IDEOLOGY” MANUSCRIPTS 5–7 (2014).

28. Cohen argues that it is “the productive forces” that are to be found “below the economic foundation” where they “strongly determine the character of the economic structure, while forming no part of it.” COHEN, *supra* note 12, at 30–31; *see also id.* at x. My terminology places “the economic conditions of production” in the position that Cohen ascribes to “productive forces” and does not ascribe any “strongly determinative” role to productive forces independent of relations of production precisely because (as Cohen notes) productive forces are bound by relations of production. *See also* ROBERTS, *supra* note 8, at 190 n.11. In this formulation the economic conditions of production are the basis of all social organization, including the economic structure: in other words, “all social organization” means one interactive structure, outside which “economic conditions” are situated. But those economic conditions are not strongly determinative. I argue rather that they are a limit condition on human existence as such. In justification of this approach, see KARL MARX, *Introduction to the Critique of Political Economy*, reprinted in A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 265–92 (N. I. Stone trans., 1904), where Marx distinguishes between simple economic phenomena common to all modes of production, without which production in any form is inconceivable (e.g. labor as such, “appropriation of nature” as such) and the specific social forms in which those phenomena are actually manifested as productive forces. *Id.* at 273. “Production in general is an abstraction, but it is a rational abstraction, in so far as it singles out and fixes the common features.” *Id.* at 269. But production in general exists nowhere as such. Production as a real historical process is always specific to a definite mode, a definite polity, a definite social formation. “To sum up: all the stages of production have certain destinations in common, which we generalize in thought; but the so-called general conditions of all production are nothing but abstract conceptions which do not go to make up any real stage in the history of production.” *Id.* at 274.

29. MARX, *supra* note 13.



Marx explains that in formulating the position embraced in the Preface he had been led *from* the study of jurisprudence as a university student *to* the study of political economy by the inability of his jurisprudential training to explain the substance of the legal and political debates in the Rhine Province Assembly on which he had commented as the youthful editor of the *Rheinische Zeitung* (1842–1843). “I . . . found myself in the embarrassing position of having to discuss what is known as material interests.”<sup>30</sup> He continues:

My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term “civil society”; that the anatomy of this civil society, however, has to be sought in political economy.<sup>31</sup>

By “material conditions of life” we might understand Marx to be referring to “the economic conditions of production”—the autonomous material substrate of geography, demography, and technology below the economic structure susceptible to precise scientific investigation. But Marx identifies the totality of the material conditions of life with civil society, the anatomy of which is to be sought in political economy. Here is the material life whose mode of production conditions the general process of social, political, and intellectual life—the legal relations and political forms that constitute the relations of production. And the operative term here is “conditions.” *Origination in* is not the same thing as *determination by*.

The effect of this reading is a radical attenuation of the distance and causal directionality that orthodox Marxism posited between economic structure and legal and political superstructure. Marx’s materialist conception of history remains very much in evidence, in the form of the economic conditions of production—the autonomous substrate—that furnish the inelucta-

---

30. *Id.*

31. *Id.*

ble limit-conditions of human existence. Rather than a determining base and a determined superstructure, however, we encounter dynamic interaction between distinct components (the economic, the legal, and the political) of the same structure.<sup>32</sup>

The radical attenuation I embrace here owes much to the influence of Louis Althusser, notably his famous 1970 essay “Ideology and Ideological State Apparatuses,” which stresses the absolute necessity to attend not to production per se but to the reproduction of the conditions of production. “[I]n order to exist, every social formation must reproduce the conditions of its production at the same time as it produces, and in order to be able to produce. It must therefore reproduce: 1. the productive forces, 2. the existing relations of production.”<sup>33</sup> The mode by which reproduction is obtained is “the exercise of State power in the State Apparatuses.”<sup>34</sup> Apparatuses appear in two forms—repressive (those apparatuses that function by coercion) and ideological (those that function by ideology). Althusser thus locates the reproduction of the conditions of production wholly in the “superstructure.” He emphasizes in particular the role played in reproduction by ideological apparatuses in constituting individuals as subjects and in representing to those subjects their imaginary relation to the real relations in which they live. “*Ideology Interpellates Individuals As Subjects*. . . . [T]he category of the subject is constitutive of all ideology . . . insofar as all ideology has the function (which defines it) of ‘constituting’ concrete individuals as subjects.”<sup>35</sup> As subjects, concrete individuals “live, move, and have our being” in ideology, which creates and recreates relations of recognition (guaranteeing “that we are indeed concrete, individual, distinguishable and (naturally) irreplaceable subjects” and that we recognize ourselves as such) that are simultaneously relations of misrecognition (“the absolute guarantee that everything really is so, and that on condition that the subjects recognize what they are and behave accordingly, everything will be all right”).<sup>36</sup> Althusser’s emphasis on the reproduction of the conditions of production has not simply moved us

---

32. See Christopher Tomlins, *Organic Poise? Capitalism as Law*, 64 BUFF. L. REV. 61 (2016).

33. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in ON IDEOLOGY 2 (2008).

34. *Id.* at 22.

35. *Id.* at 44–45.

36. *Id.* at 45 (quoting St. Paul, *Acts* 17:28), 46–47, 55.

decisively away from “base” and into “superstructure.” By making ideology the medium of reproduction he has established (or rather re-established) the crucial role of law that adherents of CLS believed Marxism had denied.<sup>37</sup>

As Althusser’s description of ideology as a “mirror-structure”<sup>38</sup> suggests, his theory of ideology owes much to Lacanian psychoanalysis. The mirror stage, in which the infant identifies with its image while experiencing its own physical weakness, creates an idealized “I” (Freud’s ego-ideal) as an external other that the individual will strive to emulate, but cannot; for the infant’s self-recognition is actually misrecognition, sustained and deepened by the relations of language and sociality that envelop the individual from infancy and structure all of the individual’s interactions with the actual conditions of its existence. Separation “enables the subject to emerge as a subject,”<sup>39</sup> but simultaneously creates the conditions of recognition and misrecognition, the subject’s imaginary relation to the real relations in which it lives, which Lacan sums up in his distinction between the Imaginary, the Symbolic, and the Real. “[R]eality, knowledge, and existence dwell in the realm of the symbolic, that is, in the register of language, of what is said and sayable.” Rather than a means of accessing “truth,” what we understand as “reality” is actually “a defense against the truth of what cannot be represented.” In other words, “[t]here is always a gap . . . between reality, which the subject can try to know and represent, and the Real, which . . . stuns, transforms, and indeed destroys the subject.”<sup>40</sup> If we acknowledge, with Alain Badiou, that in capitalism “the real of Capital is the real of universal dispersal, circulation, and absolute atomization,”<sup>41</sup> our contemplation of that Real is almost invariably a denial of it. We put in its place a dreamworld of meanings that defends us from the Real by tempering its trauma.

---

37. This becomes incontrovertible once one examines the full text of Althusser’s *ON THE REPRODUCTION OF CAPITALISM*, an unfinished manuscript from which the essay *Ideology and Ideological State Apparatuses* was extracted. The manuscript was written in two parts in 1969–1970 and remained unpublished in Althusser’s lifetime, first appearing in 1995 as *SUR LA REPRODUCTION* (1995). It appeared in English translation for the first time in 2014 as *ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES* (2014).

38. ALTHUSSER, *supra* note 33, at 54.

39. MARIA ARISTODEMOU, *LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY* 17 (2014).

40. *Id.* at 51; see SLAVOJ ŽIŽEK, *HOW TO READ LACAN* 8–9 (2007).

41. BADIOU, *supra* note 2, at 110.

For Marx, however, the objective was to rouse the world from the dream of itself. “The philosophers have only *interpreted* the world in various ways; the point is to *change* it.”<sup>42</sup>

## II. THE LEGAL NATURE OF THINGS

I began this Essay with a critique of the base-superstructure grid because it has been the fate of Marxism to be saddled with that metaphor. In fact, as Fredric Jameson has observed, Marx’s “model of base and superstructure” is entirely rudimentary, really appearing only in the 1859 Preface, which suggests that the determining material base is an illusion.<sup>43</sup> “Marx is not a mechanical materialist but a historical one.”<sup>44</sup> Jameson, unfortunately, muddies this key clarification by retaining the grid’s misleading language and swapping in a substitute determinant. For Jameson “it is the social relations of production—the labor process itself—which is *the truly material base . . .*”<sup>45</sup> As we have just seen, this is a “base” that cannot be distinguished from its accompanying legalities.

Two examples reveal just how tightly materiality and legality are intertwined in Marx’s thinking. The first is taken from the young Marx’s writings in the *Rheinische Zeitung* (1842) ref-

42. Karl Marx, *Theses on Feuerbach* (Thesis 11), in 5 THE COLLECTED WORKS OF KARL MARX AND FREDERICK ENGELS: GENERAL WORKS 1844–1895 (elec. ed., In-  
teLex Corp. 2003) (1975).

43. Other than the 1859 Preface the only clear locale for base/superstructure argumentation in the Marx/Engels oeuvre is *The German Ideology*, in particular, the chapter *I. Feuerbach*. *The German Ideology* has long been hailed as classical Marxism’s mid-1840s point of origin, the first statement of dialectical and historical materialism. But as has been shown quite conclusively in work by Terrell Carver and Daniel Blank, *The German Ideology* was not the “breakthrough of mutual ‘self-clarification,’” the “lengthy and definitive” exposition of Marx and Engels’ views, claimed by orthodoxy. *The German Ideology* in general, and the chapter *I. Feuerbach* in particular, is in fact no more than an assemblage of “very rough, discontinuous, and hitherto unwanted manuscripts,” or “offcuts.” Not even an unfinished work in progress, these intentionally discarded materials were fashioned into a form of coherence and assembled as a “book” after the fact in the 1920s by Marx and Engels’ Soviet editors. See CARVER & BLANK, *supra* note 27, at 1–2; see also TERRELL CARVER & DANIEL BLANK, A POLITICAL HISTORY OF THE EDITIONS OF MARK AND ENGELS’S “GERMAN IDEOLOGY” MANUSCRIPTS 17–23, 81 (2014). In other words, the chapter *I. Feuerbach* is a consequence of the 1859 Preface rather than its forerunner, an editorial attempt to create a textual “origin” for what would be asserted, briefly and schematically, in the 1859 Preface.

44. FREDRIC JAMESON, ALLEGORY AND IDEOLOGY 212 (2019).

45. *Id.* (emphasis added).

erenced in the 1859 Preface, specifically his commentary on “Debates on the Law of the Theft of Wood” in the Rhine Province Assembly. The Assembly is proposing to criminalize the gathering of fallen wood from privately owned forests. But, says Marx, to gather is not to thief: “In the case of fallen wood . . . nothing has been separated from property. It is only what has already been separated from property. . . . [F]or the owner possesses only the tree, but the tree no longer possesses the branches that have fallen from it.”<sup>46</sup> Yet, even though gathering fallen wood is very different from cutting branches off trees, the Assembly would have punished both as theft. Then comes a very interesting statement:

The law is not exempt from the general obligation to tell the truth. It is doubly obliged to do so, for it is the universal and authentic exponent of the legal nature of things. Hence the legal nature of things cannot be regulated according to the law; on the contrary, the law must be regulated according to the legal nature of things. But if the law applies the term theft to an action that is scarcely even a violation of forest regulations, then the law lies, and the poor are sacrificed to a legal lie.<sup>47</sup>

In Marx’s commentary, “the legal nature of things” is decisive, for it is that from which “the law” is obliged to take its expository cue if the law is not to be a lie.<sup>48</sup>

Marx’s immediate inspiration is Montesquieu’s *De l’esprit des lois*.<sup>49</sup> But whereas *The Spirit of Laws* begins from the prem-

---

46. Karl Marx, *Debates on the Law of the Theft of Wood*, RHEINISCHE ZEITUNG (1842), available at [https://www.marxists.org/archive/marx/works/download/Marx\\_Rheinische\\_Zeitung.pdf](https://www.marxists.org/archive/marx/works/download/Marx_Rheinische_Zeitung.pdf), 51 (last visited Oct. 27, 2020) [<https://perma.cc/9BM2-P8QK>].

47. *Id.*

48. *Id.*

49. *Id.* (quoting Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *De l’esprit des lois*, Tome premier, livre sixième, chapitre XII) (“Il y a deux genres de corruption: l’un lorsque le peuple n’observe point les lois; l’autre, lorsqu’il est corrompu par les lois: mal incurable, parce qu’il est dans le remède même.” [“There are two kinds of corruption: one when the people do not observe the laws; the other, when they are corrupted by the laws: an incurable evil because it is in the very remedy itself.”]).

ise that “[l]aws in their most general signification are the necessary relations derived from the nature of things,”<sup>50</sup> Marx alters Montesquieu’s premise in attributing an initial *legal nature* to things from which “the law” is in turn derived. “Legal nature” expresses an originating unity of the legal with the material in specifying the material order (“the nature of things”) from which Montesquieu’s laws arise in their turn. Law that does not comport with “the legal nature of things” is invalid, “a lie.”

Marx’s more fundamental inspiration lies, however, in his rejection of what he called law’s metaphysics, those “basic principles, reflections, definitions of concepts, divorced from all actual law and every actual form of law”<sup>51</sup> that had been at the core of his study of jurisprudence at the University of Berlin (1835–1841). There, he encountered Friedrich Carl von Savigny and his representation of law not as right, or reason, or ideal conceptual structure, but as historical fact, an emanation of “the customs and languages of particular peoples in history.”<sup>52</sup> History notwithstanding, Savigny worked to maintain precisely the arbitrary conceptual distinctions that Marx rejected, notably in imagining that law developed separately from custom and language (legal nature) both in substance and in technique.<sup>53</sup> The result would be the gapless perfectionism of form celebrated in nineteenth century German legal science, *Pandektenrecht*, “a self-completing and thus autonomous system.”<sup>54</sup> As his own emphasis upon “the legal nature of things” suggests, Marx took a different direction. “[I]n the concrete expression of a living world of ideas, as exemplified by law, the state, nature, and philosophy as a whole, the object itself must be studied in its development,” he wrote in one of his earliest commentaries on his legal studies.<sup>55</sup> “[A]rbitrary divisions must not be introduced, the rational character of the object itself must develop as something imbued

50. CHARLES LOUIS DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, *THE SPIRIT OF LAWS* 98 (1977).

51. Karl Marx, Letter from Karl Marx to his Father (Berlin, Nov. 10–11, 1837), in 1 KARL MARX & FREDERICK ENGELS, *COLLECTED WORKS OF KARL MARX AND FREDERICK ENGELS* 12 (Elec. ed. 2003).

52. GARETH STEDMAN JONES, *KARL MARX: GREATNESS AND ILLUSION* 64 (2016).

53. PETER GOODRICH, *SCHREBER’S LAW: JURISPRUDENCE AND JUDGMENT IN TRANSITION* 102–03 (2018).

54. *Id.* at 103; see also ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* (2005).

55. Letter from Karl Marx to his Father, *supra* note 51, at 12.

with contradictions in itself and find its unity in itself.”<sup>56</sup> Marx’s law is what Peter Goodrich terms “tellurian.”<sup>57</sup> Here in microcosm, says Donald Kelley, one sees “the first Marxian prefiguring of historical materialism . . . formulated in the context of a fundamental, and even revolutionary, critique of systematic jurisprudence.”<sup>58</sup> One sees foreshadowed the turn to political economy—the empirical investigation of the material—undertaken in order to understand the jurisprudential.

The second example is from thirty years later, from the mature Marx of *Capital Volume 1*. Marx quite pointedly begins *Capital* not with production per se, but with the meaning of the commodity and commodity exchange. That choice necessarily places the unity of the legal with the material—one interactive structure rather than two levels—at the center of his analysis, for the commodity cannot exist without law.

The commodity is a thing, a product of labor, the original nature of which is to satisfy human needs. As objects of utility, commodities “come into the world in the form of use-values, or material goods, such as iron, linen, corn, etc. This is their plain, homely, natural form.”<sup>59</sup> Considered solely as objects of utility, things are not commodities. They have a distinct nature. “[T]hey are only commodities because they have a dual nature, because they are at the same time . . . bearers of value.”<sup>60</sup> Their dual nature is realized in exchange, through which these “products of labour acquire a socially uniform objectivity as values, which is distinct from their sensuously varied objectivity as articles of utility.”<sup>61</sup> Once again, we have encountered the legal nature of things.

If exchange is to transform the nature of the particular thing to be called a commodity, that thing must be exchangeable. That is, it must exist in a specific and integral relationship between the materiality of the thing and the legalities of its possession. For “[c]ommodities cannot themselves go to market and perform exchanges in their own right. We must therefore have recourse to their guardians, who are the possessors of commodities,” who “recognize each other as owners of private property,”

---

56. *Id.*

57. GOODRICH, *supra* note 53, at 74, 76.

58. Donald R. Kelley, *The Metaphysics of Law: An Essay on the Very Young Marx*, 83 AM. HIST. REV. 350, 355 (1978).

59. MARX, *CAPITAL*, *supra* note 1, at 138.

60. *Id.*

61. *Id.* at 166.

and who enter into exchange relations with each other in the form of a juridical relation.<sup>62</sup> The form of that juridical relation is “the contract . . . which mirrors the economic relation.”<sup>63</sup> It is not hard to see Savigny’s masterwork *The Law of Possession* lurking behind this statement. As Gareth Stedman Jones puts it, Savigny argued that in Roman law possession was not merely the consequence of right but its very foundation. “Law, and particularly the notion of private property, derived not from reason, but from the fact of possession” grounded in the material circumstances of the possessor.<sup>64</sup> “Rights were not natural, but historical.”<sup>65</sup> Materiality and legality are completely intertwined.

From the process of exchange, Marx proceeds in *Capital Volume 1* to the oil in its hinge, the relationship between money and commodity circulation; thence to the general formula for capital (from C-M-C to M-C-M and M-C-M' to M-M'); and onward to a recapitulation of the legal relations of exchange, this time in the sale and purchase of labor power. From here Marx moves to the labor process (“the hidden abode of production”<sup>66</sup>), to the creation of capitalist ownership of the means of production (or in other words property relations), and to the extraction of surplus value from commodified labor power through manipulation and regulation of the working day, mechanization, and wage-determination. The whole structure is built on production for exchange, the ur-form of bourgeois production (“the most general and the most undeveloped form”<sup>67</sup>). Throughout, Marx’s account is as attentive to the legal history of factory regulation (regulation of the juridical/property relation between capital and labor)

---

62. *Id.* at 178.

63. *Id.* at 178; see also Tomlins, *supra* note 11, 530–34 (discussing Evgeny Pashukanis, Isaac Balbus, and the relationship between commodity form and legal form). Marx’s use of the words “mirrors the economic relation” to describe the nature of the juridical relation might be taken to indicate a purely instrumental conception of law. However, the implication is more complicated, for Marx has already used the metaphor of the mirror to describe how value (which is not inherent in the commodity) is established in the confrontation between commodities in the market. As Roberts notes, “the value of a commodity can only be expressed in the terms of another commodity, which serves as its equivalent. This equivalent is the ‘mirror’ in which the first commodity appears as a thing having value.” ROBERTS, *supra* note 8, at 81. Likewise, one may argue, for the legal relation to mirror the economic relation does not mean it is the same thing in a different language. It means it is essential to the establishment of the economic relation.

64. JONES, *supra* note 52, at 64.

65. *Id.*

66. MARX, *CAPITAL*, *supra* note 1, at 279.

67. *Id.* at 176.



as it is to their economic relation. It is difficult—if not impossible—to distinguish the one from the other. Precisely because its materialism disavows abstraction, the whole is a “scientific” assault on that other science, dominant in Germany, the *Begriffsjurisprudenz* (jurisprudence of concepts) of Savigny, Puchta, and Jhering, “a method of legal cognition entirely divorced from empirical support and distinct from all other disciplines . . . legal science, not history, policy, sociology, or interpretation.”<sup>68</sup>

“The legal nature of things,” canvassed in 1842, thus predicts Marx’s continuing close attention to legality’s capacities, both instrumental and constitutive, in the determination of the economic structure of society. I have tried to demonstrate that these capacities can be detected even in the “austerely structural” 1859 Preface.<sup>69</sup> In *Capital*, the reason that the fetishized commodity can dance and that “Mr. Moneybags” can smirk is that the law of exchange relations has endowed each of them with the power to dominate all those who depend on market relations for their survival.<sup>70</sup> As the intellectual historian Donald Kelley remarked in 1978, those who would understand Marx have given far too little attention to the profession that Marx first chose: not journalism but law, or more precisely jurisprudence.<sup>71</sup> Ironically, CLS’s headlong rush to abandon Marxism began almost precisely at the moment Kelley was trying to draw attention to the fundamental importance of his legal studies to a mature understanding of Marx’s *oeuvre*.

In concluding that one might “see [Marx’s] system of political economy as the final metamorphosis of his first calling,” however, Kelley risks an error of his own.<sup>72</sup> As William Clare Roberts has stressed, *Capital* is a *critique* of political economy, not an alternative socialist version.<sup>73</sup> It is a “critique of the forms of thought proper to capitalism, and to the capitalism that gives rise to them, in the name of liberation.”<sup>74</sup> At *Capital*’s core lies a radical and emancipatory politics of freedom as non-domination, an assault on the legalities of exchange that promise individual

---

68. GOODRICH, *supra* note 53, at 103–04.

69. See ALEX CALLINICOS, *MAKING HISTORY: AGENCY, STRUCTURE, AND CHANGE IN SOCIAL THEORY* ix (2009).

70. See ROBERTS, *supra* note 8, at 101–02.

71. Kelley, *supra* note 58, at 350.

72. *Id.* at 351.

73. ROBERTS, *supra* note 8, at 12–19.

74. *Id.* at 53.

freedom but fetishize commodities in the market and license despotic command within the labor process. Its political target is the humanistic “individualizing and moralizing” tendencies of nineteenth century socialism that would cure exploitation by purifying exchange.<sup>75</sup> These are the dreams from which Marx wished to arouse the world, all of them symptomatic of the discrepancies “between *appearances* and *reality*, *seeming* and *being*” that haunt humanity.<sup>76</sup>

How, then, does this refreshed Marxism enliven our quest to reestablish law as a site for critical theory?

### III. AWAKENING AND ACT

How was the world /before the big melt happened?  
 How was the sun /when it could touch your skin?  
 How was it all /before the city died?  
 How was the world /before the executions?  
 Before you realised it was already far too late?  
 What did you like to read /before they burned the books?<sup>77</sup>

In giving our attention to law as a site for critical theory, we are attending to a crucial constituent element of the “common sense or practical wisdom that is essential for people living in modern society,”<sup>78</sup> the symbolic order of language, of ideology, and of comprehension that lies between ourselves and *the Real*, according to Lacanian psychoanalysis, and conditions our sanity; or rather, as Teresa Brennan argues, our psychosis.<sup>79</sup> In targeting “the forms of thought proper to capitalism,”<sup>80</sup> Marx’s critique of political economy takes aim at this symbolic order. In doing so, it demonstrates just how difficult it is to disentangle the symbolic from the Real, let alone set the symbolic order in a determined or determining relationship with materiality. We

---

75. *Id.* at 55.

76. *Id.* at 147 (emphasis added). For a similar emphasis on Marx and Engels as engaged above all in the development of an emancipatory politics, see CARVER & BLANK, *supra* note 27, at 7 (“Marx and Engels’s substantive theses on humanity, history, modernity, and a communist future develop in [the “German Ideology” manuscripts] as *political* points through and through . . . by way of contrast to ‘truths’ derived abstractly.”). See also ROBERTS, *supra* note 8, at 51–53.

77. BLACK CASINO AND THE GHOST, *How Was the World*, on FAREWELL MARSHAL BRUNSWICK (Lucky Machete 2020).

78. ROBERTS, *supra* note 8, at 52.

79. See generally, TERESA BRENNAN, *HISTORY AFTER LACAN* (1993).

80. ROBERTS, *supra* note 8, at 53.

seem consigned to precisely the condition of sanity/psychosis that Lacan diagnosed. We are castrated.<sup>81</sup> Our only option is simply to recognize and live with our impotence in the face of a symbolic order that, after all, meets our incessant (but empty) craving for *more*—more meaning, more knowledge, more things to fill our lack. “Living with” protects us from the Real, the terrifying other, the abyss that we seek at all costs to avoid.

For forty years, in its own search for this more, critical theory has lavished its attention on the symbolic order. Perhaps no single historical intellect has had greater influence on the attention that has been lavished than Walter Benjamin, whose writings were so comprehensively devoted to the nature of the symbolic, and whose elevation from fugacious suicide to hero figure of cultural studies marks the elevation of attention to the symbolic to its current point of utter ubiquity. Yet we would do well to remember that Benjamin’s preoccupation with the symbolic was devoted to finding its fractures, the points at which it might be penetrated. Just as Marx wished to wake the world from its dream about itself, so too Benjamin wished “to find the constellation of awakening.”<sup>82</sup>

The same might be true of Fredric Jameson, often called America’s leading Marxist critic,<sup>83</sup> whose penetrating study of ideology as allegory reveals (like Benjamin’s) both its ubiquity, and indeed its potential for critique, while simultaneously attempting to hold on to the reality of material production rather than submit to the ceaseless self-referentiality of postmodernism’s signifying chains-without-end. “[M]eaningful narratives today, in late capitalist globalization, tend to find their fulfillment in structures that call for allegorical interpretation,” Jameson observes. But “the seemingly post-ideological mood of cynical reason and radical depoliticization” characteristic of the current epoch “encourages the conclusion that interpretation is no longer possible, or that it is no longer desirable, or, finally, that it is so democratically widespread as to be utterly devalued and in the

---

81. LOUIS ALTHUSSER, WRITINGS ON PSYCHOANALYSIS: FREUD AND LACAN 27–28 (1996).

82. WALTER BENJAMIN, THE ARCADES PROJECT 458 (2002); see also Christopher Tomlins, *A Poetics for Spatial Justice: Gaston Bachelard, Walter Benjamin, and the Return to Historical Materialism*, 32 LAW & LITERATURE 319 (2020).

83. See Terry Eagleton, *Frederic Jameson: A Theory Bookshelf*, VERSO BOOKS BLOG (July 31, 2019), <https://www.versobooks.com/blogs/4399-fredric-jameson-a-theory-bookshelf> [<https://perma.cc/Z8SF-PJKX>] (in praise of FREDERIC JAMESON, A SINGULAR MODERNITY (2013)).

long run politically worthless.”<sup>84</sup> Instead, “texts tend to allegorize themselves.”<sup>85</sup> To that extent, inability to hold production distinct from representation speaks to the permanent entanglement of reality with the symbolic that precludes the awakening Marx and Benjamin both desired. But is Jameson’s *allegoresis* capable of creating the “sudden opening onto the perception of the totality” (awakening) that he seeks? Does it not, rather, constitute “the desolate landscape of dystopian simulacra” he laments?<sup>86</sup>

Alain Badiou uses the term “restoration” to stand for what we have experienced in the last half century, and what we continue to experience. Restoration “is above all an assertion regarding the real; to wit, that it is always preferable to have no relation to it whatsoever.”<sup>87</sup> Restoration is a retreat from “the passion for the real”<sup>88</sup> that Badiou argues was the characteristic of what preceded restoration, retreat from Marx, Nietzsche, and Freud, from their hermeneutics of suspicion, and from the struggle against semblance that they unleashed on the world they had inherited; a passion of which one might say the leading European laureate was Brecht:

We  
 Who wished to lay the foundation for gentleness  
 Could not ourselves be gentle.  
 But you, when at last the time comes  
 That man can aid his fellow man,  
 Should think upon us  
 With leniency.<sup>89</sup>

Both Lacan and Althusser address the symbolic order of restoration, to which humanity has surrendered its passion for the Real, turned its back, and thus once more stands impotent. But neither for Badiou is implicated in the restoration of impotence, the sanity/psychosis of recognition and refusal. Rather, each—

---

84. JAMESON, *supra* note 44, at 309, 329.

85. *Id.* at 329.

86. *Id.* at 347; see also JAMES R. MARTEL, *THE ONE AND ONLY LAW: WALTER BENJAMIN AND THE SECOND COMMANDMENT* (2014).

87. ALAIN BADIOU, *THE CENTURY 26* (Alberto Toscano trans., du Seuil ed. 2007) (2005).

88. *Id.* at 32 (emphasis added).

89. Bertolt Brecht, *To Those Who Follow in Our Wake*, in 4 *GESAMMELTE WERKE* 722–25 (Scott Horton trans., 1967) (1939).

like Marx, like Freud—renders impotence *visible* by calling it to our attention. Each opens the way to a *Durchbruch* (break-through) or “unblocking”; the “fall of th[e] figure of the subject-supposed-to-know” that makes way for “an act.”<sup>90</sup> Each is anti-philosopher, one who does not attempt to plug our holes by filling them with meaning, allegorical or otherwise, but who seeks to hasten the act, which is precisely indifferent to meaning:

It’s absolutely not a question of telling us what’s good—the good state or good politics—and of making progress in anything whatsoever. All of that is only imaginary impotence. What there is, is a logic that captures a real and requires the hastening of the act.<sup>91</sup>

Politics as “knowledge,” politics as “progress,” is politics as meaning. “If politics is logic and act, then it’s free of meaning, which means free of progress in all its forms, free of the very idea of the representation of progress.”<sup>92</sup> To return to Brecht:

The masses arose; shook off at last their tormentors; with a single ablution rid themselves of their comforters – perhaps the most terrible of their enemies; finally gave up all hope, and won the victory. Everything was changed. Vulgarly lost its glory, usefulness attained renown, stupidity lost its privileges, brutality was no longer the key to success.<sup>93</sup>

The act is a leap of faith. It guarantees nothing. But it is a leap of necessity. For, if even the most radical political economy cannot be disentangled from the symbolic, logic from meaning,

90. BADIOU, LACAN, *supra* note 2, at 25. On the act, see Maria Aristodemou, *From Decaffeinated Democracy to Democracy in the Real*, in *ROUTLEDGE RESEARCH HANDBOOK OF LAW AND THEORY* 347, 361 (Andreas Philippopoulos-Mihalopoulos ed., 2019). On the relationship between Lacan’s act and Badiou’s event, see Lucy Bell, *Articulations of the Real: From Lacan to Badiou*, 34 *PARAGRAPH* 105 (2011).

91. BADIOU, LACAN, *supra* note 2, at 132.

92. *Id.* at 133. In the name of a constructivist and progressive Marx “full of enthusiasm for the modernities of his day and the scientífico-technological advances of the future,” Fredric Jameson is critical of “radical efforts in the era of late capitalism” that reject progress. See JAMESON, *supra* note 44, at 37. One can of course glory in the progressive opportunities afforded by the Anthropocene, see *id.* at 37, 348, if one so chooses, but if, as Roberts argues, Marx’s critique of political economy is motivated by a political theory of nondomination, one will not be able, unproblematically, to marshal Marx in one’s column, *supra* note 8. For in this *Capital* there is no determinism of development: it is for “us” to decide.

93. BERTOLT BRECHT, *THREEPENNY NOVEL* 384 (1956).

then nothing remains but decision—choosing to choose.<sup>94</sup> “That’s what the act is: being at the point where there is nothing but the possibility of choosing.”<sup>95</sup> The act is Benjamin’s “leap in the open air of history,” which he described as “the dialectical leap Marx understood as revolution.”<sup>96</sup> That is why the Marx of the *Manifesto*, no less than the Marx of *Capital*, is a crucial presence in today’s critical theory. Because it is there that the hastening of the act is contemplated, and where decision is recommended.

## CONCLUSION

What, by way of conclusion, should we expect a revitalized critical legal theory that avows the act to look like? We should expect that this will be a critical legal theory that embraces its own history instead of discarding it so that it can learn from how and why it has become what it is. As such, we should expect that this will be a critical legal theory that accepts and learns from Marx and Marxists in order to repair the breach needlessly created by CLS forty years ago. We should also expect, however, that this will be a critical legal theory that is aware of the impossibility of escaping the symbolic except by deed—a critical theory with Marx, but also with Lacan, and with Badiou.

To what will this revitalized critical legal theory grant us access? It will grant us access to an account, history, story, of a social psychosis—of an era of the ego and of the conditions of the ego’s unrequited search for its fulfillment in the increasingly uncontained “more” of colonialism and capitalism. It will not be a critical theory that is philosophical, one that searches for the meaning of this psychosis, and for adjustment to its predilections, but one that is historical, attentive not just to the “more” of colonialism and capitalism but to their attendant hallucinations made material in global space and in half a millennium of time. And it will be a critical theory whose devotion to the act must be a devotion not just to the telling of this history but to awakening from it. For otherwise, what good would it be?

---

94. On choice and decision, see Walter Benjamin, *Goethe’s Elective Affinities*, in 1 WALTER BENJAMIN: SELECTED WRITINGS, 297, 346 (Marcus Bullock & Michael W. Jennings eds., 2004); see also EELCO RUNIA, *MOVED BY THE PAST: DISCONTINUITY AND HISTORICAL MUTATION* (2014).

95. BADIOU, LACAN, *supra* note 2, at 160.

96. Walter Benjamin, *On the Concept of History*, in 4 WALTER BENJAMIN SELECTED WRITINGS 395 (Howard Eiland & Michael W. Jennings eds., 2006).

UNIVERSITY OF COLORADO LAW REVIEW