

**Law Distributes I: Ricardo Marx CLS**

**Duncan Kennedy**

Harvard Law School Emeritus  
[kennedy@law.harvard.edu](mailto:kennedy@law.harvard.edu)  
617 999 4217

## Law Distributes I: Ricardo Marx CLS

### Abstract

This article appropriates Ricardo and Marx as progenitors of one of the contemporary CLS approaches to law and political economy. In the first part I look at Ricardo and Marx through a presentist lens. I ignore their allegiance to the labor theory of value and restate what I think is important for “us” in neo-classical terms. What is left is a model in which a legal regime distributes a surplus helping some at the expense of others, setting in motion a chain of further distributional changes in a particular direction (e.g. stagnation or growth). Then I describe Ricardo’s legal presuppositions and Marx’s explicit understanding of law as seriously mistaken and restate their ideas in the “post-realist” mainstream language of contemporary American legal thought. The great question they help answer, restated, is how to decide when redistributive interventions will or will not, have or have not “hurt the people they are trying to help.” The last part introduces this approach, contrasting it with familiar liberal approaches. The normative orientation is to distribution in favor of subordinated groups rather than to efficiency and to work on transformable background rules of public and private law rather than to politically unattainable reform by tax and spend, large scale re-regulation or decommodification. A companion article applies the “neo-Ricardian” analytic to the dynamics of housing and credit markets in poor black neighborhoods.

### *Introduction*

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background rules of public and private law rather than to politically unattainable reform by tax and spend, large scale reregulation or decommodification.

My basic idea is that Marx and Ricardo invent distributional analysis. But they don't conceptualize it as distributional analysis of *legal regimes*. In fact, law figures in their work in a very mechanical, un-organic way, as a kind of inert background against which an economic conflict plays out. The contribution of CLS has been to transform and strengthen the surplus approach by adding a realist/post-realist legal analytic. My hope is that the exposition will be intelligible equally to lawyers with no economics and to economists with no law.

The article has four parts:

- I. Ricardo-Marx static surplus analysis
- II. Ricardo-Marx dynamic surplus analysis
- III. Critique and reconstruction of law in their models
- IV. Introduction to contemporary neo-Ricardian distributive analysis or "rent seeking on behalf of the poor"

## **PART ONE RICARDO AND MARX ON THE DISTRIBUTION OF SURPLUS**

### **A. Ricardo on rent: statics**

Ricardo (1772-1823), like Marx (1814-1883) and the other classical economists, believed in something called the labor theory of value. "Value" is determined by "labor equivalents" and then determines "in the long run" the prices of commodities through competition. In both Ricardo and Marx the theory was an important determinant of the distribution of surpluses throughout the economy. Because I share the neo-classical conviction that the labor theory of value is not useful in the way the classics thought it was,<sup>1</sup> I am going to translate them into the neo-classical language familiar in first year college microeconomics courses. I mean no insult to the orthodox!

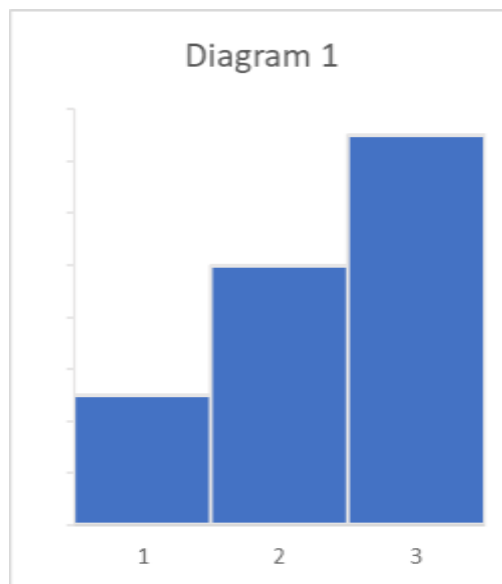
### ***Soil of varying fertility***

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<sup>1</sup> JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS (1954); BEN SELIGMAN, MAIN CURRENTS IN MODERN ECONOMIC THOUGHT, VOL. 3 (1968).

Ricardo's highly abstract model of the rent of agricultural land is the starting point for the analytic. He posits something called the "original and indestructible power of the soil," meaning its fertility before it has been developed for commercial agriculture.<sup>2</sup> We're going to translate this into "a given acre is more fertile than another acre if it costs less than on the other to produce a bushel of wheat, assuming the same amount of labor, and equipment, and fertilizer, and you know, tractors, or barns, or whatever."<sup>3</sup>

So the idea is, the most fertile land has the lowest cost of production.<sup>4</sup>



In this diagram the vertical columns represent pieces of land arrayed from more to less fertile. The vertical axis is dollars. It gets progressively more expensive to produce a bushel of wheat as we go from left to right.

Out of this very simple idea of different levels of fertility arrayed in a progression from more to less fertile, Ricardo is going to build an *enormous* apparatus. The whole history and future of the world is going to be summarized in that little idea.

### ***The demand for food***

The second part of the model is demand for food. Which means that people have money, and they will offer money for food. How much food they buy depends on how much it costs them and on how much money they have to spend. The more it costs, the less they want or demand.<sup>5</sup>

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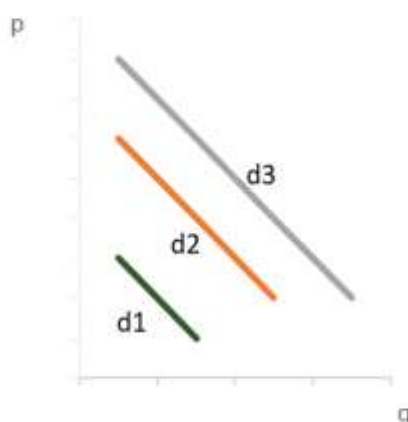
<sup>2</sup> DAVID RICARDO, *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO, VOLUME 1 ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, at 65 (hereinafter as Ricardo).

<sup>3</sup> Ricardo, at 69-70.

<sup>4</sup> Ricardo, at 70.

<sup>5</sup> Ricardo, at 79.

Diagram 2



If the price of food is low people want a lot of food. As the price of food rises they want less and less. At a very, very high price for food, very little will be demanded. If circumstances change, say because there are a lot more people with a lot more money buying in the market, the demand curve shifts, meaning here that it moves to the right. At a given price, much more demand. But it is still true in the new situation that the quantity demanded will go up and down as prices change. Just keep that in mind when we get to the setup between the parties who are producing the food in response to this demand.

### ***Landlords and farmers***

Ricardo starts from a very stylized deliberately distorted (for the purposes of his argument) model of agriculture in England in his time. His model is: the land is owned exclusively by people called landlords. He recognizes that in real life they're varied, but in his model they aren't. In his model the landlords just provide land. They live, say, in London. Their favorite author is Jane Austen, who is writing about them at that very moment.

They have country houses on their estates, which are abandoned to employees and servants who look after the premises and others who are managing the business while they're going to balls "in town." But the business is strictly limited in the model to choosing tenants and firing tenants and collecting the rent they've agreed to pay. *Landlords don't do anything except collect money from farmers.*<sup>6</sup>

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<sup>6</sup> Ricardo, at 67-69.

The other group in the model are called farmers. It is confusing that the farmers are “tenants” since they rent the land from the landlords, which suggests urban residential leases, but in fact these tenants are capitalists. The farmer in the advanced agriculture of the time rents a likely big piece of land, and provides everything for the production of actual wheat. The farmer builds buildings, the farmer buys equipment, which is not very elaborate since it’s not mechanized agriculture yet, but it will eventually be mechanized. And the farmer hires agricultural laborers. They don’t figure in Ricardo’s discussion at all—they’re just subsumed in the general cost of production.

In real life, the agricultural laborers were basically a destitute agricultural population as appears in every capitalist country in the beginning of capitalist agriculture. They have nothing, they live in barracks, they are very, very, very deprived. And they’re paid a subsistence wage, barely enough to prevent starvation.<sup>7</sup>

### ***The Improving Landlord***

In the model all production is done by the farmers, who provide the capital, hire the laborers, raise the wheat, sell into the local or national wheat market, and pay rent to the landlord. Contrary to the model, many people think the single most important thing about the early economic development of England was maybe not even manufacturing and the steam engine, it was the improving landlord.<sup>8</sup>

The improving landlord is a landlord who farms his land rather than rent it out. He is a capitalist as well as the owner. He kicks off his customary small holding tenants and builds an agribusiness.<sup>9</sup> He invests in draining it, he builds buildings, he creates roads within the estate, he does all these capitalist things to the estate to *massively* increase the yield per acre on his land. And he collects all the proceeds of the sale of the wheat. He is, in Ricardo’s analysis, both a landlord and a farmer.<sup>10</sup>

Ricardo’s relentless focus on the non-improving landlord has an obvious political as well as an analytic function. That landlord is pocketing his payment and going to the ball so to speak. That’s all he’s doing. And his wife is buying her clothes in Paris not London. Ricardo is setting up the landlord class, mainly aristocrats and pseudo-aristocrats, in favor of, you might say, the bourgeoisie.<sup>11</sup>

### ***The rental market for agricultural land***

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<sup>7</sup> EDWARD PALMER THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1966), at 213-234, and KARL MARX, *DAS KAPITAL* (hereinafter as Marx) Part 8, The so-called primitive accumulation.

<sup>8</sup> Ricardo, at 126.

<sup>9</sup> Ricardo, at 79.

<sup>10</sup> Ricardo, at 80

<sup>11</sup> EMERY KAY HUNT & MARK LAUTZENHEISER, *HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE* (2015), at 91-92.

The landlord collects rent. The question Ricardo addresses is, in the terms of his model: how much rent? He defines rent as the return to the unimproved productive potential of the soil, which means in practice what you get if you do absolutely nothing but rent it out in the state in which you acquired it and then collect the payment owed.<sup>12</sup>

In other words, the rent is what you get, *just by owning the land*.<sup>13</sup> Well, why do you get *anything* for owning the land? The answer to that is that a farmer will pay for the right, the leasehold right, to raise crops on your land and to sell them. The farmer is going to pay you a part of the proceeds of sale. And that part is rent.

If you're an improving landlord, you get a lot more than rent, because you're also the owner of, and the developer of, the machines, you hire the agricultural laborers, you build the buildings. That's not rent, that's profit, meaning a return to capital.<sup>14</sup>

The next really basic idea is that the landlord rents the land to the farmer who offers the most rent. A background condition of the model, not mentioned because it's so obvious that Ricardo doesn't need to make it explicit<sup>15</sup> is that there are many more people who want to be farmers, and have access to working capital so they could make a go of it, than there are farms for rent.

### ***The farmers' offers***

They make offers for the land. They're saying, "I'll give you this much rent for this particular parcel." What they offer is a function of what they could get by investing their capital in a different parcel, or in a different activity. They want something that's better than their alternative inside or outside farming.<sup>16</sup>

They have various things they could do with their capital. They could go into small business, they could go into manufacturing, they could go into trade, they could invest the money in Bank of England bonds. Ricardo's idea is that there is an average rate of profit in all these activities, equalized by competition. For entrepreneurs, a return to capital in farming that's just a tiny bit better than the overall average will draw them to become farmers.<sup>17</sup>

This small return isn't subsistence. It's not a category like the minimum necessary to survive, because these are capitalists. Depending on how much capital they have to invest, the average return on it in the form of profit might be a little or a great deal of

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<sup>12</sup> Ricardo, at 68-69.

<sup>13</sup> Ricardo, at 74.

<sup>14</sup> Ricardo, at 67-68.

<sup>15</sup> It is made explicit by Eric Roll in

<sup>16</sup> Ricardo, at 71-72.

<sup>17</sup> Ricardo, at 72.

money, and each of them can beat the average rate by skill in managing his particular firm.

Farmers looking for land will calculate the probable profit on each parcel, and here the most important factor is fertility (but not the only factor, viz. location, etc.).<sup>18</sup> All the wheat produced by the three parcels in the diagram with their different fertilities will be sold for the same price because buyers don't care which parcel it comes from, only about its quality, and quality is identical. Farmers have no reason to sell wheat that costs little to produce for less than the market price. So there's a single market price for wheat.

Although the parcels have radically different fertilities, the farmers looking to rent will be willing to farm any of them for just a little more than the average rate of return to investment in other sectors.<sup>19</sup> The farmers don't care about the land, and they don't care about fertility. They just care about profit.

But if the wheat is all sold for the same price, why wouldn't the farmers who rent good land be making more than the farmers with bad land? It seems counterintuitive that all the farmers will get the same return on capital whether their cost per bushel is high or low. Remember that the fertility difference between good land and bad land exists for identical inputs of labor, equipment and so forth. The farmer on good land gets his wheat for less cost than his neighbor and sells it for the same market price, so why doesn't he make more profit?

Ricardo's answer is that he won't make more profit on each bushel of wheat because he will pay all the difference in cost to the landlord as rent.<sup>20</sup> This is the hardest thing to grasp in the theory.

### ***Why the landlord gets all the surplus***

The first step is to add the demand curve to our diagram of the three parcels.

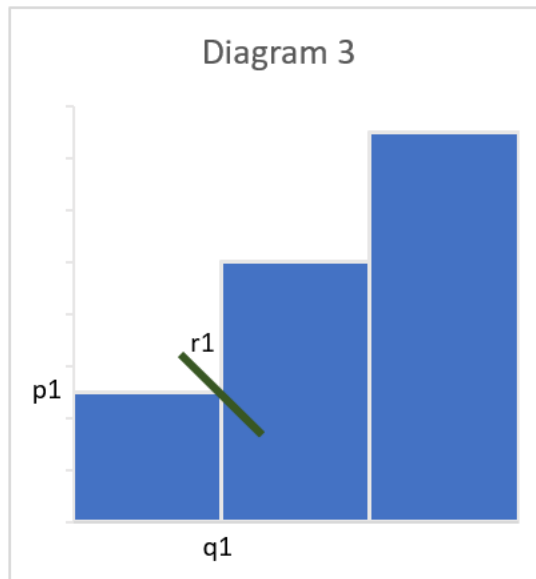
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<sup>18</sup> Ricardo, at 70. And location.

<sup>19</sup> Ricardo, at 72.

<sup>20</sup> Ricardo, at 74.





Here the idea is that when there aren't many people and they aren't rich, their demand for wheat at any price is less than it will be with population growth and development. But at this starting point (demand curve D1), the farmers on the most fertile land, Plot 1, will be able to sell their output for a price that equals their cost of production, plus that extra margin over the alternatives.<sup>21</sup>

The landlords who own plots two and three won't be able to find farmers who want to rent from them even for a merely notional rent. The reason is that if the farmer, even paying zero rent, puts in the cost of production on the land he will have to sell at a loss. The market price for wheat is below the cost of production on all but the most fertile land.<sup>22</sup>

The landlord of Plot 1 is going to get a nominal payment, just enough to make it worth it for him to take the time to rent the land.<sup>23</sup> His land is just fertile enough so that it can produce wheat that will sell for enough to cover the cost of producing it, plus this minimal return to the farmer.

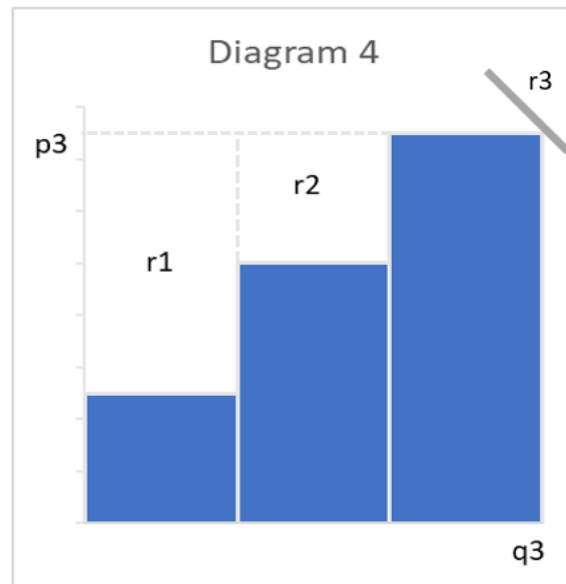
Now suppose that population growth and income growth have increased demand for food. At any given price more is demanded so the demand curve has shifted to the right (D3). All the plots, at this new much higher market price (P3), are profitable, even Plot 3, the highest cost parcel.

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<sup>21</sup> Ricardo, at 69.

<sup>22</sup> Ricardo, at 69-70.

<sup>23</sup> Ricardo, at 70.



The landlord who owns plot 3 can now find a farmer to rent at the standard average profit, just as was true for the landlord of Plot 1 in the old regime. That farmer will pay only nominal rent and receive, as all the other farmers do, the standard profit.<sup>24</sup>

Now let's go back to the most fertile piece of land. On Plot 1, the farmer has produced the same amount of wheat as the farmer on Plot 3, but it's costing him much less than on Plot 3.

Ricardo's idea is that when competing potential farmers approach the landlord who owns Plot 1, he will demand a rent equal to the whole difference between the cost of production (+average profit) and the expected market price for the produce of that Plot.<sup>25</sup>

Say the price of wheat is \$50 (P3 on the diagram). The cost of production, which is \$49 on Plot 3, is only \$29 on Plot 1. The average profit, the farmer's alternative, is \$1. The landlord will demand and get \$20 in rent (R1). The rent that goes to the landlord will be the whole difference between what it cost to produce it (+profit) on Plot 3 and Plot 1.

If farmer 1 asks to pay less rent so he can make more than the absolute minimal standard profit that everybody gets, the landlord just says "bye-bye!" and puts up a little sign saying "farmer wanted" and a line of a hundred people forms, and he waits for a person to say, "well, I'll do it for the standard profit."<sup>26</sup>

<sup>24</sup> Ricardo, at 72.

<sup>25</sup> Ricardo, at 74.

<sup>26</sup> Ricardo, at 72.

## ***Taxing the un-improving landlord would have no efficiency cost***

Ricardo's great treatise is called "The Principles and Political Economy and Taxation." One of the greatest issues of early 19<sup>th</sup> century British politics was whether or not and by how much to tax landed wealth. Be it noted that land was still the dominant kind of wealth, with manufacturing gaining fast but not there yet. Moreover the owners of agricultural land were divided between large estate owners and smallholders, representing different social classes, and both distinct from the urban proletariat and varied bourgeoisie.

The large landlords, improving and not improving, and the farmers, were locked in struggle with the emerging capitalist bourgeoisie in manufacturing and finance. A major argument against taxing landlords, believed as gospel by a large part of conservative opinion, was that taxing landlords would "hurt the people you are trying to help," as it is commonly phrased today.

If his land was fertile, the landlord would raise the rent. If it wasn't fertile enough to be profitable after paying the tax, he would withdraw it from production. Passing the tax burden to farmers, all operating at mere standard profit, would require them to increase what they charged for the now smaller supply of wheat or go out of business. Bakers would increase the price of bread, the principal food stuff of the urban proletariat. QED

Ricardo's answer was that the tax, if it was on the unimproved value of the land, and not on capital investment of farmers or improving landlords, would have no effect on output, and so no effect on the price of bread.<sup>27</sup> The landlord on Plots 1 and 2 would have no takers for their land if they tried to raise the rent above what they were already charging. The farmers operate at normal profit, which means with no profit cushion that could absorb the rent increase. Landlords would have to leave rent where it was and "eat" the tax, that is accept a reduction of their surplus (R1 and R2). As long as the tax left enough surplus to make it worth it for the landlord to keep it in production, it would stay in production.

Ricardo assumes (implicitly) that the market value of the land – the basis for taxing it – is simply a function of its productivity, in its "natural state" for commercial agriculture. For this reason, Plot 3 has little market value. Its infertility makes it barely productive enough to pay its costs. So a tax on the unimproved value of marginal land will be small or nominal and neither the landlord nor the farmer will have any incentive to withdraw it from production. In sum, the tax will have no effect on the amount of land in

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<sup>27</sup> Ricardo, at 173-75.

production, and no effect on farmers' profit and therefore no impact on the price of bread.<sup>28</sup>

In the language of neo-classical welfare economics, the tax has no efficiency cost. It is the equivalent of what is called "one shot after the fact redistribution." No actor who makes decisions will behave differently as a result of the tax, as long as it doesn't drive the pure landlord to withdraw the land. Farmer, bakers and consumers will confront the exact same price configuration as before the tax. The welfare loss to landlords is then measured in ethical/political terms against the benefits produced by the government's spending of the tax revenue.

This elegant piece of partisan political economic argument is the direct ancestor of an enormous amount of good, bad and indifferent effort on behalf of the economically oppressed and the not oppressed alike. To my mind it was "epochal." For example, Henry George's single tax plan is a straightforward application.<sup>29</sup> But the idea is central to Marx as well. As we will see in Marx's dynamic analysis, the dynamic endpoint is the costless transfer of the ownership of the means of production to an as-yet-to-be-imagined organization of the social whole.

## **B. Marx's theory of profit: Statics**

So now I'm going to do something somewhat underplayed in the Marxist and neo-Marxist literature but clear to some generally liberal historians of economic thought. The idea is that there is very close parallel between Ricardo's theory of rent and Marx's theory of profit in manufacturing under capitalism.<sup>30</sup> The parallel is so close that it seems obvious that Marx was consciously "applying" Ricardo, *mutatis mutandis*. Once again, I am going to develop the parallel in strictly neoclassical terms in spite of the fact that Ricardo and Marx believed in the labor theory of value, and that the labor theory was crucial to their conclusions.

### ***The production and sale of commodities: labor as "fertile"***

Marx's capitalist is the owner of means of production. A factory, machines in the factory, raw materials. The owner pays workers, proletarians, who operate the whole thing and produce the goods that will be sold. In the pure form of the model, there are many more workers than capitalists, all the workers are identical, they do identical work, and competition among them drives them down to an identical subsistence wage which in his terms represents the labor value of labor, or the labor cost of reproducing the labor force.

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<sup>28</sup> Ricardo, at 173.

<sup>29</sup> HENRY GEORGE, *PROGRESS AND POVERTY* (1882).

<sup>30</sup> WILLIAM J. BARBER, *A HISTORY OF ECONOMIC THOUGHT* (2012), chapter 5.

The capitalist will sell the commodity on the (free) market for a price set by competition both with other producers of his product and with all other products, representing its labor value. What is left over is profit.

The most important idea in Marx's theory of capitalist economics is that the commodity sells for more than it costs. His reason being that labor is different from land, machines, coal, cotton and so forth.<sup>31</sup>

If you add or subtract the non-labor elements, your costs go up or down by what you paid or will have to pay in the market for them. In that sense they are "inert" by contrast with labor power as Marx sees it. Labor power is intrinsically different from buildings and machines and coal because while it costs you the subsistence wage it adds more than that to the "value" and ultimately to the market price of the commodity. If you increase labor inputs or reduce them, you add or subtract more than you add or subtract in wages paid. The labor for which you only have to pay subsistence, when it's combined with the inert materials produces a price greater than your total cost.

This is the metaphysical part of the theory. Labor is a transformative element. It is "fertile" in a sense obviously analogous to land in Ricardo's theory. Mere dirt, which has no "cost" at all, when combined with capital and labor produces food--"because" of the "natural fertility of the soil." And I'd add that "capital" as abstraction in neo-liberal theory through the ages is metaphysically "fertile" as well. In that theory, the inert elements of land and labor transform alchemically at the touch of the entrepreneur with credit into market value, justifying Newport mansions and all the rest. ("The Mystery of Capital")<sup>32</sup>

### ***A neo-Ricardian account of Marxian profit***

A neo-Ricardian (because neo-classical) alternative would begin with a stock of capital, meaning the actual physical and intellectual means of production, fixed at a particular moment. Suppose that all firms in a given competitive market get the same price for the identical product but that their costs vary widely.

Although their technology is identical, firms differ in terms of location (transport cost of both supply and distribution; more or less favorable weather). Some are older than others, which is sometimes a major advantage and sometimes a major disadvantage (accumulated good will vs. worn out equipment). Still assuming perfect competition in the product and factor markets, ownership of brand names and protectable trade secrets is a major source of surplus along with favorable contractual deals with suppliers

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<sup>31</sup> Marx, ch 9.

<sup>32</sup> HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

and customers. Then there are the (Schumpeterian) competitive advantages, derived from having been the “first mover” in an industrial innovation, generating surpluses that can persist long after the industry has become competitive.

In other words, the firms are positioned along a cost curve that look just like the sequence from Plots 1 to 2 to 3. The demand curves for the commodity the firms produce are like D1, D2, D3 in Diagram 2. The surplus generated by Marxian Firm 1 is available for distribution between the capitalist and the workers, just like the surplus of Ricardian Plot 1 is to be distributed between landlord and farmer.

If the capitalists get everything above workers’ subsistence the reasons will be: the momentarily fixed number of factory jobs, the far larger number of potential factory workers willing to work for subsistence,<sup>33</sup> the greater feasibility of concerted action among capitalists than among workers (for many reasons), and more in this vein, and to be explored in detail in Part III below.

Firm 2 generates less surplus but again it all goes to the capitalist. Firm 3 is just breaking even, with the workers receiving their subsistence wage and the capitalist just enough profit to keep him afloat, equal to the “normal” profit available elsewhere in the economy.

Marx recognizes all of these differences in costs as things that happen but for him they are incidents in the process by which competition drives the price of the product to correspond to labor time.<sup>34</sup> In this alternative neo-classical version, profit is even more closely analogous to rent than in Marx’s account, because it is the differences between firms, like the differences between plots of land, that accounts for it. The differences are what distributive analysis works with rather than distractions from the truth of the labor theory of value.

### ***Marx’s “legalist” attack on the capitalist appropriation of the whole surplus***

Marx’s attack on the capitalists’ appropriation of the whole surplus of price over cost is based on the idea that the fertile element, labor, is the “real” author of the product rather than the pre-existing inert elements that were just sitting there waiting to be transformed into something valuable. “There is not one single atom of its value that does not owe its existence to unpaid labor.” The surplus of price over cost, renounced

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<sup>33</sup> The reason for this is that Ricardo’s improving landlords in alliance with innovating capitalist farmers have driven the agricultural population off the land as they reduced the labor input to agriculture while enormously expanding productivity (the “enclosure movement”). Once they are in the city en masse, a capitalist who paid more than a subsistence wage would be put out of business by his more “rational” competitors. Marx, Part 8.

<sup>34</sup> Marx, Chapter 1.

by the workers in the wage bargain and reinvested by the capitalist in the accumulation process, is “tribute annually exacted from the working class by the capitalist class.”<sup>35</sup>

Marx does not draw the conclusion that the worker is entitled to the full product of his labor (after subtracting the non-labor costs). In the *Critique of the Gotha Program*<sup>36</sup> he sharply criticizes the idea that socialism is about giving the worker a “right” of that kind. The right would mimic the individualism of capitalist property while purporting to reverse it. Without giving even a hint of the details, he makes it clear that the distribution of the surplus must treat claims to surplus as subject to some kind of supra individual ethical calculus,<sup>37</sup> thereby initiating what would become the critique of rights in CLS.<sup>38</sup>

### ***The neo-Ricardian neo-classical case against capitalist appropriation of the surplus***

In a neo-classical version of the argument that the workers should get more than subsistence, we begin with the equivalent of Ricardo’s distinction between the landlord and the improving landlord. The capitalist in Marx’s model owns everything and collects everything but not all is profit. There is the cost of the labor and material inputs, but there is also the price of management for the enterprise and of entrepreneurship in responding to the demands of competition.

The pure capitalist is like a pure landlord, except that he cashes dividend checks and clips bond coupons rather than collecting rent. He pays others for the doing of absolutely everything else. The reward for management, including entrepreneurship (bonuses to the CEO), even if it is a very large amount of money is not profit but compensation for labor. Cf. the Berle and Means theory of the separation of ownership and control in the most advanced capitalist enterprises emerging before and after World War I.<sup>39</sup>

Managers not owners do all the things that generate surplus but not as an inevitable result of labor fertility. They make the choices that generate the highly differentiated costs as between firms that translate into variable surpluses when the goods are sold at a single competitive price.

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<sup>35</sup> Marx, Chapter 24, s I, p. 728. In the wage bargain there is nothing but the “age old activity of the conqueror who buys commodities from the conquered [their labor] with money he has stolen from them.” Id.

<sup>36</sup> KARL MARX, *CRITIQUE OF THE GOTHA PROGRAM* (2008).

<sup>37</sup> See note 55 below.

<sup>38</sup> See Author (2002).

<sup>39</sup> ADOLF AUGUSTUS BERLE & GARDINER GARDINER COIT MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1991).

The owner-entrepreneur in capitalist markets is the exact equivalent of Ricardo's improving landlord. Unlike the dividend-check-casher coupon-clipper, he works hard at management. But we can in theory, even if it is difficult or impossible to do it in practice, distinguish between the two parts of his return.

The return to simple ownership of the means of production, to the simple fact of holding the shares or the bonds, is like the rent for unimproved farmland, simply unearned, not the product of any aspect of the situation that gives the capitalist as mere owner an ethical claim to the product.

There are many complexities and shortcomings to the ethical argument, but they don't concern us because we are looking at the uses of the Marxist model in order to understand how to do distributive analysis of changes in legal rules. The political motive for the analysis is to support distributive change in a radically egalitarian direction.<sup>40</sup>

My last point about the Ricardo/Marx static model is that ownership plays an indispensable role in determining distribution in each model.

***For both Ricardo and Marx, it is "mere ownership" that permits appropriation of all the surplus***

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<sup>40</sup> Ricardo/Henry George, Marx and neoliberal capital fetishists all stake a very high ethical claim on the metaphysics of fertility. Marx's claim for labor can be made intelligible by making it strictly analogous to the Henry George argument that the landlord did nothing at all to make the land valuable, so he has no claim to the surplus over cost. The true "owner" is society at large. Society at large should freely and unapologetically tax the surplus away in service of the common interest. *Progress and Poverty*. The means of production, including the advantages of firms based on location and ownership of intellectual property, are "just there" at the beginning of any given production cycle. "Labor" is another name for "all members of the society engaged in all aspects of the production of everything using limited means. The means of production are theirs in the same way the total land of the country is theirs. If we didn't have the idea that somehow (pure) capitalists contribute to production although they are just coupon clippers, and that the pie is divided between labor and capital through free bargaining, we wouldn't honor the contract by which the worker agrees to work for a wage that includes none of the surplus.

The society should decide ongoingly how to distribute the whole surplus, on the basis of people's ideas about how individual contributions to the pie should be rewarded, and about what part of the pie should instead be distributed without regard to individual contributions. Letting it happen mechanically and arbitrarily through ownership relations in a competitive market appears ethically nonsensical. In response, new arguments appear every ten or fifteen minutes to the effect that distribution according to ownership is anything but mechanical and arbitrary but rather God given, or for the welfare of all, or Kantian. Just as there are many extant arguments and more invented every day as to why society should recognize property in land and why the state should protect and empower landlords against the claims of capitalists or trespassers or society at large. That is not the distributivist's problem because s/he is working a downward distributive project rather than trying to decide whether one is justified. See Part Four below.



Ricardo: Mere ownership of agricultural land permits the landlord to appropriate the surplus from the sale of the wheat, meaning everything above the costs of production plus a minimal return to the capitalist farmer.

Marx: Mere ownership of the means of production permits the capitalist to appropriate the surplus from the sale of the commodity, meaning everything above the costs of production including the cost of barely reproducing the labor force, plus the return to the management function.

This seems obvious given the discussion so far. It is also important. If the neo-classical version of surplus that we have been tortuously pursuing makes sense, distribution is determined through the complex legal *concept* of ownership as it plays out in the equally complex *social practice* of ownership. Both the theory of property as concept and its study as social practice are as different today from their version in Ricardo and Marx as the labor theory of value is from neo-classicism. In short, we will need to critique and reconstruct both authors in light of the contemporary post-legal-realist version of what law “is” and how it works.

But first, the dynamics of the models.

## PART TWO

### DYNAMICS OF THE MODELS

#### A. Ricardo’s dynamic: higher and higher rent strangles investment

Ricardo’s basic idea is that the size of the population determines the demand for food. If the economy is growing the population will grow.<sup>41</sup> The growth in demand will drive up the price of bread. At the new high prices, less fertile land (Plot 3) will become profitable. The owners of that land will receive minimal surplus, because farmers making only the break-even price given the high cost of production will offer no more rent than it takes to get the landlord to bring the land into production.

On other hand, previously marginal land is now profitable so there will be big rent for landlords who previously got only a pittance (R2 on Plot 2), and the landlords of the most fertile land will make a lot more than ever before (R1 on Plot 1).<sup>42</sup> At first glance it

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<sup>41</sup> Ricardo, at 78.

<sup>42</sup> Ricardo, at 79.

would seem that as long as there is land to bring into cultivation this can go on indefinitely as the economy develops and the population gets fed as it grows.

The problem is that the price of bread determines the cost of production of manufactured goods.<sup>43</sup> Urban labor paid at subsistence has to consume its minimal daily ration, so the capitalist class will have to increase wages as the price of bread goes up. Ricardo thinks the market price of manufactured goods is determined by labor inputs that haven't changed with higher wages (even though the capitalist has to pay more for that labor).<sup>44</sup> (In neo-classical terms, we would expect that the capitalist will be unable to pass along the full cost increase to consumers, depending on the elasticity of demand.)

That means some capitalists will have to "eat" some of the cost, while others, those on the margin of profitability, will go out of business. The profit on capital in general (the average return we saw in the case of the farmer) will fall.

As less and less fertile land is brought into cultivation, the price of bread continues to rise and standard profit keeps falling, shrinking the amount of profit available for new investment and driving up the standard interest rate. Entrepreneurs are caught in a classic profit squeeze between higher wages and higher credit costs.<sup>45</sup>

But what about the increased rent? Why wouldn't the landlords loan their increased rental income to the capitalists, keeping the machine going through a capital market rather than by retained earnings? According to Ricardo, the problem with this—just to mention it one more time—is Masterpiece Theater. The landlords are not going to invest their new income in building British industry either in person or by loaning to capitalist entrepreneurs. They're going to spend it on balls, they're going to spend it on *imported* Paris fashions for their wives and daughters and mistresses.

They're going to spend it on food, not for armies of proletarians but for armies of household servants, on real estate, yes, but on unbelievably beautiful country houses, not factory buildings. *Not* "productive activity."<sup>46</sup>

In this situation rent increases shrink the supply of capital available to industry and choke development. Ricardo's end result is stagnation, or if the population continues to grow, a Malthusian descent into famine.<sup>47</sup>

### ***The solution: Repeal the "corn laws"***

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<sup>43</sup> Ricardo, at 93.

<sup>44</sup> Ricardo, at 111-12.

<sup>45</sup> HUNT AND LAUTZENHEISER, *supra* note 12, at 96-98.

<sup>46</sup> See Ellis, *the Classical theory of economic growth* on the significance of the productive/unproductive distinction in classical economics

<sup>47</sup> Ricardo, at 78-79.

In Ricardo's time and for twenty years after his death, Britain imposed a tariff on imported grain ("the corn laws"). In Ricardo's time, immediately following fifteen years of war against Napoleon, the rationale for the tariff was to maintain self-sufficiency in grain (=bread) for national security reasons. But everyone also understood that it was about preserving the system of aristocratic and nouveau agricultural wealth, sitting on top of a smallholder sector, a large (although shrinking) mass of agricultural laborers, and another mass of household servants.

Partly because of the obvious significance of the tariff, the landlord class reinvested a significant part of its rents in controlling politics. The system was far from anything like universal manhood suffrage; what voting there was was almost comically rigged to maximize conservative votes; and paralyzed by large scale networks of corruption.<sup>48</sup>

Ricardo's based his stagnation argument on little more than the insanely abstract model represented by the four little diagrams. But if you believed it even in a much more qualified and nuanced form, it argued powerfully for repealing the corn laws. The reason for this was that the cost of production of British wheat was already in 1821 far higher than the cost of production, plus shipping cost, of foreign wheat. Over the ensuing years, the difference would get larger and larger as the US and Canada opened vast new wheat land from Ohio outward toward Montana and Saskatchewan and began to mechanize production. Meanwhile steam replaced sail for transport across the Atlantic.

Without the corn laws, according to the reformist theory, only the most fertile British land (Plot 1) was competitive with foreign wheat. Without the tariff, the less fertile land (Plots 2 and 3) would go out of production. The owners would have zero rent and their farmers would be bankrupted unless they figured it out fast enough in advance to bail before the crash.

Cheap foreign wheat would drive down the price of bread, permitting stable wage rates far below what was coming under the old regime as population growth drove demand beyond the availability of fertile land. Cheap bread would mean high profits, permitting the capitalist class to keep growing the economy.

Note that like a tax on unimproved agricultural land, the large reduction of landlords' rent would increase total wealth. It would divert the surplus from unproductive (balls, servants, houses) to productive use in the short run and from stagnation to growth in the long run. To fully grasp this we need but will not explore here Ricardo's second amazing invention, the theory of comparative advantage in which a Britain specialized in manufactured goods and a U.S. specialized in farm products are each better of the they would be producing both goods for themselves.

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<sup>48</sup> H&K 70-71

So, choice: stagnation, or abolish the corn laws and expropriate a part of the property of the landlord class, by eliminating their legal device. Legal, legal, *legal* device. The whole thing turns on a tariff. A legislatively enacted provision, valid under general law, and applied in such a way as to completely change the distribution of income without either a tax or a domestic regulation.

By the way, that's not crit. That's just normal, political distributive analysis. Crit means doing the same thing not with having or not having a tariff, but with having or not having freedom of contract or, say, fault-based tort law. The crit move is to take the analytic—the distributive analytic—developed by Ricardo for a tariff—a public law measure that was a highly salient political economic issue—and apply it to something completely different, that is to taken-for-granted background rather than foreground rules.<sup>49</sup>

## **B. Marx's dynamic: Socialism in the womb of capitalism**

The premises of Marx's dynamic model:

The manufacturing sector of the capitalist economy grows through the reinvestment of profits by manufacturing firms, a process known by the talismanic phrase: ***capital accumulation***.

### ***The logic of capital accumulation***

Capital accumulation requires the pure owners to refrain from consuming in the unproductive mode of landlords. They gain through the mere fact of ownership the legal right to control the whole surplus of price over cost generated in their factories. But because the manufacturing sector is highly competitive, they have to reinvest at least a large part of their profits in the business. In Marx's phrase, the capitalist whether he likes it or not has to behave as a miser, sacrificing his own consumption to maintaining or increasing his wealth.<sup>50</sup>

The need to reinvest to stave off competition is a function of two characteristic of the modern capitalist manufacturing sector as Marx understands it. First, the manufacturing sector undergoes a continuous process of technological innovation reducing the cost of production. These are the familiar list including steam to coal power, assembly line technology and the like. Innovating required capital beyond what was needed to maintain a steady state because it required constant investment in new

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<sup>49</sup> See Part Four below.

<sup>50</sup> Marx, *Capital* ch 25.

equipment.<sup>51</sup> The possibility of reducing costs and making Schumpeterian profits before rivals could catch up was the main driver of technological innovation.

Second, along with the technological dimension, there was an organizational dimension, the rationalization of production.<sup>52</sup> Tech innovation permitted more and more intense specialization in the production process (the division of labor). In the first phase, a larger number of specialized workers in each firm are required to produce each unit of output, while the contribution of each worker to a unit becomes smaller and smaller. Large agglomerations of workers, each making a tiny contribution per unit, can produce together vastly more units than a collection of individuals or small teams handling all aspects of production.

In the second phase, mechanization replaces the tools of classic Smithian pin making. The machines for individual pieces are combined into the assembly line, and the work of “tending” the assembly line is so to speak facilitative, rather than in any way autonomous. As such, innovation makes it simpler and more repetitive and divides tasks not according to skill but according to whether more suited psycho-physically to men, women or children.

The logic of specialization is progressive, in the sense of developing through technological innovation in the single direction of larger and larger production units, but fewer and fewer of them. Every innovation that reduces costs allows the innovating firm to undercut its rivals and steal their market share. The larger firm can afford a yet more elaborate specialization incentivizing yet more tech innovation.<sup>53</sup>

### ***The capitalist socialization of production***

The larger and larger units based on more and more elaborate division of labor are ***managed***. The logic of the competitive market is wholly absent in the modern factory. Its ethos is intricately planned cooperation of thousands of people each with a role dependent on coordination with all the other roles in the production process. The goal is efficiency in the sense of producing a desired product at the least cost in the resources of land, labor and capital.<sup>54</sup> In short, in Weber’s phrasing of Marx’s insight, capitalist development substitutes rationally goal oriented bureaucracy for markets and competition.<sup>55</sup>

Capitalist development enormously increases society’s productive capacity by socializing it. In liberal fantasy, economic life is based on the exercise of their contractual free choices by all kinds of owners and all kinds of workers. In fact, according to Marx, the

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<sup>51</sup> Marx, ch 15.

<sup>52</sup> Marx, ch 15.

<sup>53</sup> Marx, ch 25 s. 2.

<sup>54</sup> Marx, ch 15.

<sup>55</sup> Max Weber, *Politics as a Vocation* in MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY (2009).

workers have no say at all in any aspect of the production process—they sign away their property right in their own labor at the factory gate.<sup>56</sup>

As owners delegate more and more to managers, a steel manufacturing company might employ several hundred thousand workers and managers for the benefit of several hundred thousand completely passive stockholders. From the functional point of view the capitalist is a sort of appendix to a giant bureaucratic organization.

### ***The social roles of landlord and capitalist***

Whereas Ricardo's landlord is a strictly socially negative being, who we could as revolutionaries ... gladly do without, Marx's capitalist, in Marx's theory, is the author of the modern world. The extreme poverty of the masses of today is not just or mainly a function of the maldistribution of income between capitalists and workers. There just isn't enough output of goods and services for everyone to live a modestly good material life. Moreover, the utopian hope for freedom from want goes along with the utopian hope for freedom from the need to work long hours to produce that modestly good material life.

The capitalist's miserly behavior as a profit obsessed accumulator and re-investor is opening the way to a radically different future for all of humanity. This is very Hegelian—the cunning of History, aka the system logic of capitalism--obliges totally selfish actors who have not the *slightest* desire for anything except money, to act in a way that will make it possible for everyone in the society to be rich when the accumulation process has taken its course.

On the way, there is the “ah-hah” moment when productive capacity is great enough so everyone could be modestly well off, and everyone is already organized in a socialist system, with owners cashing checks and coupon-clipping away. “The consciousness of the proletariat” then realizes this truth.<sup>57</sup> The true or pure capitalist class is holding their property titles, their stocks and bonds, on behalf of all of us, while inflicting the chaos of more and more concentrated capital and commodity markets.

Since production is already socialized, all that will remain will be to flip the ownership from private to public as the first step on the road to communism. It can be done in seconds. And nothing has to change at the enterprise level, because the owners aren't doing anything, unless of course the new owners have new ideas about how “we” should deploy “our” labor power using “our” means of production. Revolution means

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<sup>56</sup> Marx, Ch. 15, boss as “general” “military model”

<sup>57</sup> Cf. Georg Lukács, *Reification and the Consciousness of the Proletariat*, 137 in *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 83–222 (1971).

not the violent destruction of a functioning economic order, as happened in the liberal revolution against feudalism, but the birth of the baby.<sup>58</sup>

### ***Rewarding managerial and entrepreneurial success***

But you say what about the innovation that drives the system? That is not just technological it is also entrepreneurial. Yes indeed, that's why managers are paid a lot of money and given stock bonuses and golden parachutes that are supposed to incorporate them into the pure capitalist class. The socialist owners will have to decide just like capitalist owners how to compensate innovation and smart investment decisions. But there won't be a business cycle, no boom and bust and no robber barons because managers will be serving the common interest rather than trying to maximize the profits of battling private entities.

### ***The system threatens to destroy itself***

There is a flaw, a "contradiction" in this historical formation, typically Hegelian, which is precisely that economic activity along this path is driven by competition among present-oriented amoral individualist actors. Firms compete with each other for market share under the groundrules of property and contract, in a zero sum game: cut costs further than your rival and expand, or disappear. For this reason, the competitive free market is systemically prone to crises of over and under-production, booms and busts.<sup>59</sup>

Capitalists have no ethical commitment to the welfare or even the long run survival of the system in which they are the prime decision makers. They aim to survive as individuals by conquering through whatever means, legal or illegal, moral or immoral, may be current in the industry. The long run socially beneficial option is reinvestment in technological advance. The ever-present dark option is to reduce labor costs by sweating the workforce, particularly by demanding a longer working day for a constant wage.<sup>60</sup>

In Marx's model, the subsistence wage is determined in the long run by the labor theory of value in a commodity economy, in other words by the minimum amount of labor necessary to reproduce the working class as a factor of production parallel to machines and raw materials. But Marx is clear that subsistence is not a biological category. It has a customary element, because, for example, people won't eat some things, no matter how far you drive down the wage, even if those things would increase their chances of survival. It might be dogs and cats but no problem with horsemeat, or the other way around.

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<sup>58</sup> Cf. KARL RENNER, *THE INSTITUTIONS OF PRIVATE LAW: AND THEIR SOCIAL FUNCTIONS* (2009).

<sup>59</sup> Marx, Ch 15.

<sup>60</sup> *Id.*

The position of capital vis a vis labor was strong enough so that firms could improve their positions vis a vis competitors by driving the actual wage to a version of subsistence that was abysmal by the standards that prevailed in the pre-capitalist labor market and under conditions of social disintegration and consequent degradation compared even to the worst version of rural life. That went for men, women and children alike, twelve hours a day seven days a week. On the downside of the business cycle the capitalist survival strategy was to reduce the wage below the reproduction rate to actual death by starvation levels.

Marx's brilliant portrayal of the transformation of the labor process in the factory adds a second dimension. The assembly line was organized to reduce the workers from cooperators in the division of labor to "appendages" of the machine. In his picture the human consequences of mechanization are in some ways more chilling than those of starvation wages. Workers are not just de-skilled, their humanity is brutally stunted by the repetitive work regime.

The combination of immiseration with dehumanization on the assembly line, according to Marx, had begun to threaten the reproduction of labor power and therefore the whole system.<sup>61</sup> The answer was a new synthesis, also very Hegelian,<sup>62</sup> namely social democracy in the form of formation of unions, factory legislation and education. These could stabilize the system so that its productive dynamic could continue to the moment when the working class takes power.<sup>63</sup> (Another contradiction another overcoming.)<sup>64</sup>

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<sup>61</sup> "Modern Industry, indeed, compels society, *under penalty of death*, to replace the detail-worker of to-day, grappled by life-long repetition of one and the same trivial operation, and thus reduced to the mere fragment of a man, by the fully developed individual, fit for a variety of labours, ready to face any change of production, and to whom the different social functions he performs, are but so many modes of giving free scope to his own natural and acquired powers."

<sup>62</sup> Hegelian not just because dialectical but because this particular dialectic is fully anticipated/predicted in Hegel's Philosophy of Right. See Schiavone, Hegel o Savigny.

<sup>63</sup> "Where capitalist production is fully naturalised among the Germans (for instance, in the factories proper) the condition of things is much worse than in England, because the counterpoise of the Factory Acts is wanting." Marx, Preface to the first German edition.

Id: In England the process of social disintegration is palpable. When it has reached a certain point, it must react on the Continent. There it will take a form more brutal or more humane, according to the degree of development of the working class itself. Apart from higher motives, therefore, their own most important interests dictate to the classes that are for the nonce the ruling ones, the removal of all legally removable hindrances to the free development of the working class. For this reason, as well as others, I have given so large a space in this volume to the history, the details, and the results of English factory legislation. One nation can and should learn from others. And even when a society has got upon the right track for the discovery of the natural laws of its movement — and it is the ultimate aim of this work, to lay bare the economic law of motion of modern society — it can neither clear by bold leaps, nor remove by legal enactments, the obstacles offered by the successive phases of its normal development. But it can shorten and lessen the birth-pangs.

<sup>64</sup> "If the general extension of factory legislation to all trades for the purpose of protecting the working-class both in mind and body has become inevitable, on the other hand, as we have already pointed out, that extension hastens on the general conversion of numerous isolated small industries into a few **combined** industries carried on upon a large scale; it therefore accelerates



## ***Factory legislation redistributes to workers with minimal efficiency costs***

Here we come to another striking parallel between Ricardo and Marx on the distributive consequences of legal innovation. In Marx's model, workers are paid by the day for a number of hours fixed by the employer. The wage fluctuates around the reproduction cost of labor. The system-threatening capitalist strategy that Marx describes in meticulous detail is the lengthening of the working day in order to increase the amount of "unpaid" labor. A certain number of hours of work increase the value and thence the selling price of the product by an amount necessary to pay the daily wage. Further hours of labor further increase the price of the product and that increase is pure profit on the means of production employed.

In this model, legislation fixing the length of the working day at a number of hours shorter than the number prevailing in the unregulated market cannot affect the daily wage, determined by the reproduction cost of labor. A shorter day for the same wage is an unequivocal gain for workers and a loss for capitalists because beyond the very short run they can't reduce the wage in response to the regulation.<sup>65</sup> The workers at the edge of subsistence are like Ricardo's farmers who can't pay more rent because they are already operating for the minimum average profit necessary to keep them in business.

The industrialists argued that the limitation would cause a reduction in output and large efficiency costs from having to employ more workers in shorter shifts. But so long as the reduction in hours, for the constant wage, leaves some profit, and all firms are regulated in the same way, capitalists have no motive to cut production. They will "eat the loss" of surplus. Cutting production would just reduce profits further, beyond the loss caused by the regulation. As for the efficiency costs, Marx quotes the famous British factory inspectors' reports showing that the supposed massive inconveniences "vanished like snow in the sunlight" as firms quickly adjusted without loss of productive capacity.

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the concentration of capital and the exclusive predominance of the factory system. It destroys both the ancient and the transitional forms, behind which the dominion of capital is still in part concealed, and replaces them by the direct and open sway of capital; but thereby it also generalises the direct opposition to this sway. While in each individual workshop it enforces uniformity, regularity, order, and economy, it increases by the immense spur which the limitation and regulation of the working-day give to technical improvement, the anarchy and the catastrophes of capitalist production as a whole, the intensity of labour, and the competition of machinery with the labourer. By the destruction of petty and domestic industries it destroys the last resort of the "redundant population," and with it the sole remaining safety-valve of the whole social mechanism. By maturing the material conditions, and the combination on a social scale of the processes of production, it matures the contradictions and antagonisms of the capitalist form of production, and thereby provides, along with the elements for the formation of a new society, the forces for exploding the old one." See Marx, ch 15 sec 9.

<sup>65</sup> Interestingly Marx supports this claim with the observation that workers tell inspectors that the reduction in hours is so valuable that they would want it even if it cost some wage reduction (not that it has caused one).

Like Ricardo in his discussions of the taxation of landlord wealth and the abolition of the corn laws, Marx was here engaged in one of the premier activities of present day lawyer/economist policy analysts, namely assessing the distributive consequences of legal rule changes. Unlike Ricardo he is doing it in the familiar mode of social democrats responding to self-styled benevolent free-marketeers who claim that all do-gooding on behalf of the poor is self-defeating (“hurts the people....”). The rest of this article explores how the Ricardo/Marx analytic might be applied to the particular form of social democratic reform that tries to redistribute, more or less “structurally,” by modifying the background rules of private law that Ricardo and Marx either unreflectively presuppose or misconceive.

### **PART THREE**

#### **Critique and reconstruction of the role of law in Ricardo and Marx**

In Ricardo’s model, the factors determining the distribution of surplus are the fertility of the land, the cost of production, demand for wheat, and the ownership rights of landlords under a regime of freedom contract. Under the assumptions, landlords receive the whole surplus. Ricardo makes no formal or explicit assumptions at all about the legal context.

For Marx, the factors determining the rate of profit are the cost of labor, the costs of non-labor means of production, the demand for the commodity, and the resulting market price (once again simply ignoring the labor theory of value). Under the assumptions, the capitalist owners of the means of production receive the whole profit, that is the whole surplus.

Marx in *Capital* in his famous discussion of the “fetishism of commodities,” makes the “commodity form,” understood as a philosophical and also a legal abstraction, the center of the analysis.<sup>66</sup> He asserts the historical contingency of that form against the bourgeois tendency to fetishize it as an a-historical given that determines “naturally” the outcomes of economic life. But then, in common with his contemporaries, he is guilty of a fetishism of his own, which might be called legal fetishism.

He treats the abstract legal concepts of property and contract as having necessary specific meanings when operationalized at the level of particular legal rules governing production and distribution. The meanings he derives are those of the extreme laissez-

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<sup>66</sup> Author (1984).

faire private law regime of mid-nineteenth century Western Europe. (Philosophized by Hegel and abstracted by Savigny.) The upshot is that the commodity form is contingent, but it determines, in its abstraction, the legal regime that determines the distribution of surplus.

This is p 728-729<sup>67</sup>

### ***Contemporary legal thought vs Marx's legal formalism***

But it is not possible to predict what a capitalist legal regime is or will be in the real world or to predict its effects by reasoning from the abstract concepts of absolute property and free contract.

Here the critique aims to bring contemporary mainstream American legal theory into contact with neo-classical welfare economics as applied to wage and rent bargains. The mainstream legal theoretical view is that the ideas of private property and freedom of

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<sup>67</sup> "In so far as the surplus-value, of which the additional capital, No. 1, consists, is the result of the purchase of labour-power with part of the original capital, a purchase that conformed to the laws of the exchange of commodities, and that, from a legal standpoint, presupposes nothing beyond the free disposal, on the part of the labourer, of his own capacities, and on the part of the owner of money or commodities, of the values that belong to him; in so far as the additional capital, No. 2, &c., is the mere result of No. 1, and, therefore, a consequence of the above conditions; in so far as each single transaction invariably conforms to the laws of the exchange of commodities, the capitalist buying labour-power, the labourer selling it, and we will assume at its real value; in so far as all this is true, it is evident that the laws of appropriation or of private property, laws that are based on the production and circulation of commodities, become by their own inner and inexorable dialectic changed into their very opposite. The exchange of equivalents, the original operation with which we started, has now become turned round in such a way that there is only an apparent exchange. This is owing to the fact, first, that the capital which is exchanged for labour-power is itself but a portion of the product of others' labour appropriated without an equivalent; and, secondly, that this capital must not only be replaced by its producer, but replaced together with an added surplus. The relation of exchange subsisting between capitalist and labourer becomes a mere semblance appertaining to the process of circulation, a mere form, foreign to the real nature of the transaction, and only mystifying it. The ever repeated purchase and sale of labour-power is now the mere form; what really takes place is this — the capitalist again and again appropriates, without equivalent, a portion of the previously materialised labour of others, and exchanges it for a greater quantity of living labour. At first the rights of property seemed to us to be based on a man's own labour. At least, some such assumption was necessary since only commodity-owners with equal rights confronted each other, and the sole means by which a man could become possessed of the commodities of others, was by alienating his own commodities; and these could be replaced by labour alone. Now, however, property turns out to be the right, on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to be the impossibility, on the part of the labourer, of appropriating his own product. The separation of property from labour has become the necessary consequence of a law that apparently originated in their identity.

Therefore, however much the capitalist mode of appropriation may seem to fly in the face of the original laws of commodity production, it nevertheless arises, not from a violation, but, on the contrary, from the application of these laws. Let us make this clear once more by briefly reviewing the consecutive phases of motion whose culminating point is capitalist accumulation."

Marx, Ch 24, sec 1.

contract are vague or contradictory or open to conflicting but equally legally plausible interpretations (depending on the genre of critique). The actual order of enforceable formal state law has never followed and could not follow from the “logic of the commodity form” or “property and contract” because of their (relative) indeterminacy.

Actual regimes of positive law consist of highly contextual rules emerging from free-for-all political/economic conflict. Supposing that they care, the actors (including judges) with legislative or other law-making power, have been and are only very loosely bounded or constrained by ideas about what the abstractions require.

The play in the joints may be more or less and it is differently theorized by different legal theory schools. It is nonetheless obviously large enough in practice so that very left wing and very right wing versions of capitalism can claim liberal or Liberal fidelity. While pursuing a “hermeneutic of suspicion” against their enemies, all ideological formations defend their radically different rule choices as consistent with the abstractions. It is the actual ground level positive regime of state law that emerges from their continuous conflicting law making projects, rather than the abstractions, that determines distributive outcomes. Felix Cohen, *Transcendental Nonsense* (critiqued for overstatement in *A Critique of Adjudication*).<sup>68</sup>

### ***Reconstructing the legal presuppositions of Ricardian rent***

Unlike Marx, Ricardo cannot be accused of fetishism, because he has nothing at all to say about the legal regime underlying his model. But his presupposition, as best as I can reconstruct it, is the same as Marx’s explicit idea, and shared with modern day neo-classical welfare economists.

It is that the property regime in force will clearly identify someone as the owner. He will enjoy very strong legal entitlements about what is going to be done on the land that he owns. Landlords will operate in a regime of virtually complete freedom of contract when it comes to their transactions with farmers and farmers likewise in transactions through intermediaries with the wheat market. In these bargaining relationships neither party will have the right to “threaten” the other in any way, except for threatening not to transact at all.

The statement that the landlord appropriates “all the surplus” also seems to presuppose that the landlord can enforce the rent bargain that emerges from the exercise of these legal entitlements. He can get a state agency to adjudicate his claim and then order a judgment in his favor that will be carried out with official force if necessary. And enforcement is free as well as easy—landlords have nothing to fear from litigation.

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<sup>68</sup> Felix S. Cohen, *Transcendental nonsense and the functional approach*, 35 COLUM REV 809 (1935). See also, AUTHOR (2009).

## ***Bargaining power as the determinant of the distribution of surplus***

In both models, the key is that there is no meaningful bargaining either between landlords and farmers or between capitalists and workers. The reason is that in each case the labor theory of value seems to dictate the winner take all outcome, with the farmer and worker each getting the “value” of what he offers. A neo-classical read might imagine that all the farmers/workers are identical, more numerous than employers, prevented from any kind of combination and all willing to work for a common minimum if nothing better is offered. By contrast, the landlords and capitalists (not “farmers”) are positioned to “hold out” until the others come down to the minimum rent/wage.

The picture of zero bargaining power makes sense given the assumptions of the model but is my reconstruction rather than what they wrote, again because the labor theory of value led them astray. As soon as we make the model a tiny bit more complex, bargaining power will reemerge as the best way to understand the outcomes. In the Ricardo case, differences among farmers will generate bargaining power for some farmers, allowing them to demand a share of surplus.

Some farmers will be “better at it” than others, in the sense that for any number of reasons they can produce at less cost and generate more surplus than the average. They will get a premium in the form of lower rent, that is some share of the “surplus surplus” they generate. Even among equally productive farmers, some are better than others from the landlord’s point of view. For example, a farmer who has been of standard quality for a particular landlord for a long period of time should have a higher than normal value to the landlord because reengaging him saves the “costs of search” and the risks of mistaken choice in replacing him.

This analytic is the same as that I proposed for a capitalist firm in the discussion of the Marx model and it applies to landlords as firms as well. Some will be better than others at their single task of selecting and checking up on farmers, and so benefit from the surplus surplus, and so forth. The disposition of the surplus surplus, and symmetrically of losses, will occur through bargaining in which each side, not just the landlord, has some degree of power.

How much power? A multitude of factors affect the outcome but we are interested in the legal regime. There are systemic advantages and disadvantages generated by the legal regime, in the sense that changes in the regime in a given direction will advantage some and disadvantage others, both between and within the classes. There are valuable rights on both sides, rather than only on the stronger side. This is the important realist insight of the legal institutional economist Robert Hale.<sup>69</sup>

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<sup>69</sup> Robert L. Hale, *Coercion and distribution in a supposedly non-coercive state*, 38 POLIT. SCI. Q. 470–494 (1923); Author (1991).

## ***Legal rules powerfully affect bargaining power***

When we set out to analyze the impact of legal rules on party bargaining power, we can't start at the level of "property" or "contract," these are vague and indeterminate abstractions, not rules at all in the sense we are looking for. To repeat, the rules are contingent outcomes, each one the crystallization or result of a particular complex decision process in a particular political/economic conjuncture.<sup>70</sup> So we start with rules of positive law, of state law, which we identify in the normal lawyer way.

When we try to imagine the effects of these actual rules of state law on bargaining power, we come up against another interesting complexity which might be called the sociological critique of liberal legality. It is not just that the abstractions are indeterminate. It is also the case that the legally enacted rules of state law are not the whole story.

At every stage of capitalist development there have been multiple layered legal orders surviving within state law, with contradictory relationships to the rules of the presupposed models. We can trace historically and model analytically how the ability of parties to appeal from one normative order to another can influence outcomes.

Moreover, even where the formal, official, supposedly state enforced order has been clear, there have always been areas where it was resisted or just not enforced or defied by "informal" counter-norms enforced by non-state actors. Once again, we can trace these historically and model them analytically.<sup>71</sup>

## ***Ricardian examples***

Modeling distributional effects on the basis of the actual rules and institutional practices in force is a radically different enterprise than modeling them assuming absolute property rights, freedom of contract, no threats other than walking away, costless enforcement and so on. First of all, not all the landlords are the same, as we've seen already. Let's imagine a Ricardo-era farmer who has been your farmer on a five-year lease, who has done a significant amount of improvement of the property which belongs to the landlord if the lease is terminated. From your point of view it is a good deal because he's above average as a producer and replacing him means search costs and uncertainty.

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<sup>70</sup> When rules fit together in a coherent way, they make sense not because they follow from an abstraction, even a modest level abstraction, but because they represent analogous resolutions of perennial conflicts, like, say, the conflict between landlords and farmers phrased in the common (indeterminate) legal *langue*.

<sup>71</sup> Boaventura de Sousa Santos, *Law: a map of misreading. Toward a postmodern conception of law*, 14 J. LAW SOC. 279-302 (1987).

The lease comes up for renegotiation. The landlord offers to renew at the old rent, representing the standard rate of profit on capital. The sitting farmer says: "I am not going to do it. That's *much* more rent than I'm willing to pay." The landlord says ok I'll take a ten percent rent reduction. The farmer responds, "You jest." Things go downhill from there. When the landlord has on the tip of his tongue to respond, "Okay, out with the old! Bring in the new!" he thinks of his BATNA. What will happen if he refuses to renew and takes on a new farmer?

Begin with an imaginary extreme case (we are modeling not writing social history(!)). All these buildings have been built by the farmer but the lease says that they all belong to the landlord. "Where is the nearest fire department?" is a question that might go through the minds of the parties.

Well, let's imagine, in this English countryside there are volunteers and bubbling brooks and guys with pumps. They pump the water out, carry it around on horse drawn wagons and pump it out on site. Why is this relevant? Because there's a possibility that if the farmer experiences extreme outrage at ethically condemned landlord behavior—or has a criminal bent—maybe he is going to burn the place down.

Even an explicit threat to burn the place down is not a crime without an overt "act" of some kind. The farmer has little to lose by threatening, but of course if the barn does burn the threat will play a big part in a criminal case against him. Perhaps he never says anything remotely threatening but everyone knows that there is a possibility in this kind of situation and more specifically with these actors in this drama. The possibility, maybe conveyed non-verbally, can play a significant role in the negotiation. This is a gap in the legal system from the landlord's point of view but a beneficial concession to the difficulties of proof from the farmer's point of view. The consequence should be better bargains for farmers, maybe only for plausibly threatening ones, but if they are hard to tell from the nice guys then for all farmers.

But you say the whole point of the Ricardian presupposition is that the legal order should respond if not to implicit threats then certainly to actual arson. That should drastically reduce the credibility of overt or implicit threats and partially restore landlord bargaining power. Now let's imagine that rural criminal law is in the hands of the justices of the peace who are... the landlords. Up landlord BP (bargaining power). Now add that enforcement is by a posse of the local landlords, a voluntary activity with only the vaguest rules about what the posse can do. Up LL BP again.

The rules governing harms that can be inflicted either in the course of bargaining or in the event of rupture are major determinants of bargaining power. They are virtually never discussed in the economics literature or in law and economics literature.<sup>72</sup>

A more moderate and technical and lawyerlike example is the law of distraint. Distraint is the right of the landlord, owed rent, to enter the premises and take personal property off the premises, as a security for the future payment of the rent. Distraint doesn't exist in modern American landlord-tenant law. A landlord who tried it would probably face criminal trespass charges and anyway has plenty of other brutal remedies available. But distraint in its day was an effective threat. It was a socio-economic catastrophe to have a constable come into your house and "temporarily" take away everything of value. One up for LL BP.

But what if distraint in the countryside was a self-help remedy—no help from the state, such as it was. LL BP down. But if landlords had domestics with arms. LLBP up. But if there was always a risk that the farmer's son would shoot the landlords armed lackey with a fowling piece used for poaching in the landlord's forest. Then back to the justice of the peace system to sort it out. All in all, one up for sales of the novels of George Eliot and Thomas Hardy.

Remember the basic crit idea that neither the abstract concept of property nor that of contract (and certainly not the chaos of tort theory) gives a plausible description of what the rules are going to be in actual country sides and urban neighborhoods. The efforts of Kant, Bentham, Rawls, Dworkin and Posner to demonstrate what they ought to be (not even guessing at what they are in any particular place or time) are... not convincing to any lawyer or law professor I know. All the same, the rules about what you can do to harm the other during bargaining or threaten to do after rupture very often determine outcomes.

So, we bargain with each other, over the surplus "in the Shadow of the (actual) Law (in force)." It's a free market system. Everybody is actively picking strategies and making moves. The outcome is the highly uncertain product of everyone going at each other. It looks as though agency is everywhere. It looks as though they're the masters and mistresses of their own fate, because they bargained to closure. Or, they exercised their legal rights.

The argument here is that with everybody bargaining as hard as they can, being equally an agent, equally autonomous, equally aggressive or passive, they get different outcomes depending on the taken-for-granted background rules that happen to be in force. Under one rule, you have one hand tied behind your back but in the other you're

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<sup>72</sup> But see Arthur Allen Leff, *Injury, Ignorance and Spite. The Dynamics of Coercive Collection*, 80 YALE LAW J. 1-46 (1970). On wheat pricing in famine, see Edward P. Thompson, *The moral economy of the English crowd in the eighteenth century*, PAST PRESENT 76-136 (1971).



suddenly holding a cudgel. It may look the same and feel exactly the same to the participants. It's just that the bargain predictably turns out completely differently.

Just one more Ricardian example. The law of trespass and how it is enforced will deal with questions like: can the landlord plausibly keep track of the amount of wheat that's being grown in order to correctly calculate the supposedly full surplus rent. If the landlord is prohibited from going on the premises during the term of the lease, the farmer is in a better position than if the landlord has access (LL BP down).

If property law does allow access (LL BP up), a lot will depend on whether the definition of access allows leeways for farmer concealment (LLBP down). (Remember French rural houses with few windows in response to a tax based on windows justified by the practical impossibility of estimating peasant wheat production.)

The point about this is: depending on how this works, the landlord isn't going to get the difference between an imagined pure cost of production and the market price. Different landlords confronting different farmers will get much, much different things.

### ***How to explain gross over-reward of landlords and capitalists***

One conclusion that follows from the discussion to this point is that if the actual real life pattern of distribution seems to grossly over-reward capitalists and landlords, it is not because commodities have legal form and their necessary legal form is the abstract ideas of property and contract. The gross over-reward is the consequence of bargaining based on entitlements to property and contract rules but these are the product of contestation between social forces only very marginally constrained by fidelity to the abstractions. The abstract commodity legal form is an historical artifact not an eternal truth just a Marx demonstrated. But the same is true of its instantiation in positive law on the books and pluralist law in action.

Recognizing that the distribution of income and wealth emerges from bargaining structured by the contingent and incoherent ensemble of legal rules renders the distribution contingent as well. That doesn't make it any less grossly unjust. The crit approach I am trying to speak for works to make it intelligible in all its nastiness through the (Marx inspired) analytics of law and political economy rather than through a conceptual definition of capitalism and the labor theory of value.

In this version, political economy starts with groups led by elites, understood not just as collections of individuals but as collectives (usually, but not always, loose) with goals and strategies that are based on shared material and ideological, or "ideal" interests. They co-operate in social production and reproduction and are at the same time in conflict over the distribution of stakes that are both material and "ideal." Relations of domination and subordination are pervasive.

The stakes include the resources necessary for success in the next iteration of the conflict as it unfolds within the institutionally established rules of the game, including prominently law and in our case the law of property and contract. The framework is given at any particular moment, but is in constant modification since the rules of the game are among the objects of the game.<sup>73</sup>

### ***Reformers and radicals address the models' alleged outcomes in different ways***

The gross over-reward of landlords and capitalists has motivated many different arguments for social reform. For Ricardo, tax rent and abolish the corn laws; for Marx expropriate the expropriators. All the way to the contemporary moment, the model of surplus appropriation, re-contextualized and without the technical apparatus of the labor theory of value, has served as one analytical basis for dozens of proposals and kinds of proposals as to “what is to be done.”

Since gross inequality follows ineluctably from the operation of the commodity form, meaning property and contract law systems, we should:

First, social democratic regulatory regimes, including everything from factory laws, rent control and minimum wage law, through farm subsidies and (compensated) land reform, and on to the legal protection of worker associations and through to labor law, public utility law, regulation of financial institutions and consumer protection law. The public interest, social welfare and social and economic rights as guides.

Second, progressive taxation of income from land and capital and redistributive government spending from compulsory public education to health care to straightforward income support.

Third, “public not private property” as in publicly owned railroads, public housing, state owned and run hospitals and nursing homes, state owned banks, state ownership of key

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<sup>73</sup> Karl Marx, *The 18th Brumaire of Louis Bonaparte* (1852). Two other examples among many that I find inspiring are W.E.B. Du Bois, *Black Reconstruction*, (New York: The Free Press, [1935] 1998), and Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers Economists and the Contest to Transform Latin American States*, (Chicago IL: University of Chicago Press, 2002. See also Catharine A MacKinnon, "Feminism, Marxism, method, and the state: An agenda for theory." *Signs: Journal of women in culture and society* 7, no. 3 (1982): 515-544; Catherine Mackinnon, "Marxism, feminism and the State: toward feminist jurisprudence." *Signs* 7, no. 5 (1982): 515-544. Antonio Gramsci, *Selections from the Prison Notebooks*, edited by Quentin Hoare and Geoffrey N. Smith, (New York: International Publishers, 1971), is another inspiration. For political economy inspired analysis, see Author (2002) 4 *Journal of Law in Society*, 71-98; idem, "African Poverty", (2012) 87 *Washington Law Review*, 205-235; and idem, "Commentary on Anti-Eviction and Development in the Global South", in: Lucy E. White and Jeremy Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, (Stanford CA: Stanford University Press, 2010), pp. 41-50.

industries like coal and steel (the British Labor Party’s “commanding heights of the economy”)

Fourth, “abolishing the commodity form” for land use and control of the means of production—the kolkhoz and the Soviet industrial “enterprise.” The commons.

Like Ricardo and Marx themselves, each of these four modes either ignores private law altogether or presupposes it as having its own internal commodity logic. Law seen this way is a necessary but non-problematic neutral institutional background condition for the working out of the autonomous logics of the economic models, or the enemy to be done away with altogether (option 4).

#### **PART FOUR**

### **THE CLS APPROPRIATION OF THE RICARDO/MARX MODEL OF THE DISTRIBUTION OF SURPLUSES BETWEEN SOCIO-ECONOMIC GROUPS**

The fifth strand I’m pursuing here, roughly the “left institutionalist/legal realist/critical legal studies strand,” is not inconsistent with any of the above but is sharply distinct and much less well known. Let me say “loud and clear” that what I am about to describe and then elaborate in a second article--*Law Distributes II: Housing and Credit in Poor Black Neighborhoods*--is not the program of an organization called CLS because there is no organization nor is it something that people who these days call themselves crits see as the common line. This was and is the project of a sub set of “us” completely different from let’s say the various legal theory and identity and sexuality debates and con law debates or the project of the history of legal consciousness or legal semiotics or artifact production aspiring to epater les bourgeois.<sup>74</sup> Distribution is not an obligatory CLS concern.

#### ***Anti-subordination, political economy analytics, constructive/defensive program, both structural and palliative***

Agenda: Promote egalitarian distributional change and economic and social reconstruction in the interests of people who are oppressed and exploited more or less permanently within the U.S. political economy.<sup>75</sup> Equally and at times more important, defend distributive arrangements that favor the oppressed and exploited against roll back powered by the neoliberal claim that they everywhere and always “hurt the people they are trying to help.”

Apply conventional neo-classical welfare economics to legal distributional questions that arise when we take seriously the idea that the rules of private law, as distinct from tax

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<sup>74</sup> Astonish the bourgeois masses.

<sup>75</sup> Ruth Colker, *Anti-subordination above all: Sex, race, and equal protection*, 61 NYUL REV 1003 (1986).

and spend and regulation, powerfully influence distribution. They do this because they “constitute” the bargaining power of economic actors. They do this “before” taxation and regulation.

The critique’s distributive analytics are “not political:” they are supposed to be useful to proponents of radically different approaches to the question of social justice. They are however “motivated” analytics, developed as an aspect of the larger constructive left wing political project.<sup>76</sup>

The basic crit constructive idea is that it would be a good idea, though not the only one or exclusive of other approaches that work, to pursue egalitarian redistribution and social reconstruction more generally (e.g., the family, the international legal order), by redesigning the existing regime of positive private law rules with those ends in mind. The specific debates about housing and credit in poor black neighborhoods that the next article describes and develops have to do both with proposed left changes to private law rules and with defense against neo-liberal arguments for rolling back existing pro-poor private law rules.

The argument is that pro poor private law rules will in many circumstances force the strong party (land lord, bank, retail merchant, gentrifier, mortgage investor) to “eat” the benefit from surplus. The mechanisms of the Ricardian tax on landlords and the Marxian defense of factory legislation still work on contemporary private law transactional regimes. This is true whether the rule changes in question are merely palliative of oppression and exploitation (but still better than nothing) or “structural,” meaning promising substantial and permanent shifts in surplus in an egalitarian direction.

### ***Birth of contemporary neo-Ricardian distributive analysis: low income housing markets***

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<sup>76</sup> In this effort, a basic crit attitude is that trying to do the reconstruction by “applying” available political philosophical notions (Kantian, utilitarian, human rights, humanism, communitarianism, pragmatism) is not more successful than trying to choose rules by “applying” the property and contract abstractions directly. Again the problem is radical indeterminacy of the higher order abstractions. ((When legislators and judges appeal to the abstractions in legal reasoning, even in the utmost good faith, their practice is best understood by analogy to witchcraft or divination as guides to decision. ))

Contemporary law and economics and welfare economics address piecemeal some of these rules, but more or less exclusively from the point of view of efficiency analysis. Efficiency analysis can be incorporated into distributional analysis and it has provided many useful insights even though it usually ignores distribution entirely. As a comprehensive approach to the economics of private law it suffers, to my mind, from incoherence and from strong conservative to centrist political bias. See Author (1998).

This Part is a transition to *Law Distributes II*. It provides some political economic context for the development of left wing distributive analysis I describe there.

Contemporary legal distributive analysis was born in the late 1960s and early 1970's out of the political/economic crisis of the time, centered on the racial transformation of American cities. This crisis involved the continuous arrival in northern cities of large numbers of black migrants from the Jim Crow south; government-supported white flight from the inner city and close-in suburbs; and the transition of white neighborhoods to all-black and very poor. Poor black neighborhoods underwent disinvestment by the housing and financial sectors and by large-city governments withdrawing health and sanitation services.<sup>77</sup>

After Nixon's victory in 1968 the federal government adopted a hands-off policy in the face of the downward spirals in poor black neighborhoods in favor of an ineffectual "black capitalism" strategy. The Nixon majority of the post-Warren Supreme Court rejected attempts to force integration of suburban housing and schools under the Civil Rights Acts, as well as the argument that segregated inner city schools should have equal funding with rich white suburban ones. Around 1980 the return of the upper middle class to the inner city set off a second wave of massive neighborhood change by gentrification and displacement of poor by rich residents.

Think back to the list of reforms progressives developed in response to the grim Ricardo/Marx projections of the capitalist future. During the whole period since 1968, including downward spirals and gentrifying bubbles, the reformers haven't been able to adopt tax and spend or adopt sweeping regulation in favor of poor neighborhoods. Government ownership has been so "out of fashion" in the neo-liberal fever that tearing down public housing projects has been more common than building them. Decommodification has been a vital social practice—but only in communes and cults and housing and food coops.

In this situation it made sense to look to the more granular level of the existing common law and statutory legal regimes that obviously impacted poor black neighborhoods in their relationship to rich white suburbs. The motive was to find distributive arguments favoring the poor under the existing political circumstances rather than to determine analytically which rules should be part of an imagined efficient code.

This involved finding the economics literature that described the market in question and figuring out where there were surpluses in the existing regime to be defended against neo-liberal attack or to be pursued for transfer to the poor. Whether at the expense of

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<sup>77</sup> ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010); DANIEL ROLAND FUSFELD, TIMOTHY MASON BATES & TIMOTHY BATES, *THE POLITICAL ECONOMY OF THE URBAN GHETTO* (1984); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (2012).

landlords, banks, taxpayers, investors, insurance companies, rich tenants or rich homeowners, to name some obvious targets. The next steps are closely parallel as we'll see to Ricardo's analyses of taxes on the pure rent of land and the elimination of tariffs on wheat. The ways different kinds of legal rules, informal norms and lacunae impact the rent bargain for poor ghetto tenants are similar to the way "distrain," or the landlords-justices-of-the-peace-with-a-posse-to-enforce-the-rules, influence rent in the revised Ricardo model.

### **Ricardo, Marx, Ackerman**

In 1971 Bruce Ackerman, then an assistant professor at the University of Pennsylvania Law School, published *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, arguing for across the board enforcement of already existing housing codes in slum neighborhoods. I think this is the first contemporary example of neo-Ricardian legal distributive analysis of the kind I've been discussing and fifty years later still one of the most important. He argued that most landlords would absorb the increased costs of improving conditions, accepting reduced surplus without raising the rent.

Both conservatives and liberals believed that the reason for poor slum conditions was that the incomes of the poor were not big enough to pay for decent housing. The only feasible answers to slum conditions were public housing and subsidized new construction.<sup>78</sup> Ackerman's solution involved just a little public or a little subsidized housing but proposed to deliver a massive improvement of slum conditions at the expense of landlords and banks (!!). All at easily controlled efficiency costs (!!!).

*Law Distributes II* describes Ackerman's argument and then how the neo-Ricardian analytic he pioneered but unfortunately decided not to pursue developed and proliferated in doctrinal debates about housing and credit in poor neighborhoods, justifying different activist interventions and refuting the endlessly reiterated neo-liberal "hurting the people...." mantra.

Through the seventies and eighties there was a combination of political mobilization of poor neighborhoods with committed legal representation through federally funded neighborhood legal services offices. The policy debates were consequently more than academic and represented a minority strand in both legal scholarship and activist practice. As the housing analytic developed over the years other strands of CLS work abstracted, transposed and reapplied it to understand other fields of conflict between

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<sup>78</sup> This was the despairing liberal as well as the gleeful neo-liberal view. See Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. LAW REV. 869-922 (1967); Walter J. Blum & Allison Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH REV 451 (1967).

Also *In the Halls of Justice, the only Justice is in the Halls*, seemingly still unclear on the existence of landlord profits well after Ackerman's article, see Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in RICHARD ABEL (ED), *THE POLITICS OF INFORMAL JUSTICE*, VOLUME 1 119-63 (1982).

strong and weak parties, particularly in the law of family, sex and reproduction and in international law.

### ***Left of liberal vs. liberal rationale for rent-seeking on behalf of the poor***

Ackerman's 1971 article clearly formulated and addressed I think for the first time, in a liberal mode, the controversial ethics of instrumentalizing private law background rules to redistribute transactional surpluses from strong to weak parties. In his model, enforcing the housing code, which had been an unenforced dead letter, would if it worked deliberately impose a one-shot reduction in the market value of slum buildings. Giving rise to the question: "Why is it fair to impose a special obligation upon slum landlords to redistribute their wealth beyond that assumed by the rest of the population who simply pay their allotted share of the progressive income and estate tax?"<sup>79</sup> This question is no less germane to debates about regulation today, in the age of the Consumer Protection Bureau, the revival of the rent control debate and the "eviction crisis," than it was in the age of summer ghetto riots and George Wallace's presidential campaigns.

My own answer, which I think is reflective of what various other CLS inspired authors might say as well, is that the profits of individual slum landlords are a small subset of the mass of profit that enterprises of all kinds derive from dealings with the poor, from banks to auto and home insurance companies to supermarkets to holders of mortgage backed securities to pay day lenders to local appliance store owners. In the transactions in question the superior bargaining power of the strong party extracts an arbitrary and unjust share of available surplus.<sup>80</sup>

Targeted intervention through the legal regime governing the transaction can reallocate some or all of the surplus to, for example, neighborhood residents, just as Ackerman painstakingly and convincingly demonstrated. Activists, lawyers and non-lawyers, who have legal tools, ranging from local regulations (as in the housing code) to class actions to focused neighborhood litigation campaigns to individual representation, should use them opportunistically against any of the strong parties wherever they are likely to work.

The ethical justification for opportunism, that is, going after whichever exploiting transaction partner appears vulnerable to local expropriation, is first that the profit in question has no ethical claim to respect. Second, given the very limited power that the system makes available for the defense of the interests of the poor, whoever has a chance to use some of it has to use it situationally or not at all.

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<sup>79</sup> Bruce Ackerman, *Regulating slum housing markets on behalf of the poor: of housing codes, housing subsidies and income redistribution policy*, 80 YALE LAW J. 1093–1197 (1971). at 1169.

<sup>80</sup> FUSFELD, BATES, AND BATES, *supra* note 99.

This does not preclude, indeed it seems to demand, that the opportunistic intervention take into account *to some extent* the varying degrees of reciprocal vulnerability of exploiters, for example upwardly mobile black owner-occupant landlords of slum buildings.<sup>81</sup> However as an activist I put myself (yes, of course, unsolicited) in the position of trying to represent, both politically and professionally, the interests of a class of people in a fight with another class or group. With that commitment and commitment to the particularity of “the situation,” I think it ethically unproblematic to deploy what legal resources we can muster to go after strong party rents wherever we can find them and them and to defend historic social democratic successes against neo-liberal claw-back.

Ackerman’s two part answer, presented somewhat tentatively to the targeted slumlord, was:

You, as a slum landlord, are making disregard for human personality a fixture in your life, an aspect of one of the fundamental activities in which you engage. And while I do not demand that you be a saint, I do assert that at the very least you should refrain from weaving the larger social injustice of the maldistribution of income into the fabric of your life, as you do when you embark upon this continuing relationship with me.<sup>82</sup>

People do neo-Ricardian surplus analysis in aid of projects. Ackerman’s in this article was eminently political, and leftist in line with his conception of “social justice in the liberal state.”<sup>83</sup> I read his first answer to the slumlord as meant to fulfill the liberal requirement that “we” shouldn’t sanction an individual without a universalizable rationale, in this case a carefully qualified fault argument against the landlord’s behavior (or very existence) as a slumlord. A second liberal requirement is that *the state’s* choice to sanction bad conduct has to meet a further requirement that it not be chosen arbitrarily or in a discriminatory way. Again, Ackerman has a carefully qualified answer:

[I]t need not be hypocrisy for a legislature to impose a special obligation upon those privileged citizens who enter into long-lasting relationships with the poor by requiring them to conform to certain minimum standards of decency. It is simply a recognition that the pursuit of distributive justice is one of society’s most difficult tasks and that while the debate and struggle over the division of economic power continues, it is at least appropriate to require the beneficiaries of the presently flawed scheme of income distribution (among whom slum landlords are numbered) to conduct their lives with some restraint, cognizant of the moral ambiguities that accompany their superior wealth.

Note the dramatic shift from “making disregard for human personality a fixture in your life, an aspect of one of the fundamental activities in which you engage,” to being one of “the beneficiaries of the presently flawed scheme of income

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<sup>81</sup> See Ackerman, *supra* note 101, at 1174-75. I think his take in 1971 is still convincing against the tendency of white liberals to defend black economic exploitation in the black community that would look outrageous if claimed for business in general.

<sup>82</sup> Ackerman, *supra* note 101, at 1171.

<sup>83</sup> BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).



distribution.” And from “refrain from weaving larger social injustice ... into the fabric of your life” to “require the beneficiaries ... to conduct their lives with some restraint.”

It is easy to see how committed neo-liberal critics could and probably already have attacked these center-left formulations as inconsistent and hopelessly vague and so failing to meet the petty-bourgeois cry of outraged property rights. My own view is that the liberal frame in cases of this kind is open to equally plausible deployments for diametrically opposite specific results. In this view, there is no right answer to Ackerman’s question within the framework he and his adversaries presuppose.<sup>84</sup>

Opportunistic rent seeking on behalf of the poor, it seems to me, doesn’t rest on the moralistic critique of the individual slum landlord. Moreover, it is not a demand that the targeted rent-receivers “refrain from weaving... ” or “conduct themselves with some restraint, cognizant of the moral ambiguities that accompany their superior wealth.” Both are eventualities devoutly to be wished. But not the basis of the CLS mode of distributive analysis.

In this current, we attempt rent-seeking on behalf of the poor as a tactic of expropriation in what we see as the macro-systemic group conflict over distribution between strong and weak parties. We hope we are on the right side, that our commitment to act for that side won’t turn out to have been a wrong choice. We also hope without guarantees that ethically uneasy self-selection into the advocate role deploying our elite status perks won’t one day seem counter-productive for the cause, and arrogant to boot. It is reassuring that given our far marginality vis a vis power it is unlikely that we can do a lot of harm.

What we say and do in the battle is of course subject to all kinds of restrictive moral imperatives. Although it is a battle and subject to the logic of conflict rather than cooperation or compromise, it is nothing like a Schmittian crisis in which the exception suspends the rule.<sup>85</sup> But neither is it Ackerman’s question: “What are the obligations of a citizen of an unjust state that is capable of reformation?”

When trying to decide “how far to go,” opportunistically, against the property rights of the other side, I think the most helpful reference may be to notions like “don’t target innocents,” “when you can’t avoid hurting them, observe an idea of proportionality in terms of the gains obtained at their expense,” “excessive force is wrong no matter the provocation.” In short, in rent seeking on behalf of the poor the heavily reconstructed but still decisionist doctrines of the modern law of war may be more useful than the hopeful legalism of liberal political theory.<sup>86</sup>

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<sup>84</sup> See supra note 92. And contemporaneous with Ackerman’s formulation, Author (1978).

<sup>85</sup> No, dear reader, nothing Schmittian here. Cf. Author (2000).

<sup>86</sup> DAVID KENNEDY, *OF WAR AND LAW* (2009). The legal realist antecedents of this frame are in the scholarly debate about unfair competition in the 1930s. See...