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CRITICAL LEGAL STUDIES:

A Marxist Rejoinder

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> Jurists, politicians (statesmen in general), moralists, clerics. For this ideological subdivision within a class: (1) *The occupation assumes an independent existence owing to the division of labour.* Everyone believes his craft to be the true one. Illusions regarding the connection between their craft and reality are the more likely to be cherished by them because of the very nature of the craft. In consciousness—in jurisprudence, politics etc.—relations become concepts; since they do not go beyond those relations, the concepts of the relations also become fixed concepts in their mind. The judge, for example, applies the code; he therefore regards legislation as the real, active driving force.[1]
>
> —Karl Marx & Friedrich Engels

I. INTRODUCTION

Critical Legal Studies (CLS) writers argue that judicial decision making is not politically neutral; rather, it is only a stylized version of political discourse. More pointedly, these writers argue that the belief in legal neutrality legitimates an unrepresentative political process, thereby benefiting the powerful to the detriment of the weaker. Accordingly, CLS writers consider the belief in legal neutrality to be ideological. Also, CLS writers consider judicial decision making itself (as opposed to beliefs about legal decision making) to be ideological in the sense that the outcomes of legal decision making are informed and influenced by conservative ideology.[2] Thus, a

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1. Karl Marx & Friedrich Engels, THE GERMAN IDEOLOGY (1846), *reprinted in* 5 KARL MARX AND FRIEDRICH ENGELS: COLLECTED WORKS, 92 (W. Lough trans., International Publishers 1975).

2. I use two senses of the term "ideology" in this essay. The ideological belief in legal neutrality is ideological in a pejorative sense. That is, it is a false belief that works to the detriment of its holder. The conservative ideology that informs legal decision making is ideological in a descriptive but not necessarily a pejorative sense. For a discussion of these and other distinctions between the possible meanings of the term "ideology," *see* Raymond Geuss, THE IDEA OF A CRITICAL THEORY (1981), esp. ch. 1.

central project of the CLS movement is to unmask the ideological nature of law.[3]

What CLS writers expect unmasking of the ideological nature of law to achieve is apparent upon consideration of the premise that law is constitutive of society—a premise widely held by participants in the CLS movement.[4] In Robert Gordon's words:

> [I]t is just about impossible to describe any set of "basic" social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relations such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality.[5]

If law is constitutive of society, it follows that changing law changes society. To quote Gordon once again:

> Slavery is a legal relationship: It is precisely the slave's bundle of jural rights (or rather lack of them) and duties vis-à-vis others (he can't leave, he can't inherit, he has restricted rights of ownership, he can't insist on his family being together as a unit, etc.) that makes him a slave. Change the bundle significantly and you have to call him something else. And how could one say something like "medieval law bolstered (or undermined) the structure of feudal society"? Again, a particular (though concededly in this case very hazily defined) set of legal relations composes what we tend to call feudal society. If those relations change (commutation of in-kind service to money rents, ousting of seignorial jurisdiction to punish offenses, etc.) we speak not simply of changes in "the legal rules regulating feudal institutions," but of the decline of feudalism itself.[6]

As I detail in Part III, CLS writers claim that unmasking the ideological nature of law leads to change in the law. Thus, by implication, CLS writers expect the unmasking of the ideological nature of law to lead to societal change.

Of central concern in this essay are the positions that (1) law is constitutive of society and (2) unmasking the ideological nature of law leads to change in the law, which in turn leads to change in society. As we shall see, positions (1) and (2) pit CLS writers against the Marxist tenet that law is distinct from and determined by socioeconomic forces. Accordingly, many

3. For discussion of the premises that the liberal belief about law is ideological and that the function of CLS writers is to unmask this ideological nature, see David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 5 (David Kairys ed., 1990); Alan Hutchinson, *Introduction* to CRITICAL LEGAL STUDIES 3 (Alan Hutchinson ed., 2d ed. 1989); Richard M. Fischl, *Some Realism About Critical Legal Studies,* 41 U. MIAMI L. REV. 505, 524–25 (1987); and Duncan Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFF. L. REV. 205 (1979).

4. *See, e.g.,* Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES 253–57 (1987) and Robert W. Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57, 102–109 (1984).

5. Gordon, *supra* note 4, at 102.

6. *Id.*

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CLS writers reject the Marxist analysis of law.[7] However, they purport to do so for reasons other than the incompatibility of positions (1) and (2) with Marxism.

First, CLS writers argue that the Marxist analysis of law cannot withstand an "antiformalist" critique. Put in other terms, CLS writers argue that the Marxist analysis of law relies upon the false assumption that judicial decisions are made on the basis of legal reasons alone. Second, CLS writers argue that Marxists groundlessly assume that socieconomic forces determine judicial decisions, thereby precluding further inquiry regarding this assumption. Third, CLS writers argue that the Marxist project of explaining the law by reference to the relations of production is tautological. Supporting this argument is the seemingly plausible assertion that these relations (e.g., the capitalist's ownership of the means of production and the proletarian's ownership of his or her labor power) are nothing more than legal relations. In Parts IV, V, and VI of this article I critically examine and reject each of these critiques. In short, I show that Marxism possesses sufficient theoretical resources to deflect these critiques. However, I do not attempt to rebut a fourth ground that CLS writers and others cite to reject Marxism—the implausibility of Marxism's teleological framework.

No doubt, the idea that the history of humanity is correctly understood as a march toward communism is central to Marx's work. I do not defend this aspect of his thought; rather, I distinguish it from the parts of Marxism I do defend. One can reject the idea that history has a foreordained end, such as communism, yet adhere to the Marxist tenet that socioeconomic forces constitute the engine of history. More germane to the present essay, one can continue to oppose the CLS positions (1) and (2) described above by propounding the Marxist tenet that socioeconomic forces are separate from and, to a significant extent, determinative of law and legal decisions. Thus, the critique of the teleological aspects of Marxism does not implicate the Marxist tenet defended here. However, if correct, the first three critiques of Marxism described above would undermine this tenet. On the other hand, if my refutation of these three critiques is sound and CLS writers have no affirmative reason to reject the Marxist tenet that socioeconomic forces determine the law, then CLS writers have reason to reconsider positions (1) and (2), which are incompatible with this tenet.

II. MARXISM

Before addressing CLS writers' critiques of Marxism, I must set out in further detail the understanding of Marxism that informs this essay: G.A.

7. Examples of explicit rejections of Marxist analysis of law can be found in Kairys, *supra* note 3, at 6; Hutchinson, *supra* note 3, at 7; Fischl, *supra* note 3, at 524–26, and James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 658, 721–25 (1985).

Cohen's analytical perspective, supplemented with criticisms of another analytical Marxist, Jon Elster.[8] Cohen distinguishes the following set of basic Marxian concepts: the forces of production, the relations of production, the base or the economic structure, and the superstructure.[9] Examples of the forces of production are: (i) the means of production, which includes the instruments of production (e.g., tools, machines, premises, instrumental materials), raw materials, and spaces and (ii) labor power.[10]

Production relations and the economic structure of a society are interrelated concepts. Production relations are either (i) ownership by persons of productive forces or other persons or (ii) relations presupposing such ownership.[11] Examples of production relations are: *x* is the slave of *y*; *y* is the master of *x*; *x* is the serf of *y*; *y* is the lord of *x*; *x* is hired by *y*; *y* hires *x*; *x* owns *y*; *x* owns thing *z*.[12] The sum total of the production relations in a society constitutes the economic structure, or base, of that society.[13] The form of the economy (e.g., feudalism or capitalism) is defined by the distribution of the types of production relations that predominate. For instance, a society is capitalist where laborers typically own their own labor power (and thus can be hired) and where a few capitalists (who hire the laborers) own the means of production.

Cohen articulates the forces of production, the relations of production, and the superstructure by way of functional explanation, which has two unique features. First, a functional explanation explains a phenomenon by reference to its function.[14] Second, the thing to be explained, the *explanandum,* precedes the thing that does the explaining, the *explanans.* Perhaps the most well-known example of this sort of explanation is the explanation that an animal possesses a particular trait because that trait contributes to its survival. Note that the animal's trait (the explanandum) is explained by reference to its function (contributing to survival) and that the explanandum antedates the explanans (the animal's survival). This form of explanation contrasts starkly with the more typical form of (causal) explanation wherein the explanans antedates the explanandum: For example, the eight-ball rolled into the corner pocket (the explanandum) because the pool player struck it with the cue ball (the explanans). As I explain in Part V, a functional explanation is ultimately reducible to a conventional causal explanation.

According to Cohen, Marx's work comprises two functional explanations. First, the forces of production determine the economic structure of a society in that those relations of production that tend to maximize the

8. Jon Elster, MAKING SENSE OF MARX (1985) and Gerald A. Cohen, KARL MARX'S THEORY OF HISTORY: A DEFENCE (1978).
9. Cohen, *supra* note 8, at 32.
10. *Id.* at 55.
11. *Id.* at 63.
12. *Id.* at 35.
13. *Id.*
14. For a more detailed description of functional explanation, see *id.* at 249–72.

development of the forces of production will emerge and be sustained.[15] Second, the prevailing relations of production in a society give rise to a superstructure comprising those noneconomic institutions that tend to stabilize the prevailing relations of production.[16] In this article, I assume a law or legal decision that benefits the dominant class is a noneconomic institution that stabilizes the prevailing relations of production.

Like Cohen, Elster finds two strands in Marx's work: one based on the productive forces and the other based on the relations of production. Unlike Cohen, Elster finds the first strand of Marx's thought (the relation between the productive forces and the relations of production) to be implausible.[17] Specifically, Elster holds that while Marxists have identified mechanisms whereby the relations of production affect the superstructure, they have not identified mechanisms whereby the level of the productive forces affects the nature of the relations of production. Siding with Elster, I focus on the nexus between the relations of production and the superstructure, and I largely ignore the nexus between the forces of production and the relations of production.

Marking a further difference with Cohen, Elster rejects the Marxist tendency to explain the superstructure functionally. For instance, Elster would reject the functionalist explanation that a particular law takes a certain form because that form benefits the capitalist class. Though noting the prevalence of functionalist explanation in Marx's work, Elster favors Marx's use of more conventional explanation wherein, unlike with functional explanation, the explanans comes before the explanandum. Specifically, Elster identifies and develops Marx's nonfunctionalist explanation of the superstructure in terms of the interplay of class interest.[18] As I explain in Part V, functional and conventional forms of explanation are not necessarily incompatible; rather, functional explanation is reducible to conventional explanation. Moreover, contra Elster and in agreement with Cohen, I suggest in Part V that functional explanation plays a useful role in Marxist explanation of the law.

III. THE TENSION BETWEEN MARXISM AND CLS

Despite their differences, Cohen and Elster similarly depict the superstructure, which includes law, the state, and ideology,[19] as determined to a

15. *Id.* at 134.
16. *Id.* at 216.
17. *See* Elster, *supra* note 8, at ch. 6.
18. *See* Elster, *supra* note 8, at chs. 7, 8.
19. Cohen assumes that ideology is not part of the superstructure but nevertheless states that much that can be said about the superstructure applies to ideology. *See* Cohen, *supra* note 8, at 216.

significant extent by class structure. Thus, Cohen and Elster share the Marxist tenet defended here that socioeconomic forces determine the law. The CLS writers reject this tenet. Rather, they hold that (1) law is constitutive of society and (2) unmasking the ideological nature of the law leads to progressive change in the law and society.

The CLS writers demonstrate the ideological nature of law by revealing unrecognized contradictions inherent in the law. Two different senses of contradiction correspond to two different CLS projects to unmask law's ideological nature and to effect change.[20] Some CLS writers posit that the ideals fundamental to the liberal legal conceptual framework are contradictory. Those taking this view controversially propose that these contradictions require that liberalism be abandoned before meaningful social change can occur.[21] In a second research project, CLS writers identify contradictions between law as written (including policies underlying the written law) and law as actually implemented in judicial decisions. In this project, bringing the implementation of law in line with the law as written and the policies embodied by that law leads to social change.[22]

Because CLS writers hold that society can be changed by changing the law or the implementation of the law, Marxism, which depicts law as playing a limited role in social change, must be rejected. As James Boyle states:

> Inspired by the insights of phenomenology, existentialism, and the discoveries of comparative history, anti-positivist social theorists see the Marxist efforts to locate "the engine of history" as merely another attempt to deny contingency, to take choice out of human hands and to put it into the hands of some external implacable force. . . . If one is convinced by the argument so far, then one can see the truth in the idealist position that a change of these belief-clusters will be an actual change of the world.[23]

For their part, Marxists reject the view that collectively held beliefs and ideals are the only, or primary, restrictions on the possible scope of social change. According to Marxists, pointing out the contradiction inherent in the liberal legal framework or between law on the books and the law as

20. For a brief description of these two CLS projects and citations to works that represent them, see Brian Leiter, *Is There an "American" Jurisprudence?,* 17 OXFORD J. LEGAL STUD. 367, 382–85 (1997).

21. Mark Kelman describes the contradictions inherent in liberalism as among (1) the advocacy of mechanically applicable rules and advocacy of situation-sensitive, ad hoc standards; (2) the commitment that values or desires are subjective and the ideal that we can "know" social truths objectively; and, (3) the belief in individual free-will and the belief in determinism. Kelman, *supra* note 4, at 3. For a similar list of contradictions inherent in liberalism, see Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 89 1685 (1976).

22. *See, e.g.,* Karl Klare, *Critical Theory and Labor Relations Law, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 61 (David Kairys ed., 1990) and David Kairys, *Freedom of Speech, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 237 (David Kairys ed., 1990).

23. Boyle, *supra* note 7, at 725.

implemented will not bring these contradictions to an end.[24] In the general Marxist view, the class structure creates and sustains the contradictions relating to the law. Thus, it is unsurprising that CLS writers marshal the following critiques against the general Marxist analysis of law.

IV. THE ANTIFORMALIST CRITIQUE

A central tenet of Critical Legal Studies is commonly referred to as the antiformalist critique. As the term implies, this critique is a rejection of legal formalism, which is the position that a judicial decision is the unique result of the application of the set of relevant legal reasons to a particular fact pattern. One can distinguish between strong and weak formalism. A strong formalist, such as Ronald Dworkin or the late nineteenth-century American legal scholar Christopher Columbus Langdell, holds that only one answer results when the class of legal reasons is applied to a particular question of law.[25] A weak formalist argues that reasoning from the class of legal reasons sometimes, but not always, leads to only one legal conclusion.

The CLS writers reject strong formalism. More controversially, they also reject the weak formalist position, holding that a unique legal outcome rarely results when one applies the set of relevant legal reasons to a particular fact pattern.[26] Thus, CLS writers argue that the application of legal logic nearly always leads to indeterminate results—more precisely, underdeterminate results.[27] Accordingly, something else must determine the outcome of legal decisions given that legal logic does not. This something else is conservative political ideology—hence the recurring phrase in the CLS literature that "law is politics."

24. For a discussion of the similarity between the CLS view that change in society can be implemented via the resolution of contradictions in the ideology underlying the law and the views of the Young Hegelians that Marx scathingly criticized, see Leiter, *supra* note 20, at 383–84.

25. Of course, Langdell and Dworkin would disagree about the contents of the class of legal reasons.

26. Karl Llewellyn, a legal realist and original critic of formalism, rejected formalism in light of the observation that the legal rules relevant to a particular decision can be interpreted by any number of opposing canons of construction. According to Llewellyn, indeterminacy results when no legal metarule definitively resolves which canon of construction and, consequently, which interpretation of a given rule should control. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395 (1950). Though CLS writers follow the legal realist's rejection of legal formalism, CLS writers base their rejection on different grounds. For CLS writers, legal indeterminacy is the result of either (1) the tension between ideals underlying the law or (2) the indeterminacy of language. For a brief discussion and relevant cites relating to CLS writers' understanding of indeterminacy, see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence,* 76 TEX. L. REV. 267, 273–74 (1997).

27. The distinction between characterizing legal reasoning as underdeterminate as opposed to indeterminate is that the latter suggests that legal reasoning could result in any decision whereas the former indicates that legal reasoning limits the number of possible results though it cannot select a particular result. For a more complete discussion of indeterminacy and legal reasoning, see Brian Leiter, *Legal Indeterminacy,* 1 LEGAL THEORY 481 (1995).

Several CLS writers have attempted to direct the antiformalist critique at the Marxist analysis of law. For example, Robert Gordon argues that because law is indeterminate, the tenet that the dominant class requires certain determinate laws for its maintenance is untenable.

> If the critiques of legal belief structures are accurate, that even in their theoretically ideal forms they are contradictory and incoherent, and that in practical application they depart constantly from the ideal in wildly varying fashion, it follows that no particular regime of legal principles could be functionally necessary to maintain any particular order. Similarly, no given economic order can be thought of as requiring for its maintenance any particular bunch of legal rules. . . . [28]

Of course, this critique only implicates Marxism if it is the Marxist position that the dominant class requires determinate laws for its maintenance. One might think that only determinate law could serve the function of benefiting the dominant class; therefore, Cohen's functionalist explanation of law entails the assumption that law is determinate. However, indeterminate law can benefit the dominant class just as well as determinate law. If CLS writers have done nothing else, they have shown how the indeterminacy of law often plays to the advantage of the more powerful groups in society.[29] Moreover, as I discuss below, it is not difficult to envision a mechanism whereby indeterminacy may systematically play to the advantage of one of these groups, today's capitalists—the owners, representatives, and managers of large for-profit corporations.

I assume here that indeterminacy would systematically play to the advantage of corporate interests if lawyers and judges shared a background set of beliefs and values—an ideology—conducive to these interests. There is reason to believe that lawyers and judges share such an ideology given that they all undergo the same experience in the form of three years of legal education at law school in which the corporate economy plays a unique role.[30]

It is well documented that a person's view of the world can be powerfully influenced by his or her interests. For instance, "hot" cognitive mechanisms such as wishful thinking, sour grapes, and dissonance reduction commonly operate to align one's interests and views of the world.[31] Given that the model employer of graduating law students is a law firm servicing the various needs of its corporate clients, it is in a law student's personal economic interest in employment to hold values and beliefs that would make such a

28. Gordon, *supra* note 4, at 421. For a similar critique, see Mark V. Tushnet, *Marxism as Metaphor,* 68 CORNELL L. REV. 281, 287–90 (1983).

29. For examples of CLS works demonstrating precisely this point, see sources cited, *supra* note 22.

30. In Duncan Kennedy, *Legal Education as Training for Hierarchy,* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 38 (David Kairys ed., 1990), Kennedy similarly argues that law school prepares students for jobs servicing corporate interests. However, he rejects the Marxist analysis of law. *Id.* at 47.

31. For a discussion of "hot" cognitive mechanisms, see Jon Elster, SOUR GRAPES (1983).

career bearable. Thus, it is reasonable to posit that "hot" cognitive mechanisms conform law students' values and beliefs to corporate interests. Furthermore, it follows that law students would be especially receptive to those legal theories and accounts of the law conducive to corporate interests.

There are several reasons to suspect that law schools prepare students substantively and psychologically for work servicing the corporate economy. One of the more obvious is that the goal of law schools is to prepare their students for employment with the law firms whose primary clients are corporations. In addition, many law school professors come to their position in legal academia by way of at least a short career with such firms. Thus, they, like their students, have faced psychological pressure to conform their beliefs and values in a manner conducive to corporate interests. It is not unreasonable to posit that these professors' beliefs and values, thus influenced, are reflected in what they teach.

If by virtue of their common socialization, lawyers share an ideological bias in favor of corporate interests, it is likely that the arguments lawyers make before courts would tend to be conducive to these interests. Similarly, judges, who are also socialized lawyers, would tend to be more receptive to arguments reflecting corporate interests. In summation, if the law is indeterminate and legal decisions cannot be definitely reached by reference to legal reasons, and if it is true that lawyers and judges share an ideological bias, then it would follow that legal decisions track this bias.

Having proffered a mechanism whereby indeterminacy plays to the advantage of the dominant class in the United States, I should make some qualifications. First, I do not suggest that the mechanism proposed above is law-like. It should only be considered a depiction of a general tendency. Second, the above is only a sketch. Admittedly, many details must be supplied and the concepts I have employed—such as socialization, belief, value, and corporate interests—must be more fully defined. However, it should be remembered that I have proffered this mechanism only as an illustration of how the indeterminacy of law might play to the favor of the more powerful. For this limited purpose, this rough sketch is sufficient. Finally, I should add that the above mechanism should not be considered exclusive. Indeterminacy probably plays to the advantage of the corporate economy by way of numerous mechanisms.[32]

A second weakness of the antiformalist critique is that its central premise—that the law is globally indeterminate—is suspect. The conclusion by CLS writers that legal decisions are indeterminate is based almost exclusively on analysis of appellate-level judicial decision making. However, appellate-level cases are not a representative sample of the universe of legal

32. One that immediately comes to mind has to do with a corporation's ability to spend much more on legal representation than can a typical noncorporate plaintiff. Money cannot buy many things, but it probably can buy superior legal representation, which, if law truly is indeterminate, should translate de facto into superior rights. A second, mentioned by a reader of an earlier version of this article, is that the political process of appointing federal judges is also constrained by corporate interests.

problems. On the contrary, cases reach the appellate level of decision making precisely because they are not easily resolved. Therefore, even assuming that legal decision making is indeterminate at the appellate level, it does not follow that legal decision making is indeterminate in other domains. Likewise, one cannot rule out the possibility that society's dominant class is doubly benefited. That is, the dominant class may simultaneously (i) enjoy the beneficial effect of the general determinacy of law and (ii) exploit the more indeterminate character of law in the context of appellate court legal decision making.

V. THE CRITIQUE THAT MARXISTS UNCRITICALLY ASSUME THAT SOCIOECONOMIC FORCES DETERMINE LAW

Several CLS writers criticize Marxists for refusing to question the assumption that socioeconomic forces determine the law. Exemplary of this line of critique is the following comment by Karl Klare:

> [B]y taking for granted that legal phenomena reflect the vagaries of class conflict within an overall structure of system-functional imperatives, the approach avoids all the hard issues and assumes what needs to be proved. The precise questions at stake are whether legal outcomes reflect systemic constraint and social struggle, and if so, why and how this occurs.[33]

Klare observes that Marxist theories of law assume that judicial decisions reflect systemic constraint and social struggle. This observation is correct as applied to the functionalist Marxist explanation that law is *x* because by being *x* the law benefits the dominant class. However, the fact that a theory entails certain assumptions is problematic only to the extent that the assumptions remain unquestioned. Rather than stifling inquiry about the relationship between judicial decisions and systemic constraint, Marxist functional explanation facilitates further inquiry. To illustrate this point, a detailed analysis of the complementary relationship between conventional and functional explanation is necessary.

Recall the example of functionalist explanation wherein an animal's traits (the explanandum) are explained by their function (the traits' contribution to the animal's survival). For example, a zebra has stripes because stripes contribute to its survival. As in all functional explanations, the explanandum (the zebra's stripes) antedates the explanans (the contribution to the zebra's survival). Obviously, this functionalist explanation is not satisfactory as the final word as to why a zebra has its stripes. And, of course, it is not; rather, the animal's traits can be explained more fully via the mechanism of natural selection. For example, today's zebras bear stripes because the striped zebras of yesteryear survived long enough to pass on their stripe-bearing genes, whereas stripeless zebras got eaten. Note that in

33. Klare, *supra* note 22, at 67. For a similar criticism to Klare's, see Kennedy, *supra* note 30, at 47.

this explanation, the explanans antedates the explanandum. The mechanism of natural selection (the explanans) weeded out stripeless zebras in the past so that today, only zebras with stripes (the explanandum) remain.[34]

Like the functional explanation of an animal's traits, the functionalist Marxist explanation of the law is not the end of inquiry.[35] Rather, this functional explanation is a placeholder for more detailed conventional explanations. Examples of such conventional explanations can be found in Marx's work and in the work of later Marxists, such as Elster.

In *The Eighteenth Brumaire,* Marx employs both functional and nonfunctional explanation regarding the success of Luis Bonaparte's coup d'etat against the French bourgeoisie-controlled state of 1851.[36] In a functionalist mode, Marx argues, somewhat paradoxically, that Bonaparte overthrew the bourgeoisie-controlled state and rose to power because in so doing, he stabilized the bourgeoisie's economic power. This explanation is compatible with Marx's general explanation that the superstructure (in this case, the state) has a particular nature because that nature stabilizes or benefits the prevailing class (in this case the bourgeoisie). Marx's nonfunctional explanation in *The Eighteenth Brumaire* entails a detailed examination of how the class struggle among the bourgeois, proletarian, and peasant classes resulted in the ascendancy of a Bonapartist state that was relatively autonomous of bourgeois control.

Elster develops the nonfunctionalist aspect of Marx's work. Though Elster views Marx's analysis of Bonaparte's coup d'etat in terms of class struggle as flawed in several respects, he generally embraces this nonfunctionalist explanation as an exemplar of a promising methodological approach. Accordingly, he has further developed possible mechanisms whereby the class struggle may affect the nature of the state and ideology.[37]

Functional explanation does not stifle further inquiry because it is not a satisfactory final explanation. Rather, it requires the development of underlying conventional explanations, such as natural selection and those proposed by Elster and Marx. The following question arises: Why approach detailed conventional explanation via the path of functional explanation? Why not begin with conventional explanation? The answer is that functional explanation is required when there is a provocative correlation but

34. In addition to natural selection, there are other mechanisms that could be implicit in a given functional explanation. As Cohen notes, two of these are Lamarckian and instrumental explanation. Cohen, *supra* note 8, at 287–89. Consider the functional explanation that a center has powerful muscles because he needs them to play football. A Lamarckian further elaboration of this same phenomena is that the football player develops large muscles in the course of, and as a result of, repeated battles with opposing nose tackles. The functionalist Marxist explanation that law *x* is passed because that law stabilizes the prevailing relations can be further explained, albeit crudely and probably falsely, by the intentional explanation that the ruling class actively promoted law *x* in order to protect its advantageous socioeconomic position.

35. *See* Cohen, *supra* note 8, at 261–64.

36. Karl Marx, THE EIGHTEENTH BRUMAIRE, *reprinted in* 11 KARL MARX AND FRIEDRICH ENGELS: COLLECTED WORK (1852), at 99 (New York: International Publishers 1975).

37. *See* Elster, *supra* note 8, at chs. 7, 8.

not enough data to determine how the correlation comes about.[38] There is such a correlation in the context of judicial decision making.

If CLS writers have shown nothing else, they have demonstrated that appellate decisions, taken as a whole, favor the dominant class.[39] Upon the basis of this observation, one may explain the result of appellate decision functionally and assert that such decisions are reached because they benefit the dominant class. Such a functional explanation answers some questions. Further, this explanation points research in the right direction. Specifically, possible mechanisms by which appellate decisions are made to conform to the interests of the dominant class must be formulated and scrutinized.[40] Thus, functional Marxist explanation facilitates rather than stifles further inquiry. Moreover, further inquiry regarding the conventional explanation underlying the Marxist functional explanation is a necessary predicate to the determination of whether and how progressive social change can be implemented. To illustrate this point, it is necessary to return to the example of natural selection.

As discussed, the mechanism of natural selection is the conventional counterpart to the functional explanation that an animal has certain traits because such traits contribute to its survival. An understanding of this underlying mechanism sheds light on the scope conditions of the function served by the animal's traits as contemplated in the functional explanation. In turn, understanding these scope conditions facilitates inquiry into (i) whether the animal's traits will continue to serve their function, and (ii) what factors might bring the service of this function to an end.

Two major scope conditions of natural selection are mortality and continuity. For the mortality scope condition to obtain, an animal's survival must depend on the presence of certain traits and the lack of others. Continuity requires that there be no radical difference between the environment when a particular trait is selected and the environment of the next generation of animals. Despite significant advances in medical technology, the mortality scope condition will continue to be met for the foreseeable future. Animals, including humans, will continue to die before reproducing owing to the presence or lack of certain traits. Thus, it is unlikely that an animal's traits will cease to serve the function of contributing to the animal's survival for failure of the mortality scope condition. However, the same cannot be said for the continuity scope condition.

The degree to which the continuity scope condition is met has diminished and probably will continue to diminish given the magnitude of the effect of industrial civilization on the environment. Thus, it is possible that at some point the continuity scope condition of natural selection will no longer be met and it will no longer be true that an animal has a particular trait because that trait serves the function of contributing to its survival. Moreover, to a certain extent, whether this scope condition will continue to

38. *See* Cohen, *supra* note 8, at 285–89.
39. *See* sources cited, *supra* note 22.
40. *Id.* at 287.

be met is within human control. For instance, though perhaps unlikely, governments of the world could act together to stabilize industrialization's effect on the environment.

Just as an understanding of the mechanism of natural selection sheds light on the prospects of change in the function served by an animal's traits, an understanding of the conventional explanations complementing Marxist functional explanation sheds light on whether and how the function of benefiting the dominant class can be changed. In the previous section, I proposed several possible mechanisms whereby corporate interests affect judicial decisions. First, I suggested that judicial decisions serve corporate interests because of the close relationship between the corporate economy and law schools. In a footnote, I also suggested that other mechanisms may be relevant, such as the greater resources corporations can expend on legal representation and the influence corporations can bring to bear on the political appointment process of judges. Consideration of these mechanisms sheds light on the scope conditions of the function served in the Marxist functional explanation of judicial decisions. In turn, an understanding of these scope conditions facilitates the determination of whether and how progressive change can be implemented.

If the mechanisms proposed above are accurate, a major scope condition of the function served by judicial decision making—to benefit corporate interests—is that the current economic structure must remain unchanged. That is, as long as large corporations have access to superior resources and have a special relationship to the law schools, judicial decision making will continue to serve corporate interests. It is unlikely that pointing out contradictions in the law and legal ideology will mitigate the function served by judicial decisions. Rather, to mitigate this function, the underlying economic power structure must be changed. Thus, not only does Marxist functional explanation facilitate further inquiry regarding the relationship between socioeconomic forces and the law, but it channels further inquiry in a manner conducive to implementing progressive social change—a goal that Marxists and CLS writers share.

VI. THE CRITIQUE THAT LAW AND THE RELATIONS OF PRODUCTION ARE NOT CONCEPTUALLY DISTINCT

Various authors have argued that the relations of production are legal relations of ownership. These authors have further reasoned that because it is useless to explain something by reference to itself, the Marxist project of explaining the contours of legal ownership by reference to the relations of production is questionable.[41] Karl Klare, among other CLS writers, has embraced this critique.

41. As Cohen notes, this critique is presented in Robert Nozick, ANARCHY, STATE AND UTOPIA 273 (1974) and in ch.2, sec. I of J.P. Plamenatz, GERMAN MARXISM AND RUSSIAN COMMUNISM (1954).

> There is simply no "prelegal" realm of social life to which legal outcomes can be referred, at least not in this modern age. A particularly embarrassing case of circularity is the ease with which we are told that legal outcomes and processes derive from the underlying relations of production or property ownership, as though production relations or property could meaningfully be defined without reference to legal rules.[42]

If the primary point of this critique is that Marxism is circular, it is easily rebutted. Consider the following examples of (1) a circular functionalist and (2) a circular nonfunctionalist Marxist explanation:

1. Capitalists own the means of production because such ownership stabilizes the capitalists' ownership of the means of production.
2. Capitalists own the means of production because such ownership is the result of the capitalists' pursuit of their class interest, which is a function of their legal ownership of the means of production.

Consider also the following.

(A) Law = *x* because law = *x*.
(B) Law at time 2 = *x* because law at time 1 = *x*.

Changing the circular nonfunctionalist explanation (2) in accordance with the change from (A) to (B) results in a Marxist explanation that is not circular.

> (2) (B) Capitalists own the means of production at time 2 because such ownership is the result of the capitalists' pursuit of their class interest at time 1, which is a function of their legal ownership of the means of production at time 1.

Other noncircular Marxist explanations are apparent upon consideration of the fact that law is a broad conceptual category encompassing many forms of law, including constitutional law, statutory law, judicial decisions, and administrative regulations and decisions. It is not circular to describe some of these subsets by reference to others.[43] Such an explanation can be represented in formulaic terms as follows:

(C) Law *X* = *x* because Law *Y* = *y*.

42. Klare, *supra* note 22, at 67. *See* Tushnet, *supra* note 28, at 285–88, and Gordon, *supra* note 4, at 102–109 for basically this same critique.

43. This response is not original in this essay. Addressing the critique of Marxist analysis of law based on the assertion that the relations of production can only be conceived in legal terms, Elster states:

> How serious is this difficulty? Does it do away with the ambition of historical materialism to explain political phenomena in terms of the economic structure? I do not believe it does. Observe that the explanandum includes both the structure of the political system and the actual decision made. Among the latter, some take the form of enacting laws while others do not; of the laws enacted some concern the forms of ownership while others do not. It is perfectly consistent to explain all phenomena that do not relate to

Both the circular functional explanation (1) and the circular nonfunctionalist explanation (2) are easily avoided in a Marxist analysis following pattern (C). The specific details of Klare's discussion of recent legal decisions in the area of labor law can be used to illustrate how. The main subject of Klare's discussion is the legality of wildcat strikes, which are strikes by employees whose terms of employment are governed by a collectively bargained contract. As Klare discusses, the United States Supreme Court has held that federal district courts may enjoin such strikes. This decision can be functionally explained in accordance with the noncircular pattern (C) above as follows: The U.S. Supreme Court determined that wildcat strikes may be enjoined because such a decision stabilizes the capitalist ownership of the means of production. This decision can also be nonfunctionally explained in accordance with noncircular pattern (C): The Supreme Court's decision with regard to wildcat strikes is a result of the capitalist's pursuit of his or her class interest. In these explanations, circularity is avoided because one subset of the law, the legal ownership relation of the capitalist, explains another subset, the workers' right, or lack thereof, to employ a wildcat strike.

In the beginning of this essay, I noted the closely related and widely shared CLS positions that law is constitutive of society and that unmasking the ideological nature of law leads to change in the law, which in turn leads to change in society. I also suggested that the Marxist analysis of law generally opposes these positions. However, the foregoing rebuttal depicts a version of Marxism not entirely at odds with these positions. Though the class structure places some limits on what form legal change can take, legal change, thus constrained, may redefine the class structure. Thus, legal change may lead to change in the class structure, which would constitute a change in society as well.

A second interpretation and response to Klare's critique yields a more thoroughgoing rejection of the CLS positions that law is constitutive of the relations of production and that unmasking ideology can lead to change in the law.[44] One might interpret Klare's critique either as (i) a challenge to the Marxist claim that the base is conceptually primary vis-à-vis the law or (ii) a challenge to the Marxist claim that the base is explanatorily primary vis-à-vis the law. The former critique holds that because it is impossible to conceptualize relations of production in other than legal terms, the base cannot be conceptually primary vis-à-vis the law. As Klare states, production relations or property cannot "meaningfully be defined without reference to

matters of legal ownership in terms of those that do. Moreover, one may attempt to explain changes in the legal ownership structure in terms of the interest of an economically dominant class. These attempts may or may not succeed, but at least there is no ground for thinking that the base-superstructure problem prevents them from getting off the ground. Elster, *supra* note 8, at 403–404.

44. This line of response is borrowed directly from Cohen, *supra* note 8, at 217–31.

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legal rules."[45] The critique of the explanatory primacy of the base accepts that the base may be conceptualized without reference to legal terms but argues that such a conceptualization is empirically inaccurate. Cohen offers a forceful rebuttal to both of these challenges.

I must lay some initial groundwork before I can show that production relations and legal terms are conceptually distinguishable. First, ownership and other production relations should be conceived as bundles of rights. For example, the laborer's ownership of his or her own labor power corresponds to the bundle of rights that might include the following: the right to temporarily alienate one's ownership of one's labor power; the right to work; the right to bargain collectively; and the right to wildcat-strike. Second, a bundle of powers that roughly match these rights should be enumerated. That is, a laborer might have the power to alienate his or her own labor, to work for another, to bargain collectively, and to wildcat-strike. Rights and powers are distinct in that the existence of one does not presuppose the existence of the other. Rather, only the possession of a legitimate power entails the presence of a right and only the possession of an effective right entails the possession of a power. For example, though it might be illegal for a worker to wildcat-strike, it is still possible that wildcat strikes will occur. Thus, a worker might have the power to wildcat-strike though he or she does not have the right. Conversely, a worker working in an unorganized labor market might have the right to strike but not the power.

Cohen argues that to speak of production relations, such as the ownership of the means of production or the ownership of one's labor power, is not to speak of legal rights, but rather it is to speak of underlying powers that match those rights.[46] To illustrate this distinction, Cohen discusses the changing legal and economic situation of the feudal serf at the dawn of capitalism.[47] Under feudalism, the serf did not legally own or have power over his labor. Rather, at one time, the feudal lord legally owned the serf's labor and controlled the only means of livelihood available to the serf, namely the manor. This relationship fundamentally changed with the rise of factories in the cities. Though the serf still did not legally own his labor, the opportunities for work elsewhere than the manor gave the serf a power over his labor that he did not previously possess. And in fact, many serfs exercised this newly found power in violation of their feudal obligations. For Cohen, the relations of production are essentially constituted by effective control over forces of production. In the present example, the relation of production is constituted by the serf's power, or effective control, over his own labor and not the legal ratification of that power. Thus, Cohen demonstrates the conceptual distinction between law and the relations of production.

An argument for the explanatory primacy of these relations can be fashioned that builds upon the conceptual distinction of the relations of

45. Klare, *supra* note 22, at 67.
46. Cohen, *supra* note 8, at 219.
47. Cohen, *supra* note 8, at 225–30.

production as nonlegally understood. Ultimately, the law changed and workers obtained legal ownership over their labor power. In functionalist terms, this legal change occurred because it stabilized the nascent capitalist relations of production (the power of the former serf over his labor and the capitalist over his means of production).

In response to Cohen's defense of the conceptual and explanatory primacy of the relations of production, Robert Gordon fairly wonders what is the point.[48] One response is that such a defense shields Marxist analysis of law from allegations of circularity. This is true. However, Cohen's defense is not necessary in light of the defense against circularity described above. Gordon suggests that the only possible value of Cohen's defense is "to vindicat[e] a wholly abstract commitment to 'materialist' world views." However, as we shall see, Cohen's defense does not even serve this value.

As discussed earlier, historical materialism comprises two strands. The first holds that the level of the productive forces determines the economic structure (i.e., the set of relations of production). The second holds that the relations of production determine the superstructure, which includes the law. When Marx speaks of material properties, he is not distinguishing between material and mental properties. Rather, he is distinguishing between material and social properties.[49] Material properties are roughly coterminous with the forces of production. Therefore, an attempt to vindicate a materialist world view would be a defense of the primacy of the productive forces vis-à-vis the relations of production. Neither Cohen's defense nor Klare's critique addresses the primacy of the productive forces. Rather, Cohen defends against charges that the relations of production are not primary vis-à-vis the superstructure. Thus, the significance of Cohen's defense, if there is any at all, must lie elsewhere.

In my view, Cohen's defense is important for reasons closely related to the view shared by both CLS writers and Marxists that social analysis should be conducted with an eye toward implementing social change. In consideration of this shared view, it is especially important to CLS writers and Marxists that the engine of social change be correctly identified. By taking the position that the relations of production (conceived in terms of effective control rather than legal ownership) determine change in the law, Cohen leaves little room for law to then effect change in the relations of production. Thus, if Cohen is right, it would be futile to attempt to bring about change in society via change in the law. Conversely, if Cohen is wrong, there may be some room to effect change in the relations of production by effecting change in the law with the caveat, expressed above, that class interest may place some constraints on bringing about change in this matter.

Of course, whether Cohen is right depends upon whether explanations similar to that offered above with respect to the serf's legal emancipation

48. Gordon, *supra* note 4, at 105.
49. *See* Cohen, *supra* note 8, at 88–133 for a discussion of this distinction.

from the manor can be empirically borne out with respect to all relations of production. This is unlikely. However, it would still be important if some, but not all, relations of production could be so explained. With respect to those relations of production that are primarily relations of effective control, it would be less likely that change in law would lead to social change. With respect to those relations of production that are primarily legal relations, change in law would be a more promising, though not definite, route to such change.

VII. CONCLUSION

In this essay, I have shown that CLS writers' three main critiques of Marxism are not well founded. First, I demonstrated that CLS writers' "antiformalist" critique fails given that CLS writers incorrectly assume that the Marxist analysis of law relies on the assumption that law is determinate. Further, the central premise of the antiformalist critique (that law is generally indeterminate) is questionable given that CLS writers have only shown that law is indeterminate in the context of appellate judicial decision making.

Second, I demonstrated that rather than stifling further inquiry about the relationship between law and socioeconomic forces, as CLS writers argue, Marxist functional explanation provides a framework to test hypothetical mechanisms underlying this relationship. Moreover, I tentatively offered several possible mechanisms whereby corporate interests may pervade the thinking and decisions of lawyers and judges. To the extent that these mechanisms accurately depict the relationship between judicial decision making and corporate interests, it is unlikely that the CLS project of implementing progressive change by illustrating the contradictions inherent in the law can succeed. Rather, such change can only occur if the underlying economic power structure changes first.

Third, I defended against the claims that Marxism is circular and that Marxism is false to the degree it claims that the relations of production are primary vis-à-vis the law. In the course of this defense, I described three different permutations of Marxist analysis of law that conflict in varying degrees with the positions generally held by CLS writers that law is constitutive of society and that changing the law leads to change in society. The first permutation concedes that law may be constitutive of the relations of production but nonetheless holds that the relations of production so constituted constrain further change in the law. The second permutation denies that law is constitutive of the relations of production. Rather, the legal relations of ownership corresponding to the relations of production merely reflect, and perhaps stabilize, the relations of production, which are actually relations of effective control. The third permutation comprises those positions that fall between the poles of the first two permutations. That is, law may constitute some relations of production, but with regard to

other relations, law is only a reflection of the underlying relations of effective control.

In sum, I have shown that the three critiques that CLS writers level at Marxism fail. In light of this refutation, CLS writers should reconsider their generally negative view of the Marxist tenet that socioeconomic forces determine the law. Moreover, this essay should discourage other scholars from too readily agreeing with CLS writers' rejection of the Marxist analysis of law.