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Norman Levine

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THE GERMAN HISTORICAL SCHOOL OF LAW AND THE ORIGINS OF HISTORICAL MATERIALISM

BY NORMAN LEVINE

The search for the origins of historical materialism leads back to the eighteenth century.* The work of Ronald Meek traced these origins to the Scottish Enlightenment and specifically to the four-stage historical theory of Adam Smith, Adam Ferguson, John Millar, William Robertson, Lord Kames, John Dalrymple, and Francis Hutcheson.¹ Acknowledging his indebtedness to a 1938 essay by Roy Pascal, "Property And Society," Meek in several essays and books first located the origins of historical sociology in the Scottish Enlightenment and then suggested how the major themes of this Scottish historical sociology filtered into the work of Karl Marx.² Pascal wrote with great certainty that "Marx's first thorough exposition of historical materialism, *The German Ideology*, 1845-46, builds on the groundwork laid by Adam Smith and his contemporaries."³ More cautious than Pascal, Meek preferred to speak of the method of historical sociology which was initiated by the Scots, only to find its complete articulation in Marx.⁴

In this essay I will present an alternative thesis and argue that the roots of historical materialism are to be found in the German Historical School of Law, in the legal sociology of Friedrich Karl von Savigny and Gustav Hugo, and in the histories of Bartold Niebuhr. I do not claim

* This essay would not have come into existence without the help and encouragement of J.G.A. Pocock. In 1979 I was a member of an NEH Summer Seminar for College Teachers at Johns Hopkins University, and Professor Pocock was the first to turn my interest to the problems of the Scottish Enlightenment, and this article is a product of these initial guided explorations.

¹ The major historical works of the Scottish Enlightenment which I have consulted are Adam Smith, *The Wealth of Nations*, 2 vols. (Oxford, 1975); *Lectures on Jurisprudence*, ed. R.D. Meek (Oxford, 1978), containing a fuller description of Smith's views on the four-stage theory; Adam Ferguson, *Essay on the History of Civil Society*, ed. Duncan Forbes (Edinburgh, 1966); John Millar, *Origins and Distinctions of Ranks* (Edinburgh, 1806) and *An Historical View of the English Government*, 4 vols. (London, 1812); William Robertson, *History of America* (Glasgow, 1806) and *A View of the Progress of Society in Europe* (Glasgow, 1798); Lord Kames, *Sketches in the History of Man*, 4 vols. (Edinburgh, 1788); John Dalrymple, *Institute of the Law in Scotland* (Edinburgh, 1981); Francis Hutcheson, *A System of Moral Philosophy* (Glasgow, 1755).

² R.D. Meek, "The Scottish Contribution to Marxist Sociology," in Meek, *Economics and Ideology* (London, 1967), 34-50.

³ Roy Pascal, "Property and Society," *The Modern Quarterly*, 10 (1938), 167-79.

⁴ Meek, *Social Science and the Ignoble Savage* (Cambridge, 1976), *Smith, Marx and After* (London, 1977), and *Turgot on Progress, Sociology, and Economics* (Cambridge, 1973).

that Niebuhr was a member of the Historical School of Law, but he had a great influence on it, particularly through his discovery of the *ager publicus*, which helped shape the legal thinking of Savigny, and through his personal friendship with this author of *The Right of Possession*. Of the three men mentioned above, Niebuhr had the greatest impact on Marx, specifically his books *Lectures on the History of Rome* and *Lectures on Ancient History*; for both works presented Marx with a historicist interpretation of property, which became one of the foundations of historical materialism.⁵

Before I can clarify the influence which the German Historical School of Law exerted on Marx, it will be necessary for me to comment on a group of French authors: Charles Pecqueur, Simon Linguet, Eugène Buret, and Simonde de Sismondi. The members of the eighteenth-century Scottish Enlightenment had used the four-stage theory as an ideological defense of private property, of the advantages of civilization over primitivism, as a proof of human progress, and as an indication that the moral personality found its economic support in private property. Charles Pecqueur and Simon Linguet commented specifically upon the four-stage theory but employed it as a denunciation of civilization, as an indication not of the progress of man but of his decline. Neither Eugène Buret nor Simonde de Sismondi commented directly on the four-stage theory, but they contributed to the critique of civilization in its capitalist form and thus showed that property had led not to the civic humanist ideal of the autonomous moral personality but to economic enslavement. An appreciation of the origins of Marxism is impossible unless seen in the context of this expanding critique of civilization.

According to the four-stage theory, human history had been characterized by four evolutionary periods: savage, pastoral, agricultural, and commercial existence. The economic condition of savage life was hunting and fishing, pastoral life was characterized by the cultivation of herds, the long agricultural period was based on farming, while the modern commercial period was founded upon an exchange economy. The Scottish theorists defined private property in terms of exclusive claim, or individual proprietorship. The savage did not know property but lived with goods in common, and this was an age of lawlessness and immorality. Individual property had its inception in the pastoral stage, in which property was

⁵ D. R. Kelley and Bonnie G. Smith, "What was Property? Legal Dimensions of the Social Question in France (1789-1848)," *Proceedings of the American Philosophical Society*, 128, (1984), 200-230. Although Kelley and Smith wrote primarily on the legal dimensions of the social problem in France, they do comment on the influence which the work of Savigny and Niebuhr had in France. In addition, the authors show how the Historical School of Law contradicted both the natural rights and Hegelian tradition of property and also point out how Niebuhr's discovery of the *ager publicus* flowed into the early nineteenth-century vision of primitive communism, a vision which influenced the work of Proudhon and Marx.

defined as exclusive occupancy of flocks, while in the agricultural stage property was distinguished as land, and in commercial society property was categorized mainly as exchangeable commodities. Even though property was the source of inequality, the basis upon which social "ranks" were established, the Scottish theorists looked upon property as the economic underpinning of civilization. Regardless of the fact that property tended to reaffirm human selfishness, Scottish conjectural history thought that property was the economic presupposition of the family, of law, and of the state, and that civilization could not have arisen without these legal and institutional frameworks. The four-stage theorists were apologists for civilization, which they believed rested upon commercial-industrial relations, because they shared an optimistic view regarding the progressive nature of human history and because they looked upon both the state and other political institutions as positive supports of the moral-individualist values of western society.

In Marx's *German Ideology* (1845-46) the two basic premises of historical materialism were articulated for the first time: the contradiction of the means and mode of production, and the determining influence of the "form of ownership" upon an economic formation. Of the two basic premises, my remarks will be directed exclusively to the question of the "form of ownership." Here is the pivotal passage, which will be used to establish the influence of earlier currents contributing to historical materialism:

The first form of ownership is tribal ownership. It corresponds to the undeveloped stage of production, at which a people lives by hunting and fishing, by the rearing of cattle or, in the highest stage, agriculture. In the latter case it presupposes a great mass of uncultivated stretches of land. The division of labor is at this stage very elementary and is confined to a further extension of the natural division of labor existing in the family. The social structure is, therefore, limited to an extension of the family: Patriarchal family chieftains, below them the members of the tribe, finally slaves.

The second form is the ancient communal and state ownership which proceeds especially from the union of several tribes into a city by agreement or by conquest, and which is still accompanied by slavery.

With the development of private property, we find here for the first time the same conditions which we shall find again, only on a more extensive scale, with modern private property. On the one hand, the concentration of private property, which began very early in Rome (as the Licinian Agrarian law proves) and proceeded very rapidly from the time of the civil wars and especially under the emperors. . . .

The third form of ownership is feudal or estate property. If antiquity started out from the town and its little territory, the middle ages started out from the country. The different starting-point was determined by the sparseness of the

population at that time, which was scattered over a large area and which received no larger increase from the conquerors. In contrast to Greece and Rome, feudal development at the outset, therefore, extends over a much wider territory, prepared by the Roman conquests and the spread of agriculture at first associated with them. Like tribal and communal ownership, it is based again on a community; but the directly producing class standing over against it is not, as in the case of the ancient community, the slavers, but the enserfed small peasantry.⁶

If we now return to the problematic of the Scots, there are two methods for determining the influence of the Scots on Marx, the first of which I call the bibliographic and the second the structural. By "bibliographic," I mean a direct encounter between Marx and the Scots through Marx's reading of their books. By "structural," I mean the decomposition of the four-stage theory into its constituent elements, and then an analysis of the location of the four-stage theory in the general structure of Scottish socio-politico-moral thought.

The issue of political economy is not the central point which this paper debates. There is a difference between Scottish political economy and Scottish historical sociology. Scottish political economy concerned the labor theory of value and the concept of the division of labor. Scottish historical sociology was a philosophy of history, a presentation of human evolution in terms of sequential stages. Meek contended that Marxist economics was shaped by Scottish political economy and also that the Scottish four-stage theory formed the basis of historical materialism. While I do not dispute that Scottish political economy was an immediate presence in Marx's economics, I do reject the idea that Scottish historical sociology influenced historical materialism.⁷

It is possible to discover satisfactorily the books Marx actually read during his lifetime. We begin by perusing Marx's own works and noting whom he mentions in the text and in footnotes, now gathered conveniently in indices that have been appended to Marx's work by subsequent publishers. Marx was a meticulous scholar and kept notebooks in which he listed most of the books he had read and in which he copied out paragraphs he found valuable or paraphrased a passage he found interesting. However, Marx's notebooks are not without flaw, for it is possible to find in Marx's own published works references or actual quotes from books which Marx neglected to list in his notebooks. Additionally, there are sources mentioned in the notebooks that Marx did not call upon as a reference in his published books. But if these two sources are combined, an accurate picture of what Marx read in his lifetime emerges. This is

⁶ *The German Ideology*, in *The Marx-Engels Reader* (New York, 1978), 151-53.

⁷ For an excellent recent study of the Scottish Enlightenment see Istvan Hont and Michael Ignatieff, *Wealth and Virtue* (Cambridge, 1983). For another work which presents a Marxist point of view of the Scottish Enlightenment, see Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft* (Göttingen, 1973).

the bibliographic enterprise I will undertake in relation to Marx and the Scots.

Marx never read any book by William Robertson or Lord Kames. He did read Adam Ferguson's *Essay on Civil Society* but only after he had written *The German Ideology*. Marx apparently read Ferguson's *Essay on Civil Society* in 1847, certainly before he wrote the *Poverty of Philosophy*, for Ferguson was alluded to in this work. Ferguson was also quoted on four separate occasions in volume one of *Das Kapital*, specifically in relation to the problem of the division of labor. John Dalrymple's *An Essay Towards a General History of Feudal Property* was read by Marx in 1851-52. John Millar's *Observations on the Distribution of Ranks in Society* was also read by Marx in 1852.

The exception to this rule was Adam Smith, for Marx had read the *Wealth of Nations* in 1843. Smith did briefly mention the four-stage theory of Book V of the *Wealth of Nations*. Montesquieu's *The Spirit of the Laws*, Book XVIII, which Marx read in 1843, did not advocate the four-stage theory but did reflect an evolutionary view of human social production distinguishing between hunters and shepherds, economic categories which did appear in the Scottish conjectural view. Marx read James Mill's *Elements of Political Economy* in 1844, but Mill did not mention the four-stage theory. What Marx did learn from Mill's book (as shown in his commentaries in the *Paris Manuscripts*) concerned the general categories of economics as established by political economy, such as labor theory, value theory, the difference between constant and variable capital, and the division of labor, and especially the moral decadence of political economy. Marx's writings on political economy in the *Paris Manuscripts* were philosophic-humanist attacks on political economy as an ideology of the capitalist class and as perpetuating the process of the alienation and dehumanization of the proletariat; from the bibliographic point of view, they indicate no influence of the Scottish school upon Marx's origination of historical materialism.

Marx's most pronounced acquaintance with the four-stage theory was not through the Scots or Adam Smith, as Meek and Pascal state, but through the French, especially Charles Pecqueur (whom he had read by the time he wrote his *Paris Manuscripts*) and Simon Linguet (whom he had read by 1845). As we shall see, both of these authors discussed the four-stage theory in great detail. Yet Marx made no use of this either in the *Paris Manuscripts* or in *The German Ideology*. This circumstance serves to emphasize that further four-stage conjectural history bore no relevance to the birth of historical materialism.

The question we must now ask is why Marx had no interest in the four-stage theory. Only by answering this question can we discern what Marx was looking for, or the ingredients which did lead to the development of historical materialism.

In the following analysis of the four-stage theory, when I speak of

the "form of ownership," I do not use this phrase in the natural jurisprudential tradition of Grotius⁸ and Pufendorf.⁹ A great difference separated Marx's definition of "form of ownership" and the natural-law philosophers, to whom private property meant an individual's exclusive occupancy over an object. For Marx "ownership" was not simply reducible to private "property" (exclusive claim) but rather meant access to, or the ability to use, an object; and "property" was only one historic "form of ownership," a term to be used in the sense of Grotius, Pufendorf, and Locke, because it defined exclusive occupancy applied by natural jurisprudence. There were also other "forms of ownership," such as various forms of communal possession. When Marx in *The German Ideology* depicted three "forms of ownership," tribal, classical and feudal, he meant there had been three ways of relating to the means of production on a communal basis. The "form of ownership" for Marx meant a relationship of production which then became a determinate force in the structuring of a socio-economic formation.

The four-stage theory differed from historical materialism because it was not an analysis of different "forms of ownership." Scottish conjectural history, following the tradition of natural jurisprudence, was basically concerned with property, either as flocks, lands, commodities, capital, and how these different stages of property produced laws which acted to preserve individuality and then political institutions, which were reflections of the private self and of its right to occupancy. A reading of the passage from *The German Ideology* indicates that Marx was concerned not with property but rather with various "forms of ownership" and how they influenced an entire economic formation. *The German Ideology* demonstrates that the focus of historical materialism was placed upon comparative economic anthropology, a study of several "forms of ownership" and how the relations of ownership imparted unique structures to different economic formations.

Scottish conjectural history was primarily a theory of industrial stages, not a dialectical theory of the mode of production; and so we must look outside of the Scottish Enlightenment for the origins of historical materialism. It is necessary to find an influence upon Marx which educated him to look upon the "form of ownership" as determining an economic formation. In the Scottish historians, history had not liberated itself from natural law—had not achieved the sort of "historicism" that made Marxism possible. Only when history displaced natural law was it possible to move from necessary stages of the history of production to the understanding that a mode of production was shaped totally by historical forces.

⁸ Hugo Grotius, *Of the Law of War and Peace*, tr. F. W. Kelsey, (Oxford, 1927).

⁹ Samuel Pufendorf, *On the Law of Nature and Nations*, tr. W. A. Oldfather, (Oxford, 1931).

Marx also required a critique of the ideological apparatus of the themes of progress and civilization. He needed an ideological critique of political economy which would stand the four-stage theory on its head, show in fact that historical development had led not to a "polished nation" but in the words of Eugene Buret, to "misery." He required a rejection of the moral postulates of political economy and the four-stage theory, a critique which would expose classical English political economy as merely a selfish defense of personal luxury and acquisitiveness.

The critique of political economy was in progress before either Marx or Friedrich Engels took up the task. Most of the arguments which Marx levelled against Smith, Mill, Ricardo, and Malthus in the *Paris Manuscripts* had already been articulated by four French social critics of the eighteenth and early nineteenth centuries. Eugène Buret's *The Misery of the Working Classes in England and France*, Simonde de Sismondi's *New Principles of Political Economy*, Simon Linguet's *Theory of the Civil Law*, and Charles Pecqueur's *New Theory of Social and Political Economy* all attacked the ideological assumptions of political economy. Marx had read Buret, Sismondi, and Pecqueur by the time he came to write the *Paris Manuscripts* and Linguet by the time he came to write *The German Ideology*. All of these men were opponents of classical English political economy; but only two of these men, Pecqueur and Linguet, wrote about the four-stage theory, which, they demonstrated, could be used as a weapon against commercial self-justification and legitimation. Marx's own critique of political economy began in the *Paris Manuscripts*, and Marx drew many of his ideas for that critique from Buret, Sismondi, and Pecqueur. From the German side, four other influences were present in the *1844 Manuscripts*: Feuerbach, Hess, Hegel, and Engels.

Published in 1842, Buret's *The Misery of the Working Class in England and France*, was a study of the contradictions inherent in commercial society. Because the capitalist always sought to depress the wages of the working class, the production of social wealth was also the production of "misery" for the proletariat. Rather than speak of progress and civilization in the style of Smith, Buret talked of decadence. He maintained that as long as the commercial system went unchanged, society would produce "misery" even more quickly than it produced wealth. Not only had low wages debased the life of the working class but capitalism had turned the laborer into a commodity to be exchanged at the whim of the proprietary class. Emphasizing the theme of dehumanization, Buret also recognized the centrality of class struggle in history. The position of the worker under capitalism was merely another form of feudalism; for just as the serf had been dominated by the landed aristocracy, so the proletariat was dominated by the industrial aristocracy. Buret offered graphic descriptions of industrial misery in France and England, and Marx did not have to wait for Engel's *The Conditions of the Working Class in England*

to discover the horrors of proletarian life, for in 1842-43 Buret had already described these horrors to Marx.¹⁰

Sismondi's two-volume *New Principles of Political Economy* (1847) was as harsh in its attack on capitalism as Buret's.¹¹ A Physiocrat, Sismondi also drew attention to the theme of class struggle and, since he was interested in agriculture, depicted several types of agrarian exploitation, such as *métayage* and *corvée*. Sismondi rejected not only the Scottish notion of progress and civilization but also the Scottish attitude toward the division of labor. Rather than see the division of labor as the source of social prosperity, Sismondi looked upon capitalism as leading to underconsumption, since he recognized that under capitalism production was carried on not to satisfy needs but for accumulation. As long as the reproductive process of capitalism was aimed at increasing profits, the needs of the proletariat would not be fulfilled, an argument Marx later used in *Das Kapital*.

In his 1844 *Manuscripts* Marx made ample reference to the work of Charles Pecqueur. Pecqueur's *New Theory of Social and Political Economy* (1842) represented the viewpoint of Christian socialism. Marx was only interested in Pecqueur's attack on the method of distribution under capitalism. Instead of distributing in terms of labor, as classical political economy argued, Pecqueur called for distribution on the basis of need and function. This was the same calculus that Marx employed when he spoke of the mutuality between ability and need in *The Critique of the Gotha Program*. Influenced by Saint-Simon, Pecqueur sought a new arithmetic of distribution, one not tied to the exchange of money for labor.

The most interesting sections of Pecqueur's book were those dealing with property, and it was in these sections that he dealt with the four-stage theory. The structural assignment that the four-stage performed in Pecqueur's work was vastly different from the structural assignment it performed for the Scots. Rather than defend progress and civilization, the four-stage theory in Pecqueur supported the attack on private property, because it completely reversed the interpretation of the first stage, the epoch of savagery. In the anthropology of natural jurisprudence and Scottish historiography, the age of savagery was synonymous with perpetual warfare. Pecqueur, however, employed the first stage in the primitivist tradition of Rousseau.

Pecqueur argued that the first acts of savage man were to form "associations" which were grounded upon "public spirit" and a respect for "law." Within the small nomadic tribes, within the shepherds and the fishers, solidarity was "instantaneous," and the shepherds owned their flocks in common. The division of labor was not a source of social

¹⁰ Eugène Buret, *La Misère des classes laborieuses en Angleterre et en France* (Brussels, 1842).

¹¹ J. C. Simonde de Sismonde, *Nouveaux principes d'économie politique* (Paris, 1827).

fracture but an agency for greater social cooperation because, as some people specialized in agriculture and others in war, it led to the common distribution of the crops as well as the common distribution of the spoils.¹² Rather than see all history as an advance beyond savagery, Pecqueur believed that the subsequent three stages represented a decline in which the original natural sociability of man was never regained. History was not an ascent into civilization but a decline into a Hobbesian chaos.

The anthropological vision of Pecqueur differed from the anthropological perspective of the Scots or of the natural law tradition. For Smith, Ferguson, and William Robertson, savage existence was lawless, amoral, brutal, and isolated. The natural-law tradition of Grotius and Pufendorf pictured the state of nature as a condition of perpetual warfare and slaughter. By picturing savagery as a state of human debasement, both political economy and natural jurisprudence could argue that property was a cause for the civilizing of mankind. The anthropological vision of Pecqueur was interesting for two reasons: it introduced a more sophisticated view of primitive life, one which recognized the social cohesiveness of primitive existence that anticipated modern anthropological views; and second, because in the case of primitive solidarity and social cooperation, Pecqueur could also claim that communism conformed to the nature of man and that an early and primitive state of happiness had been destroyed by the advent of private property.

Pecqueur also offered a history of private property. Drawing part of his inspiration from the work of the German historian Bartold-Georg Niebuhr, Pecqueur claimed that the natural law theory of first occupancy was wrong and that it was false to think of the original state of man as isolated and totally given over to individual self-preservation. According to natural rights theory from Bossuet to Pufendorf to Smith, there was either non-property (communism) or private property, and private property could only be occasioned by five methods: by occupation, by tradition, by accession, by prescription, and by succession. Natural rights theory could accommodate neither the idea of economic anthropology nor comparative economic history, and it was not sensitive to many types of "forms of ownership" because it tended to think of private property as a right and communal sharing as being appropriate to a degraded state of human existence. In order to enter the field of economic anthropology, an understanding of the historicity of property forms was necessary.

Pecqueur's excursion into economic anthropology demonstrated that five different forms of property ownership had existed throughout history, some of which Marx also depicted in *The German Ideology*:

¹² Charles Pecqueur, *Théorie nouvelle d'économie sociale et politique* (Paris, 1842), 795. For some interesting news on the work of Pecqueur in relation to other French socialists see the recent work of Ralf Bambach, *Der französische Frühsozialismus* (Opladen, 1984).

In this regard, we recognize five principle forms, four economic combinations within history.

1) Where the land is not appropriated individually because the nation is nomadic. The land is collective, undivided by the pasturages of herds, but even if an individual does cultivate certain portions, the products remain common. This is one of the earliest economic combinations in history, because society was initially pastoral before becoming agricultural. Amidst the nomadic-pastoral-tribes the common appropriation of herds and beasts was natural and just, because there existed for each pastoral tribe an abundance of open unoccupied land.

2) Where each caste, each tribe is assigned a unique function, which is inherited, voluntarily or by imposition, due to a prior disposition. Within this caste property is collective; in consequence certain castes have the exclusive function of cultivating the earth and of producing the means of subsistence for the entire community, without becoming absolutely invested with property;—This is the economic model which resembles the original caste system of India, and can be seen in Egypt, Persia, Assyria.

3) Where each tribe with the grand natural family, and each family within the tribe, receives a common base of existence and of security more or less of the same size within a territory, and acquires along with agricultural property the special function of wars, of hunting, of artisan manufacture, or commerce.

4) Some tribes gain exclusive property, and use of national territory and exploit this land for their profit because they have conquered it and then exclude the conquered tribes from the use of the land.

5) Or finally, the property ceases to be social and religious; it is individualized.¹³

In the above passage, Pecqueur depicted tribal, feudal, and Asiatic forms of property ownership. When Pecqueur talked of primitive families, he was referring to the *gens* structure of tribes. Pecqueur referred to Bartold Niebuhr by name and made use of Niebuhr's discovery of the *ager publicus* to prove that the Romans themselves practiced agrarian communism.¹⁴ Pecqueur was also familiar with the Asiatic mode of production through his reading of Niebuhr, and he wrote: "Within India, if one can believe Niebuhr, the monarch is the sole proprietor of the land, and the people only labor in the capacity of tenants; the monarch reclaims the lands which are temporarily possessed by subjects."¹⁵ He additionally learned from Niebuhr that in Greece and Rome land was held in common by the *polis*: "Citizenship entitled the inhabitant of the city to the use of the land." In the classical world there can be no doubt: "Within Greece, as in Rome, we find a property sovereign or municipal,

¹³ *Ibid.*, 836-37.

¹⁴ *Ibid.*, 821.

¹⁵ *Ibid.*

national—that is to say, within our language, a property collective and social.”¹⁶ When Marx read the work of Pecqueur he was introduced to the three modes of property ownership that he later incorporated in *The German Ideology*, tribal, classical and feudal (as well as the Asiatic mode of production, which was not present).

Marx did not read Simon Linguet until 1845. Published in 1757, the *Theory of Civil Laws* used the four-stage formulation for the same purposes as Pecqueur in order to establish that communism was the natural state of man.¹⁷ The four-stage theory as it was used by Linguet did not defend civilization in the Scottish fashion, but it was employed by the communist wing of the French Enlightenment to denounce civilization as a product of authoritarian conquest.¹⁸ The savage epoch of man was a global phenomenon characterized by a clan structure, and Linguet recognized that the Greek clan bore a striking resemblance to that of the American Indians, an insight which predated Louis Henry Morgan by about a century.¹⁹

Linguet had inverted the notion of savagery as it was to appear in the Scots, or had appeared in natural jurisprudence. He presented communism during the savage period not as a stage of human degradation but as a condition of inherent sociability and natural democracy. In *The Theory of Civil Laws* the origin of private property was set in the pastoral stage,²⁰ and exclusive occupancy was a function of conquest. The pastoral stage also witnessed the loss of freedom and the emergence of subordination,²¹ for those who were dependent upon the property of an owner became subject to the will of the owner.²² Linguet knew that the state had come into existence as a means of protecting private property and that political power arose in order to protect economic advantage. Whereas the Scots maintained that civilization could not exist without a state, Linguet asserted that the state was merely an instrument of economic power, that it had destroyed the natural sociability of man, and that it was the origin of subordination and inequality.²³ Marx was influenced by Linguet's theory of the state, and in his *Theories of Surplus*

¹⁶ *Ibid.*, 823.

¹⁷ Simon Linguet, *Théorie des lois civiles* (London, 1967). For an excellent study of the communist wing of the French Enlightenment, see Hans Thamer, *Revolution und Reaktion in der französischen Sozialkritik des 18. Jahrhunderts* (Frankfurt, 1973).

¹⁸ *Ibid.*, 271-72.

¹⁹ Simon Linguet, *Recherches philosophiques sur la droit de propriété* (Paris, 1967), 28.

²⁰ Linguet, *Théorie des lois civiles*, 327.

²¹ *Ibid.*, 329.

²² *Ibid.*, 331.

²³ For an interesting study of Linguet, see Darlene Gay Levy, *The Ideas and Careers of Simon-Nicolas-Henri Linguet* (Urbana, 1980).

Value he asserted that Linguet had grasped the true meaning of political power.²⁴

In spite of Marx's knowledge of Pecqueur and Linguet, there is no mention of the four-stage theory in any of Marx's writings up to and including *The German Ideology*. For the idea that laws as well as the mode of ownership of property were determined solely by historical circumstances, Marx had to turn to the German Historical School of Law, with which he had been familiar since at least 1837. In 1835 Marx had entered the University of Bonn to study law but left in 1836 to go to the University of Berlin to study philosophy, and on November 10, 1837, he wrote a letter to his father outlining his course of studies there.²⁵ In that letter Marx indicated that he had read Karl Savigny's work "on possession."²⁶

Savigny had been greatly influenced in his legal studies of Roman property rights by Niebuhr, whose *History of Rome* was first published in three-volume form in 1828-32.²⁷ One of Niebuhr's major historical accomplishments was the discovery of the *ager publicus* in Roman history, for on this basis he could explain the origin of private property in Rome. According to Niebuhr, the *ager publicus* was originally land conquered by the Roman Republic and held as communal land for the citizens of Rome: every Roman citizen originally had a right of possession, a right of use, in the *ager publicus*. Private property developed when Roman patricians violated the law of Licinius and expropriated part of the *ager publicus* for themselves. Savigny's book, *The Right of Possession*, had been published in 1803, and he had long been familiar with the distinction between property and possession, a legal difference dating back to Roman law itself. Niebuhr's uncovering of the *ager publicus* served to substantiate the original insight of Savigny, who openly acknowledged his indebtedness to Niebuhr in later editions of his work. Savigny and Niebuhr were also close personal friends, cementing their relationship when both were at the University of Berlin from 1810 to 1813.²⁸

²⁴ Marx, *Theorien über den Mehrwert*, in *Marx-Engels Werke*, XXVI (Berlin, 1976), 320-26.

²⁵ Marx, "Letter to his Father," *Selected Works*, ed. Easton and Guddat (New York, 1967), 40-50.

²⁶ Savigny, *Das Recht des Besitzes* (Giessen, 1827).

²⁷ Niebuhr, *The History of Rome*, trans. Leonard Schmitz, 3 vols., (London, 1844-49).

²⁸ D. R. Kelley, "The Metaphysics of Law: An Essay on the Very Young Marx," *The American Historical Review*, 84 (1978), 350-67. I have gained a lot from Professor Kelley's discussion of Savigny and of the differences between the historical school of law, the Hegelian school and the tradition of natural law flowing out of Grotius and Pufendorf. There is a striking parallel between my article and Kelley's because we are both addressing the same problem of Marx's relation to the Historical School of Law: the differences rest in the fact that Kelley approaches the subject from the point of view of the history of law, while I approach it from the perspective of anthropology. Taken together, this article,

Although there is no direct bibliographical indication that Marx had read the work of Niebuhr before he wrote *The German Ideology*, I will argue that he most certainly did. Savigny had mentioned Niebuhr in his book *The Right of Possession*, and we know from Marx's letter to his father that Marx had read Savigny. Marx was at the University of Berlin when Savigny was there and took a course with him.²⁹ Niebuhr went to the University of Bonn in 1822, remaining there until his death in 1831, teaching courses in Roman and ancient history. Marx arrived in Bonn in 1835, four years after Niebuhr died. This is circumstantial evidence, but it is highly probable that before 1857 Marx was led to read the work of Niebuhr through his contact with people and circles around which Niebuhr had moved. By 1857 there is no doubt that Marx knew the work of Niebuhr because he referred to him in the *Grundrisse* and specifically quoted from the second edition (1827) of *The History of Rome*.³⁰ In 1867, in volume one of *Das Kapital*, Marx again used Niebuhr as an authority.³¹

In the *Grundrisse* Marx resorted to Niebuhr in his discussion of pre-capitalist forms of land ownership.³² Here Marx wished to prove that throughout the ancient world, from the Indian villages of the Indus River to the Germanic clans, various forms of communal ownership of land had existed. From the sources he had consulted, Marx presented an argument for a speculative agrarian geology, for a period of ancient history in which various forms of communal land ownership was a universal social mode from India to Greece and the Rhine. To document this point he employed Niebuhr's *ager publicus* as proof that in the Greco-Roman world political citizenship in a *polis* entailed common access to the land. Marx used the *ager publicus* to show how a "form of ownership," where the political was the precondition for communal land ownership, acted as the privileged determinant in shaping an entire economic formation.

Not only did Marx make use of Niebuhr in the *Grundrisse* but he also utilized Savigny; but whereas he alluded to Niebuhr by name, he did not do the same for Savigny. In those pages of the *Grundrisse* in which Marx discussed pre-capitalist forms of land ownership, the basic paradigm he established was Savigny's distinction between property and possession.³³ When Marx referred to communal ownership he employed

that cited in n. 5 above, and my own work draw attention to a major discussion of human anthropology and the legal institutions which developed from that anthropological base, which concerned European scholars throughout the nineteenth century and which was an important influence on the evolution of Marx's thought.

²⁹ *Ibid.*, 351-52.

³⁰ Marx, *The Grundrisse*, tr. Martin Nicholas (London, 1973), 476-78.

³¹ Marx, *Das Kapital*, *Marx-Engels Werke*, XXIII, 250.

³² Marx, *Grundrisse*, 471-79.

³³ *Ibid.*, esp. 475, 477, and 490.

the Savignian term "possession," to distinguish it from capitalist ownership, or property.

Marx's original contact with the German Historical School of Law was not a happy one. In 1842 Marx wrote an article for the *Rheinische Zeitung* called "The Philosophical Manifesto of the Historical School of Law."³⁴ In the same year Marx wrote articles calling for the removal of press censorship as well as the elimination of church control over divorce. Savigny and Hugo were defenders of the Prussian Crown and were opposed to the withdrawal of press censorship and the secularization of marriage and divorce; and Marx, in the above mentioned article, attacked them as puppets of the Brandenburg monarchy. How was it possible for Marx to denounce the Historical School of Law in 1842, while accepting their influence, and that of Niebuhr, in 1846?

When Marx attacked the Historical School in 1842, he did so from a Hegelian point of view. At the University of Berlin, Marx had taken courses from Eduard Gans, a Professor of Law, a Hegelian, and one of the editors of Hegel's collected works. Marx was influenced by Gans and in early 1842 was still a Hegelian, so it was to be expected that he would attack Hugo and Savigny from the point of view that their system deviated from the idea of law as found in Hegel. Marx at this period still accepted the doctrine of *The Philosophy of Right*, looked upon property as an eternal right, as the ground of the moral personality and the economic foundation of the family, and perceived the attempt by Savigny and Hugo to derive law from sociology as an assault by history and accident upon the universality of reason. In his early Hegelian stage Marx refuted a historical interpretation of law and defended an idealistic one. By 1846 Marx had abandoned Hegel and moved into a materialist phase, so while in 1842 he was prevented by his Hegelianism from appreciating the German Historical School of Law, in 1846 he was freed by his surrender of Hegelianism to accept a materialist view of history and was receptive to the insights of the Historical School into the sociological nature both of law and of property.

The Historical School of Law, as well as the historian Niebuhr, had close ties with the Romantic movement. Yet Marx himself owed little or nothing to Romanticism, with its nationalist conceptions of societies as products of organic growth. Marx received the notion of the historical foundations of property, but he rejected the Romantic notion of organicism and its attachment to the medieval, agrarian past. The *Paris Manuscripts* were filled with attacks upon those who sought to defend agrarian relations from a romantic idolization of the feudal past. Marx was on the side of industrial progress and recognized even in 1844 that capitalism was invading the countryside and that it was mere phantasy to look back

³⁴ Marx, "The Philosophical Manifesto of the Historical School of Law," in *Selected Works*, 97-105.

in remorse and sadness. In Volume Three of *Das Kapital*, Marx ridiculed the feudal phantasies of Justus Möser, whom he had first read in 1843. The fact that Marx was influenced by the views of the Historical School of Law on property did not mean that he was in agreement with their political or nationalist viewpoints. As I stated above, Marx rejected the monarchism of Savigny and Hugo and was himself forced into a more radical posture because of the intransigence of the Prussian Crown.

In his five-volume *Textbook for a Course on Civil Law* Hugo described the natural law tradition as a branch of philosophy and ethics.³⁵ He argued that it was impossible to understand the development of law if, like Grotius and Pufendorf, one looked at the law as an expression of ontology or ethics. In contradistinction to the natural law tradition, Hugo presented the historical interpretation of law and property as expressions of given societies, of given nations.³⁶

Basically concerned with the history of law in Western Europe, Hugo recognized that different forms of property had existed in Rome and Germany. According to Hugo, law and property in Rome were centered upon the city. After the Germanic invasions, however, law and property were understood in terms of an association of people who were scattered over great territorial distances. While in the Roman world the city formed the organizing core, for the German world an association of people spread out over a large territorial area formed the organizing core.³⁷ If we refer back to our quote from *The German Ideology*, we will see that Marx defined classical ownership and Germanic ownership in exactly these terms. In relation to Roman property, Marx wrote, "The second form is the ancient communal and state ownership which proceeds especially from the union of several tribes into a city by agreement or by conquest and which is still accompanied by slavery." In relation to German property, Marx wrote, "If antiquity started out from the town and its little territory, the middle ages started out from the country. The different starting-point was determined by the sparseness of the population of that time, which was scattered over a large area and which secured no large increase from the conquerors."

Hugo had introduced Marx to the distinction between classical and German forms of ownership and law. The work of the historian J. C. Pfister, *A History of the Germans*, which Marx read in 1843, offered additional information to the picture of early German property and community.³⁸ Pfister described the uniqueness of early German society and its dispersment over great distances, but he also pointed to the communal property sharing of the Germans. Within the German tribes

³⁵ Gustav Hugo, *Lehrbuch eines civilistischen Cursus*, 5 vols. (Berlin, 1832).

³⁶ *Ibid.*, II, 45.

³⁷ *Ibid.*, I, 139-40; also 89-92.

³⁸ J.C. Pfister, *Geschichte der Teutschen* (Hamburg, 1829).

property was communal property, and an individual enjoyed possession of it, the right to use but not to own it (as Savigny had shown), based upon his membership in the community, i.e., his willingness to take up arms.³⁹ From Hugo and Pfister, Marx had acquired a sound picture of the unique property relations of Roman and German society.

If the outlines of an economic anthropology were presented to Marx by Hugo and Pfister, it was only in the work of Niebuhr that the full implication of differing "forms of ownership" were drawn in their greatest detail and clarity. In two works, *Lectures of Ancient History* and *Lectures on Roman History*, which he had given as university courses at Bonn between 1825 and 1830, Niebuhr discussed the uniqueness not only of Roman but also of oriental tribal (*gens*) and feudal ownership. A study of Niebuhr's work led one to the conclusion that five different forms of property ownership had existed in history: oriental, tribal, classical, feudal and modern. Niebuhr himself only went as far as the feudal, or four forms, but any learned person could recognize that modern forms of property followed the medieval era.⁴⁰

In Volume I of his *Lectures on Ancient History* Niebuhr presented a standard eighteenth-century picture of Oriental despotism. In the Asian form of ownership, the despot was proprietor of all the land. Niebuhr equated orientalism with political Caesarism, intellectual laziness, and a stagnant economy. He was an avid admirer of Herodotus and thus continued the Greek tradition of contrasting western liberty and Asian authoritarianism. Since the monarch owned all the land, only the conquered populations paid heavy taxes to the monarch. In order to win the consent of the ruling nation to a policy of imperialism, the monarch, who "from ancient times has always been regarded among asiatic nations as the real owner of the soil,"⁴¹ exempted his own nation from taxation while compelling the subject tribes to carry the burden of taxation.

Niebuhr even used the phrase "oriental despotism" when referring to the East: "The Persians, who had originally been a very free people, even in their relation to their kings, now gradually began to submit to oriental despotism, and thus entered the condition of the other nations which lived in a state of servile dependence."⁴² He contrasted Asian depravity to western progress and crowned his ethnocentrism by justifying English imperialism in Asia on the grounds that it would improve the condition of Asia, "so degenerate was the east even at the early period, nowhere do we find greater moral disparity than that which runs through ancient history in all parts of the east—for although their government

³⁹ *Ibid.*, 25-31.

⁴⁰ Niebuhr, *Lectures on Ancient History*, trans. Leonard Schmitz, 3 vols. (London, 1852).

⁴¹ *Ibid.*, I, 98-99.

⁴² *Ibid.*, 101-2.

is but indifferent, and although it commits sad blunders and causes much suffering, yet the country is governed with the best intentions and the British government is for the Indians really a heaven on earth."⁴³

Niebuhr described tribal ownership in Volume I of *Lectures on Ancient History* in narrating the conquest of Attica by the Greeks before the establishment of the state. The Greeks who invaded Attica were organized on the basis of tribes, and the tribes were internally divided on the basis of *gentes*, or clans. Within this tribal organization the mode of ownership was communal ownership distributed on the basis of tribes; and when the Greek city state developed, and also the Roman, the original structure of the state correspond to tribal and *gens* organization. Niebuhr was among the first to see the *gens* as the nuclear building block of primitive life both in the political and economic sense:

Everywhere in Greece we meet with a two-fold division. In many cases, there existed a fundamental division into three Phylae or tribes, as, for example, among the Dorians—the other fundamental division is that into four tribes—such a system, it is true, has often been the characteristic feature of tribes, but whenever this has been the case, it arose out of conquests. The fundamental divisions into threes and fours, are frequently found combined in the subdivisions. Both divisions are of primitive origin; with those nations, among which no conquest can be shown to have taken place, they were local divisions; but where a single city rises to the rank of a state, the division is commonly based upon Gentes—the Dodecapolis of Attica, therefore, might represent the twelve Phratriae of the four Ionic Phylae; but it is more probable, that it was an ante-Ionian division, whether the fundamental division was into four or into three tribes.⁴⁴

In his *Lectures on the History of Rome* Niebuhr described the Roman tribes and their *gens* organization before the founding of the Roman state and found that it corresponded exactly with earlier Greek organization. It was clear that he was describing a geological layer of primitive social structure. For Niebuhr, in the tribal condition of social structure the political state was organized on the basis of tribes, and property was owned communally on the same basis, an idea Marx later incorporated in *The German Ideology*. As Niebuhr explains,

Such an association, consisting of a number of families, from which a person may withdraw, but into which he either cannot be admitted at all or only by being adopted by the whole association, is a Gens. I assume it as a fact which for the present requires no proof, that the Roman division of the nation into gentes answered to the gentes of the Greeks, and to the geschlechter among our ancestors: of this postulate the sequel of my exposition will furnish sufficient evidence. Let us first consider the nation respecting which we have more satisfactory information, I mean the Greeks. Their Gens were associations which, notwithstanding their common name, are not to be regarded as families, de-

⁴³ *Ibid.*, 129.

⁴⁴ *Ibid.*, 221-22.

scended from the same ancestors, but as the descendants of those persons who, at the foundation of the state, became united into such a corporation.⁴⁵

It was a peculiarity of the institution of *gentes*, that the state was divided by legislation into a fixed number of associations, each forming in itself a small state, with many peculiar rights.⁴⁶

Political organizations based upon tribes as well as tribal ownership of land gave way in Rome to state ownership of land. When Niebuhr described the mode of ownership in Rome after the founding of the Roman state, he saw that it was determined by membership in the state. In other words citizenship was the precondition of ownership. In Rome the economic was a function of the political, and the soil was merely seen as a privilege of political participation.⁴⁷

In 1846 Marx incorporated two of Niebuhr's four modes of ownership in *The German Ideology*, the tribal and classical. In the *Introduction to the Critique of Political Economy* (1854) he made use of the third, the Asiatic. In his *Lectures on the History of Rome*, Niebuhr also described feudal ownership; but his medievalism was that not of Pfister, not the communal ownership of the early period of the Germanic invasions but rather the aristocratic ownership of the barons after the establishment of their military hegemony. Niebuhr had stressed the priority of the political and had drawn an analogy between Roman, Germanic, and Asiatic forms of land possession. Membership in the state was the distinguishing category, and while in Rome citizenship in the *polis* guaranteed entitlement to the land, in the Germanic for "there is no land at all without its feudal lord"; and so obedience to the sovereign was also the condition for entitlement to the land, whereas in Asia the despot was the real owner of the soil, and so the peasant possessed it only on terms of submission to the sovereign will.⁴⁸

Niebuhr had demonstrated that communal property existed for the greater duration of the Roman Republic, for the *ager publicus* was common land to which every Roman citizen had a right of use.

The forms of the Roman constitution have nearly always some analogy in the Greek states, and this is often the case in the civil law also, but in the Agrarian law the Romans are quite peculiar. A Greek state conquered a country and founded colonies on it, but the *possessio agri publici* was not known among them, and there is only a single instance in which something similar occurs—according to the Roman law, the state did not take from that which was publicum the highest amount of produce, but made known that every Romanus Quiris, who wished to cultivate a part of the conquered territory, might take it: This was

⁴⁵ Niebuhr, *Lectures on the History of Rome*, 86.

⁴⁶ *Ibid.*, 90.

⁴⁷ *Ibid.*, 86.

⁴⁸ *Ibid.*, 193.

the occupation *Agri Publici*; the right belonged at first to the patricians only as the most ancient citizens who might occupy a piece of land wherever they pleased.⁴⁹

Niebuhr's discovery of the *ager publicus*, which strengthened Savigny's thesis regarding possession, had proven that communal property had existed in the Roman Republic. Private property in land, as distinct from possession, arose when patricians disobeyed the agrarian law of Licinius and seized land from the *ager publicus* and claimed it as their own. Tiberius Gracchus simply attempted to return to the original conditions of the Licinian laws.⁵⁰

Niebuhr had thus shattered both the four-stage theory and the natural rights theory of property. He had shown that "form of ownership" took precedence over mode of subsistence. In distinction to the Scottish four-stage theory, he showed that tribal communal ownership spanned the hunting and food gathering stage, the shepherd era, and the agrarian period. According to the Scots, communal ownership was only practiced in the tribal stage, and private property was introduced in the shepherd era and the agricultural epoch. Niebuhr exploded that theory by proving that tribal or communal ownership spanned the history of mankind from primitive tribes to the Roman Republic. He showed that property was not an inherent right of mankind, for the historical mode of ownership from primitive man to the Roman Republic and beyond was communal ownership. It was impossible to talk of the natural right of property when mankind had spent most of its recorded history practicing some form of communal ownership, if we include Germanic communalism. Niebuhr also exploded Hugo's "juristic anthropology," for primitive life was not marked by egoistic acts of self-defense but was rather inherently social. Niebuhr rejected natural law atomism and showed that some form of social cohesiveness and sharing of property had existed since the beginning of recorded human history.

It is now possible to reconstruct the passage from *The German Ideology* to show the sources from which Marx drew its various constituents. Marx had talked about three modes of ownership in *The German Ideology*, tribal, classical and German. His description of tribal and classical modes of ownership were drawn from Niebuhr. His descriptions of Germanic ownership were drawn from Hugo and Pfister. Historical materialism, or the part of historical materialism which stressed the determining force of the "form of ownership" upon an economic formation, came into being when Marx pieced these economic taxonomies together into a systematic statement. But he found the ingredients for his taxonomy in

⁴⁹ *Ibid.*, 195.

⁵⁰ Norman Levine, "The Myth of the Asiatic Restoration," *The Journal of Asian Studies*, XXX, (1977), 75.

the German Historical School of Law and in the historians surrounding and informing that school.

In the *Grundrisse* of 1857-58, Marx still talked of three "forms of ownership" but expanded and enlarged the concept of tribal and *gens* ownership to include Asia. In the section of the *Grundrisse* now referred to as "pre-capitalist economic formations," Marx expanded the *gens* and tribal forms to include the village communities of India and Asia. But Marx did not mean "Asiatic" as Niebuhr and the eighteenth century generally meant that term, referring to simple despotism. Marx saw the Asiatic mode of ownership of land joined to a peasant village economy operating in a communal form organized around the *gens*. Marx broke with Niebuhr in his view of Asia and focused his own attention more on the self-contained communal village than on the despot. Marx learned about the Indian village commune in the early 1850s from travel books and reminiscences of British officials in India and Java. Many of these sources portrayed a Niebuhrian view of India as "oriental despotism," but several others presented an alternative view of India as a republic of village communes.⁵¹

A nineteen-year hiatus, from 1857 until 1876, existed before Marx returned to the problem of Asia, the *gens* and agrarian communism. Nevertheless, it was Marx's earlier acquaintance with *gens* society, his fascination with the problem of agrarian communalism, particularly in reference to Russia, that provided him the background from which to interpret Tsarist society in the late nineteenth century. Beginning in the 1870s Marx was becoming increasingly interested in rural Russian society and its revolutionary potentials and was led to read August Haxthausen's *Die Landliche Verfassung Russlands* in 1876. Four years later, in 1880, Marx read Lewis Morgan's *Ancient Society*.⁵² When Marx began his correspondence with Vera Zasulich over the fate of the Russian *mir* he had behind him a long familiarity with the problem of clan communism. Marx displayed a continuous involvement into the problems of clan organization running from Niebuhr to Zasulich.

Marx's famous statement in his *Introduction to a Critique of Political Economy* of 1859 which described "Asiatic, Ancient, Feudal, and modern bourgeois modes of production"⁵³ can now be seen in its proper perspective. It was a modification of his original statement of "forms of

⁵¹ On Asia Marx's reading was John Dickinson, *The Government of India*; Thomas Stamford Raffles, *The History of Java*; Mark Wilkes, *Historical Sketches of the South of India*; John Forbes Royle, *Essay on the Productive Resources of India*; Hugh Murray, *Historical and Descriptive Account of British India*; George Campbell, *A Scheme for the Government of India*; John Chapman, *The Cotton and Commerce of India*; Robert Patton, *The Principles of Asiatic Monarchies*. For further bibliography see article cited in previous note.

⁵² Levine, "The Myth of the Asiatic Restoration," 77.

⁵³ *Ibid.*, 83.

ownership” which was presented in *The German Ideology*. The Asiatic mode of the *Introduction* of 1859 was not the Asiatic mode of Niebuhr, although Niebuhr had familiarized Marx with this concept.⁵⁴ By 1859 the Asiatic mode meant the ancient village commune organized on a *gens* basis which was under a Caesarian government. The ancient mode of 1859 was still the ancient mode of 1846, the “form of ownership” based upon membership in the state (in which the state was composed of tribes or clans), and the heritage of Niebuhr remained intact. The feudal mode of 1859 was still the feudal mode of 1846, as first formulated in the work of Hugo and Pfister and later in studies of Maurer, whose work Marx read in depth. The modern bourgeois form clearly was industrial capitalism, which Marx first found not in the Historical School of Law, but in the work of Adam Smith, Scottish political economy, and Hegel.

Historical materialism was a product of the early development of economic anthropology. The German Historical School of Law and the work of Bartold Niebuhr, in their search for the historical forms of property, stood at the beginning of comparative economic history. By showing the historic determination of all property forms, of all legal forms, Hugo, Savigny, and Niebuhr, were touching upon the area of comparative economic taxonomy. This insight informed Marx’s enterprise in *The German Ideology*.

University of Maryland Baltimore County.

⁵⁴ Marx, *Introduction to a Critique of Political Economy* (New York, 1976), 5.

