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"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law

Gustav Peebles

In this paper I approach the European Union Treaties (Rome and Maastricht) and the European Court of Justice's jurisprudence from a Marxist standpoint. I argue that the treaties and case law of the European Union (EU) revolve around the rights of things (commodities), rather than of people. People primarily gain rights within the EU by demonstrating that they embody exchange value and are therefore personified commodities; people are not accorded rights merely for being human. In essence, the treaties and case law have enshrined Marx's notion of commodity fetishism, which Marx asserted to be a social mystification, into transparent law. Focusing on the grand scheme of the treaties' jurisdiction in this manner also illuminates the role of the court as it struggles to balance the demands of capital's self-valorization with fundamental human rights. I then consider the consequences of this balancing act for the EU integration process. I argue that this phenomenon as a whole also carries implications for EU civil society and for notions of legal equality among persons.

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INTRODUCTION

The European Union treaties (Rome and Maastricht[1]) and the fleshing out of their interpretation in the European Court of Justice (ECJ) provide an excellent base from which to investigate the relevance of Marx's analysis of capitalism in today's world. The treaties' overarching objective is to secure peace in Europe and "to lay the foundations of an ever closer union among the peoples of Europe" (European Economic Community [EEC] 1957, Preamble). The framers of the treaties believed that the best way to go about this was to intertwine Europe's peoples via the free competition of the open market. For example, Article 8a of the Rome Treaty (7a of the Maastricht Treaty) states that the "internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." Much of the rest of both treaties and subsequent case law in the ECJ focus on the freedoms listed in 7a and elsewhere. In fact, the primary issues that the EU treaties really address are exchange and industry; these treaties (in particular, Rome) initially only saw their influence in the region of trade, though over time their scope has broadened, largely via judicial interpretation. Green, Hartley, and Usher (writing before Maastricht) tell us that "[m]ost Treaty articles are concerned with economic matters and deal with social questions only to the extent that they are relevant to the attainment of economic objectives" (1991, 91–92).

Despite this planned containment to the economic sphere, the cultural, fiscal, and other internal matters that were initially the exclusive province of the individual member states have slowly given way to the enhanced powers of the EU supranational governing bodies. For example, writing in 1985, Kommers and Waelbroeck point out that "the Treaty rules on free movement of goods severely limit the freedom of Member States in the exercise of some of their control of domestic economic policy" (214); with the recent push toward the European Monetary Union, such limitations have become increasingly evident. Thus, the desire for economic unity has driven the new push for "harmonization measures," which attempt to unify an astonishing array of more social or localized matters.[2] Since Marx

1. The Rome Treaty was signed in 1957, establishing the European Economic Community (EEC). In 1992, the Treaty on European Union (EU), often referred to as the Maastricht Treaty, replaced it. Though the Maastricht Treaty covers much new ground, for the purposes of this paper (which is concerned primarily with the free movement of goods and workers), the two treaties are highly similar. Much of the jurisprudence analyzed in this paper occurred prior to Maastricht.

2. Many scholars have addressed the question of EU harmonization and its relationship to the free movement of goods, workers, services, and capital. Indeed, it is a central focus of many studies on the EU, since liberalizing the flow of these four factors of production is the central plan of the economic union. Among the authors referred to in this paper are Coppel and O'Neill 1992; Garth 1985; Kommers and Waelbroeck 1985; McGee and Wetherill 1990; Meehan 1993; Weiler 1993. Aside from Marx, many authors address the relationship between

was so concerned with the exchange of commodities and their impact on society, the EU treaties' distinct focus on this phenomenon makes it an intriguing subject for a Marxist analysis. I believe that viewing these developments in the EU from a Marxist perspective allows certain aspects of EU governance to come into sharp relief.

Robert Jessop, in his book *State Theory*, urges that a Marxist interpretation of the state not be overly reductionistic. Such reductions are likely to underestimate the complexities of the state form. For one thing, Jessop points out that there is no a priori ideal state form for capital (1990, 162). Also, asserting that the state is exclusively interested in protecting and promoting the interests of capital ignores the fact that there are many competing capitals. The absence of a unitary domineering capital means that no state would know what policy is clearly the best for capital (152). This is certainly true of Europe. The fate of Europe's futures exchanges in the event of complete monetary union serves as an example of such competing capitals. *The Economist* reports that the policies of EU integration could easily put many exchanges out of business. It writes, "If the members of the European Union succeed as planned in introducing a single currency in January 1999 the future of futures looks fraught. . . . the spread of the euro will begin to scythe through the tangle of guilder, D-mark, franc and lira interest-rate contracts which at present support so many exchanges" (1996a, 69–70). Considering that some businesses will go under as a result of this political project while others will thrive from it, this example clearly illustrates what Jessop is referring to: many competing capitals exist, and no given government policy will necessarily benefit all of them all of the time.

Additionally, Jessop cites Poulantzas, who explains the hegemony of capital via "a strategic causality which explains state policy in terms of a process of strategic calculation without a calculating subject" (Jessop 1990, 257). Thus, though there is no calculating subject, a strategy nevertheless emerges within state policy that can favor capital *in general*. This allows Jessop to draw the conclusion that the state system should not be considered neutral. He asserts, "It has a necessary structural selectivity" (268). Joseph Weiler, a European legal scholar, makes this fact clear in the case of the European Union when he writes that the EU's plan for a single European market is not simply a value-free

> technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology and political culture: the culture of "the market." It is also a philosophy, at least one version of which—the predominant version—seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition

law and markets in other places and times in history, including Braudel 1982; Greif, Milgrom, and Weingast 1990; Sunstein 1988; and Weber 1978.

> as a means to maximize utility. . . . This need for a successful market not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values. (1991, 2477–78)

Thus, the EU definitely exhibits a structural selectivity in favor of capital. Weiler points to the astonishing lack of debate over economic integration in Europe as one indicator that the EU has taken economic liberalization as inherently good, and thus unquestioned. At the member state level, the question of economic liberalization has been a matter of profound ideological debate, but this debate has been strangely absent at the pan-European level. All parties seem to be agreed on the fact that freer trade is the right path, and hence, we find that the EU framers and bureaucrats have claimed that EU economic integration is "ideologically neutral" (Weiler 1991, 2474).

However, just because the treaties favor the self-valorization of capital[3] by freeing the factors of production and the flow of commodities, this in no way means that the EU in its entirety always favors capital, regardless of Marx and Engels's assertion in the Manifesto that the "executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels 1978, 475). In the course of its development, the EU has exhibited, of course, many tendencies to work against capitalism as well, and particularly against a completely unregulated market (e.g., the Common Agricultural Policy). This question of the state's role in the development of capitalism has been addressed by other authors for various times and places. In his mammoth survey of European history and capitalism between the 15th and 18th centuries, Fernand Braudel asserts:

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3. When introducing the central concept of self-valorization, Marx writes, "In truth, however, value is here the subject of a process in which, while constantly assuming the form in turn of money and commodities, it changes its own magnitude, throws off surplus-value from itself considered as original value, and thus valorizes itself independently. For the movement in the course of which it adds surplus-value is its own movement, its valorization is therefore self-valorization [*Selbstverwertung*]. By virtue of being value, it has acquired the occult ability to add value to itself. It brings forth living offspring, or at least lays golden eggs" (1990, 255). (For a brief explanation of the English translator's choice of the neologism *valorization*, cf. Marx 1990, 252, translator's note). In short, self-valorization is the way in which capital manages to expand (in Marx's analysis by sapping the "surplus-value" from workers). Capital is invested in order to expand: it's primary goal is constantly to increase itself (cf. inter alia Marx 1990, chap. 4). When economic boundaries are relaxed and capital and commodities can move more freely, capital can seek out the locations where it will be most fruitful (i.e., the location where it will be able to "self-valorize" most substantially; Marxist theory also provides other reasons for why a freer market favors the self-valorization of capital). Part of the EU's goal, as Weiler points out above, is to increase market efficiency by expanding the market and increasing the mobility of the factors of production. This is widely acknowledged as being good for the expansion of capital. Hence, I believe it is fair to say that the EU treaties exhibit a tendency toward favoring the "self-valorization" of capital.

> the state undoubtedly encouraged capitalism and came to its rescue. But the formula can be reversed: the state also discouraged capitalism which was capable in return of harming the interests of the state. Both statements could be true, one after another or simultaneously since real life is always complicated. . . . the *power apparatus*, the might that pervades and permeates every structure, is something more than the states. It is the sum of the political, social, economic and cultural hierarchies, a collection of means of coercion where the state's presence is always felt, where it is often the keystone of the whole, but where it is seldom if ever *solely* in control. It may even be eclipsed, or destroyed; but it always reconstitutes itself, unfailingly, as if it were somehow a biological necessity of society. (1982, 554–55; emphasis in original)

Clearly then, the role of the state in capitalism's development is not a new debate. The state's role is complex in this regard, and it cannot be reduced to an exclusive concern with capital's self-valorization. Of course, the need for capital to self-valorize is just one way of explaining certain elements of the EU's development, but one I find to be a productive line of inquiry into the matter. A study of ECJ case law reveals that the Court is in fact an interesting player in this balance between state and capital. I intend to show that while the Court must follow the treaties, which favor capital's self-valorization, it also makes substantial efforts to stem capital's demands.

Marx believed that the freer flow of commodities has a centralizing effect that is advantageous for the formation of states; in fact, this notion was central to his vision of history. Rules and laws become harmonized in the wake of capitalist trade because of "the cry of the capitalists for equality in the conditions of competition" (1990, 621). Elsewhere he writes that the "necessary consequence of this [the spread of bourgeois capitalism] was political centralization" (Marx and Engels 1978, 477). Weber also discusses the rationalizing influence of the market. He writes that the "ever-increasing integration of all individuals and all fact-situations into one compulsory institution which today, at least, rests in principle on formal 'legal equality' has been achieved by two great rationalizing forces, i.e., first, by the extension of the market economy and, second, by the bureaucratization of the activities of the organs of the consensual groups" (1978, 698). According to these two theorists, the rules of the market can permeate social life and effect substantial change in societal norms and legal frameworks.

As already noted, other authors have pointed to the harmonizing influence of the freer market on individual member state laws, though not in a Marxist framework. A Marxist framework grants us the additional insight that in certain settings humans can become objects;[4] as such, they can enter

4. Postone clarifies this point well when he states that these "individuals are not only self-determining 'subjects,' acting on the basis of will; they are also subjected to a system of objective compulsions and constraints that operates independent of their will—and in this

into the economic sphere as equals to all other objects therein. If people are objects equal to other commodities, then we should expect to find that they are conferred no rights other than those ordinarily attached to objects in the capitalist market. And so it is, crudely speaking, in the EU. Weiler, writing in 1987, asks "is not the Court signaling that all that interests it is the economic integrity of the Common Market and not the individuals that make it up? Are not, in this fashion, individuals really turned into factors of production?" (cited in Craig and de Burca 1995, 331). This paper will investigate to what extent this claim remains true in the EU today. Individuals are defined economically in EU law, and just as the market distributes wealth unevenly, when a legal apparatus defines its subjects economically, we find that it distributes rights unevenly. The protection of rights granted by the EU legal apparatus only extends to people who can show their relationship to the circulation or production of commodities.

In order to reach these conclusions, a few preparatory steps are necessary. First, I summarize the broad consensus within academia regarding the "constitutionalization" of the EU treaties and how the doctrine of supremacy developed during this process. The doctrine of supremacy is central to the problem the individual faces, which I consider later. Next, I discuss the treaties and case law in more detail, regarding the rights they confer on commodities and bearers of commodities via the guarantees of free movement of workers and goods. Following others, I consider these elements of the treaties essential in driving the harmonization process, to which I turn next. I conclude by considering the impact of these developments for individual rights, civil society, and the EU. Throughout the analysis I bring in points from Marx's corpus (but primarily from volume 1 of *Capital*) to show their relevance to the situation in the EU and to clarify my arguments.

I consider what follows to be a commentary on the broad configuration of the treaties and the impact of these governing documents as interpreted by the ECJ; I am not concerned with whether or not the ECJ interpreted them appropriately. The details differentiating various cases from one another are, of course, better left to legal scholars. The treaties are complex documents, and there are indeed countless subtleties to ECJ case law that have been extensively and expertly analyzed by these scholars. Nevertheless, I believe that in focusing on the grand scheme of the treaties' jurisdiction from a Marxist perspective, four aspects of current EU governance come to light. First, the treaties favor capital's self-valorization. Second, in so doing, they transform humans into personified representations of commodities. Third, in reducing humans to their economic roles, the treaties (and their supremacy over member state laws) have forced the Court to

sense, are also 'objects.' Like the commodity, the individual constituted in capitalist society has a dual character" (1996, 164).

minimize the consequences of this objectification by granting protection only by turning as many forms of human interaction as possible into economic ones. Fourth, this practice by the court is one of the factors facilitating the permeation of EU law into previously noneconomic spheres. This process as a whole then illuminates at least part of the complex relationship between state (formation) and capital in the EU. Although I focus primarily on these points, I also attempt to point out some potential benefits of this process, such as the possibility that it may contribute to the deflation of nationalist sentiment in Europe and that workers can potentially find better protection than in their home country once they have gained the protections of the EU legal apparatus.

FROM INTERNATIONAL TREATY TO DE FACTO CONSTITUTION

Having outlined the general notion that the EU may be developing a favorable strategy for capital that carries implications for both individuals and member states, I can now move on to a more detailed analysis of the judicial history that is actively aiding this development. The Maastricht Treaty clarifies its objectives at the outset in Articles 2 and 3, wherein it proposes to establish an internal market within the Union that will be free of most restrictions on trade. Article 3, in particular, emphasizes the many "common policies" and "harmonization measures" that the EU intends to implement. Examples include "a common commercial policy," "a common policy in the sphere of agriculture and fisheries," "the approximation of the laws of Member States to the extent required for the functioning of the common market" and so forth. Many articles that follow address these objectives in technical detail in order to ensure the fulfillment of the plan.

Before looking more closely at some of these treaty articles, it is important to establish how the EU is gaining power at the expense of the member states.[5] For many years, the Rome Treaty's high aspirations for the elimination of many obstacles to trade went unfulfilled. The 1985 White Paper from the EEC, suggesting over 300 specific measures in order to complete the single market, attests to the fact that member states have not always readily abandoned their various idiosyncratic trade policies in favor of Community-wide policies (Bieber et. al 1988, 13–15). It was not until the ECJ started to actually enforce the treaties and interpret them in new ways that

5. What follows is a basic summary based on an extensive literature regarding the constitutionalization of the EU treaties. For a more detailed analysis of this field, see, inter alia, Craig and de Burca 1995; Easson 1989; Jacobs 1992; Mancini 1989; O'Neill 1994; Ward 1996b; Weiler 1986, 1991.

they began to have much greater impact on the Union members.[6] The new force residing behind treaty articles and Union legislation means that countries will now have a much harder time maintaining any sort of obstacles to trade. Easson writes of the power of treaties and the ECJ: "What are in their initial conception multipartite treaties have been transformed into constitutional documents and the Court of Justice has evolved into a constitutional court. That this is so is almost entirely the doing of the Court of Justice, for the 'constitutionalization' of the treaties rests principally upon the twin concepts which it has developed, of the direct effect and supremacy of Community law" (1989, 103).[7]

The direct effect and supremacy doctrines that Easson refers to are, as he states, the linchpin of the Community enforcement apparatus. The development of direct effect and supremacy has been addressed in many writings and will therefore not be extensively rehashed here. Suffice it to say that direct effect is the doctrine that confers the rights and obligations of EU law upon member state nationals, not just upon the states alone. In the pivotal *Van Gend en Loos*, decision the Court proclaimed that

> The conclusion to be drawn from this is that *the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.* Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. (Cited in Craig and de Burca 1995, 152–53; emphasis mine)

After this judgment, the EU treaties began to shift from an international agreement among governments to a de facto constitution. A number of cases in the 1970s made it clear that citizens could rely on EU regulations and partially on directives as much as they relied on the treaties.[8] Thus, the new power imbued in the treaties and most EU legislation has the same binding nature upon citizens, companies, and governments as a constitu-

6. Other factors gave increased strength to the legal arms of the Union, such as the imposition of majority voting procedures in the Single European Act of 1986 (Weiler 1993, 436). For a concise summary of the development of EU government, see chapter 1 of Craig and de Burca 1995.

7. One discovers countless echoes of this statement in the scholarly literature (cf. Craig and de Burca 1995, 151; Mancini 1989, 603; and Meehan 1993, 36).

8. Article 189 of the treaties outlines the types of legislation used in the EU. In lay terms, a regulation has binding force directly, as issued, in the member states. A regulation is not modified and/or "implemented" by member state governments. It is immediate law as passed by the EU governing bodies. A directive, on the other hand, leaves the form and method of implementation of the law up to the discretion of the member state governments. In practice, this has meant that member state governments must formally pass the directive into law—a situation that often has led to problems of implementation and is the subject of an enormous amount of scholarly literature (cf. Coppel 1994; Craig 1992; and Weiner 1990).

tion; indeed, it actually supersedes any member state constitution, a crucial fact to which we must now turn.

The doctrine of supremacy also began with the *Van Gend en Loos* case. The ECJ greatly solidified this doctrine in such cases as *Costa v. E.N.E.L.*, Case 6/64, 1964 C.M.L.R. 425. (The C.M.L.R. are the Common Market Law Reports.) In Case 11/70, *Internationale Handelsgesellschaft*, 1972 C.M.L.R. 255, of 1970, the ECJ claimed that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure" (Craig and de Burca 1995, 246).[9] This clear assertion by the ECJ means that the EU has the capacity to substantially impact member state policies, protections, and laws. O'Neill describes the new situation after supremacy in this manner:

> This much is clear: Community law, as interpreted by the Court of Justice, requires national courts to interpret and apply Community law in accordance with the principles developed by that Court with a view to contributing to the development of the Community, often at the expense of Member State powers and, indeed, contrary to their national constitutional provisions. . . . European Community law has given the national courts of the United Kingdom the potential to alter the balance of the unwritten constitution, allowing the [U.K.] courts to (re-) claim powers denied them since the seventeenth century. . . . The Court of Justice has become the master of the Treaty by translating the Treaty into a European constitution. (1994, 32–33)

Thus we see that the supremacy doctrine has broad ramifications for the national legal systems of the member states. For matters within the jurisdiction of EU law, the member state courts are subordinate to the ECJ in a federal-type system, wherein the ECJ has the final say on what stands as law. The ECJ has the power to review member state measures to ensure that they are in accordance with Community law. Herein lies a central element of the force that has gradually turned the treaties into de facto constitutions. Weiler states that the "combination of the two doctrines [direct effect and supremacy] means that Community norms that produce direct effects are not merely the Law of the Land but the 'Higher Law' of the Land. Parallels to this kind of constitutional architecture may, with very few exceptions, be found only in the internal constitutional order of federal states" (1991, 2415).

9. For more details on the development of the supremacy doctrine, cf. Craig and de Burca 1995, chap. 6.

PROTECTING ONLY COMMODITIES?

Clearly, what was once seen as an international treaty is increasingly functioning as a federalist constitution. For the purposes of this paper, the most interesting aspect of this development is that the "constitution" primarily concerns itself only with trading law, centered around liberating the movement of goods, services, workers and capital—in other words, the factors of production and the salable items of consumption. If it is indeed becoming more of a constitutional structure, then clearly the next vital question to ask is "who or what does this constitution seek to protect, and what rights does it seek to guarantee?" As I hope to show, the EU treaties qua Constitution are structured in such a way as to protect only commodities.[10] The EU treaties codify Marx's discovery about a previously hidden aspect of capitalist society, namely that "the characters who appear on the economic stage are merely personifications of economic relations; it is as the bearers of these economic relations that they come into contact with each other" (1990, 179). Humans only fall within the scheme of EU law insofar as they are bearers of either the commodity labor power or the commodity money.[11]

The primary right accorded to humans under the EU treaties is the right to move, which is the same "fundamental" right accorded to goods, services, and capital.[12] Other standard rights found in Western liberal democracies are noticeably absent. So, for example, freedom of speech is not mentioned among the four rights granted in the treaties to individuals; the same is true of many other rights ordinarily associated with liberal Western democracies. Instead, in Article 8, the EU confers only (1) the right to move and reside freely within the Union, (2) the right to vote and stand for municipal and European parliament elections in any member state in which he/she is resident,[13] (3) the right to diplomatic representation in a third

10. My analysis only addresses the rights of member state nationals, not non-EU nationals, whose rights might not measure up to other people's even when they are bearers of commodities (cf. Garth 1985).

11. Most ECJ cases regarding the rights of people revolve around the rights of workers. The addition of money bearers is important because directive 73/148 conferred immigration rights to recipients of services (such as tourists), and directive 90/364 conferred residence rights to those of independent means (Green et al. 1991, 97–99). Otherwise, we can largely be concerned with the rights conferred upon workers for the purposes of this paper. Furthermore, in Marx's opinion, money becomes the right to own the fruits of someone else's labor power: "that which mediates my life for me [money], also mediates the existence of other people for me" (1967, 127). Hence, the baseline commodity remains the same. In Marxist terms, to say that one is a bearer of money is only to say that they "bear" the right to someone else's labor power. The translator of Marx's *Capital* states, "The concept of an object (or person) as the receptacle, repository, bearer of some thing or tendency quite different from it appears repeatedly in *Capital*, and I have tried to translate it uniformly as 'bearer.'" (1990, translator's note, 179).

12. This is the case, in particular, prior to the insertion of Article 8 in the Maastricht Treaty.

13. See D'Oliveira (1995, 71–73) for the limitations upon this specific right.

country by any member state of the Union, (4) the right to petition the European parliament (European Union Treaty 1992 [EU], Article 8a–8d). This last one seems particularly hollow, in light of the fact that the Parliament itself has very little power (cf. Craig and de Burca 1995, 57–69).

The immediate rejoinder to the claim that the EU treaty does not provide these rights is that the member state constitutions do. However, as noted above, the member state constitutions have been superseded by the treaties, which for the most part do not concern themselves with such rights. Some authors argue that situations can arise where the rights of an individual as conferred by his/her national constitution run up against the now more "fundamental" and foundational rights of the capitalist market in the EU (Coppel and O'Neill 1992, 242–43; Phelan 1992, 684–86; Weiner 1990, 576).[14] However, as Weiler documents (1986, 1129), the ECJ has worked the European Convention on Human Rights (henceforth ECHR) into its catalog of protections for individuals. Nevertheless, it is only when a person is defined economically that the ECJ can confer the rights of the ECHR. In those cases where a person successfully illustrates that he/she is a bearer of a commodity, the ECJ can balance the human rights enshrined in the ECHR with the market rights conferred by the treaties (cf. Case 260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [henceforth *ERT*], [1991] E.C.R. I–2925, paragraph 43). (E.C.R. stands for the Court of Justice of the European Communities: Reports of Cases before the Court of Justice and the Court of First Instance.)

If this is true, we must now turn to the question of which legal situations "produce direct effect" in order to see where EU law comes into play and the ECJ can invoke its commitment to the ECHR rights. The fact that the treaties are primarily concerned with guaranteeing the smoother flow of the factors of production and the exchange of commodities means that the rights conferred on people only become active when the person is defined economically. People are only protected, within the view (and jurisdiction) of the treaties and the ECJ, when they fall into the sphere of commodity circulation and production. By altering the definition of citizenship, the EU has created and legitimized an alternate definition of citizenship from that which we have grown accustomed to in the modern era. D'Oliveira explains that "the core and origin of Union citizenship is the right to free movement. Mobility is the central element, around which other rights crystallize" (1995, 65). This definition of citizenship is, for D'Oliveira, so novel as to be illegitimate; he calls the citizenship granted under Article 8 of the Maastricht Treaty a "gross misnomer" (84).

14. Phelan addresses *S.P.U.C. v. Grogan* in an article and argues that in "EC law, a right is fundamental in the sense that it is of basic importance in promoting Treaty objectives" (i.e., the freer movement of goods, services, etc.)(1992, 677). In addition, the author claims that the ECJ follows the logic that "what is essential for the market is necessary in the law" (1992, 678).

But it *is* citizenship of a sort. Indeed, many rights and duties accrue to those who fall within the definition. It is only that the fashionable locus (in the modern era) of the nation-state has dropped out of the equation; instead of attaching citizenship to a community of blood or territory, the EU attaches it to a community of economic circulation.[15] Weber (1978) also addresses the issue of citizenship and how it has developed. He shows that citizenship has always had a fluid and relative definition throughout history. He finds that sometimes it is attached to economic status, while at other times it is attached to nations. Thus, we should not be surprised that a new definition has emerged in Europe; however, whether it is one that most people in Europe would consider an improvement is open to question. This paper argues that the definition of full European Union citizenship leaves many people at least theoretically outside the laws and protections of the EU.

Marx believed that citizenship and the legal equality between persons that it entailed masked more fundamental inequalities extant in the society (cf. 1978). However, he also believed that capitalism demanded legal equality between persons, for "the most fundamental right under the law of capital is the equal exploitation of labour-power by all capitalists" (1990, 405). People must enter into economic exchange relations as independent beings, separated socially from one another.[16] In such a condition, formal law is required to mediate the relations between atomized individuals. Laws that have the potential to fall outside these economic relations between individuals (such as freedom of speech) are, in theory, unnecessary for capitalism to function. Legal predicaments outside of economic relations are equally meaningless in the EU. Instead, such legal predicaments are covered by nation-state laws (Coppel and O'Neill 1992, 236).[17] Meehan argues that this is fine, since an individual can call on different sets of laws as the case

15. Of course, in order to be an EU citizen one must first be a member state national, so the tie is far from completely dissolved. To gain the rights associated with EU citizenship, member state nationality is only a first step (and an essential one, to be sure); in addition, however, one must also be an economic agent. See Garth 1985 for a discussion of non-EC migrant workers, who fit within the economic definition of EU citizenship but not within the first tier, that granted by the member state.

16. Marx writes that "Things are in themselves external to man, and therefore alienable. In order that this alienation may be reciprocal, it is only necessary for men to agree tacitly to treat each other as the private owners of those alienable things, and, precisely for that reason, as persons who are independent of each other. But this relationship of reciprocal isolation and foreignness does not exist for the members of a primitive community of natural origin, whether it takes the form of a patriarchal family, an ancient Indian commune or an Inca state. The exchange of commodities begins where communities have their boundaries, at their points of contact with other communities, or with members of the latter. However, as soon as products have become commodities in the external relations of a community, they also, by reaction, become commodities in the internal life of the community" (1990, 182). This last sentence also points to the capacity of exchange relations between communities to infiltrate the home community.

17. Weiler and Lockhart provide an example separate from freedom of speech: "If your client, say a British national in a British prison, complained about a violation of his or her

demands. She applauds the EU for bringing the economic tie to citizenship into the open:

> since property or economic independence has almost always been a criterion of eligibility for citizenship, it may be possible to argue that the Community's approach to citizenship, originating in the rights of migrant *workers*, is a more honest indicator of status than the normal and normative connotations of universalism—instead of denying the possibility of European citizenship, on the ground that Community regulation is restricted to the social and economic spheres. (1993, 16–17; emphasis in original)

However, since EU law holds sway over other laws, economic agents gain different rights and can be differently protected than others by the new legal order that has emerged in the EU, so it is not always as beneficial as Meehan suggests.[18] Moreover, while Marx may have been correct about universal citizenship masking other inequalities, this is not to say that the universal citizenship that Western democracies have become accustomed to does not often successfully confer civic rights, such as freedom of speech.

Comparing the ECJ's decisions in Case C-159/90, *S.P.U.C. vs. Grogan* (henceforth *Grogan*), 1991 E.C.R. I-4685, and Case 260/89, *ERT*, 1991 E.C.R. I-2925, serves to illustrate the point that humans must assert their "objectified economic" status in order to fall within the protection of EU law.[19] In the *Grogan* case, the court was faced with the question of whether or not an Irish decision to prohibit students from publishing and circulating information about abortion services available in the United Kingdom was valid within the EU's law concerning free movement of services (in particular EEC 1957, Articles 59 and 60). First, it is notable that the students needed to defend their actions in economic terms, as providers of a service, though they also appealed to Article 10 (granting freedom of expression and information) of the ECHR (*Grogan*, 1991 E.C.R., 4697–98). Even so, the ECJ decided that because the students were not economically linked with the providers of service in the United Kingdom (e.g., as employees), they could not be protected by the treaty articles protecting freedom to provide services:

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rights by the British authorities, curtailing, say, rest hours, you would be remiss to advise him or her that . . . a legal remedy might be sought under Community law" (1995, 62).

18. This is particularly true in member states that have not fully integrated the ECHR into national law (e.g., United Kingdom, Denmark, Ireland). Thus, if the case is not economically oriented, the people involved clearly get different rights than if it were (cf. Weiler 1986, 1141).

19. See Coppel and O'Neill 1992 and Phelan 1992 for other comparisons of these two cases.

> The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information *which is independent of the economic activity carried on by clinics established in another Member State*.
> It follows that, in any event, a prohibition on the distribution of information in circumstances such as those which are the subject of the main proceedings cannot be regarded as a restriction within the meaning of Article 59 of the Treaty. (*Grogan*, paragraphs 26, 27; emphasis mine)

The court then pointed out (citing *ERT*, paragraph 42) that since, as it had reasoned above, the matter at hand was outside the scope of the treaty, it could not make a ruling regarding the issue of a breach of Article 10 of the ECHR:

> The reply to the national court's second and third questions must therefore be that it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information . . . where the clinics in question have no involvement in the distribution of the said information. (*Grogan*, paragraph 32)[20]

Rigaux makes an interesting observation about the Grogan case for the purposes of this paper. He points out that at the time of the proceedings against the students, no sanctions were in place in Ireland against the numerous advertisements in magazines giving information about abortion services. Thus, he argues that "commercial advertising is protected by EEC law but not the liberty of information through non-profit organizations" (1992, 8).[21] He also points out that the Irish prohibition would have fallen within the scope of EU law if the students had been in the employ of a provider of service:

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20. Under EU law, a member state's court can ask the ECJ for "preliminary ruling" on a certain case, to see how it should be adjudicated in light of EU law (and indeed if it need be adjudicated in light of EU law at all). Hence, ECJ rulings often appear as guidelines to the lower courts for how they should proceed, rather than giving an overt ruling on the matter (cf. Craig and de Burca 1995, chapter 10).

21. Article 58 on the rights of service providers is interesting in that it clearly points out that to attain the rights listed in the services section of the treaties (EEC 1957 and EU 1992, chapter 3), one must not only be economically defined, but also seeking profit. It unambiguously states that "[c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, *save for those which are non-profit making*" (emphasis mine).

> The narrow reason why the Court did not rule that the Irish prohibition was incompatible with the free movement of services is that the clinics about which the information was given in Ireland had "no involvement in the distribution of the said information". One can argue *a contrario* that should the case have been the other way around, the prohibition would have struck against Article 59 and following of the Treaty. (7)[22]

The point here is not that the ECJ should have taken a moral position regarding abortions in *Grogan*. Nor do I wish to claim that the EU should absolutely have intervened on behalf of the students; states all over the world retain various abilities to limit such freedoms as freedom of expression (cf. Weiler and Lockhart 1995, 585). Rather, I wish to point out that the students are not afforded the protection of EU law because they are not economic agents within the capitalist machinery. Other cases discussed later further attest to this position of the court.

In contradistinction to this situation, the *ERT* case further elucidates the economic focus of the rules under which the ECJ operates. In this case a Greek mayor and a television concern challenged the status of the Greek television monopoly. After the mayor and television concern established their own station, the monopoly (ERT) took the mayor and the new station to court, citing its privileged monopoly under Greek law. The case was referred to the ECJ for a preliminary ruling, and the ECJ decided in favor of the renegade station and the mayor. After dealing with many of the technical aspects of where and why the Greek monopoly might possibly fall foul of EU law, the Court went on to address the question of fundamental human rights, specifically Article 10 of the ECHR (the same article appealed to by Grogan and company):

> As the Court has held (see judgment in Joined Cases C-60 and C-61/84 *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605, paragraph 25 and judgment in Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law . . . it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights . . . .
> *In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services*, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. . . .

22. Phelan 1992 and de Burca 1993 also discuss the court's decision in this case.

> It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court. (*ERT*, paragraphs 42, 43, 44; emphasis mine)[23]

So, in this instance, the court determined that fundamental rights were protected by EU law. The defendants in *ERT* were granted the same free speech protection that Grogan and company were denied. The clear difference between the students in *Grogan* and the defendants in *ERT* is that the latter are, within the ECJ's definition, economic agents. As such, they are accorded a host of rights that must be considered when weighing other rights and laws within the EU and in the member state.[24] Grogan and his fellow students had to depend, instead, only on the laws and rights designated by Ireland.

Comparing these two cases also reveals the wide gap between rhetoric and reality in the EU. The ECJ claims that human rights have long been an "integral" part of EU law. And indeed they have, except that people can only depend upon them in certain situations (i.e., when EU law is at issue) (cf. Weiler 1986, 1142). This makes perfect sense within the logic of the treaties, but it clearly sets up a situation wherein those within the sphere of exchange are accorded different rights than those outside it. From a practical standpoint, this is not in the least shocking, for this is what the treaties aim to address. In finding *Grogan* outside its jurisdiction and *ERT* within it, the court is merely performing its duty under the authority granted to it by the treaties. Those who fall within the circle of economic exchange merit additional attention and protection from the highest law of the land.

The *Grogan* case illustrates this most clearly, for it reveals the possibility of different treatment of individuals *within* the same member state, rather than different treatment across member states (which is to be expected, as

23. *ERT* is often cited as an important departure from the court's jurisprudence in *Cinéthèque* because it represents "a further encroachment by the principles of the European Convention and other general principles of law into the legal systems of the Member States" (Craig and de Burca 1995, 321). Nonetheless, the narrow reason that fundamental rights were not an issue for the court in *Cinéthèque* is that the French successfully argued that the law in question fell within the derogations provided for in Article 36; if not for this, the economic nature of the case would have allowed the court to analyze the case in light of fundamental rights (cf. *Cinéthèque*, paragraphs 25–26). Thus, the economic question remains central, though the court in *ERT* extended its reach by allowing it to now review such claims to derogations as well. This judgment expanding the Court's jurisdiction is one reason why Coppel and O'Neill believe that "the high rhetoric of human rights protection can be seen as no more than a vehicle for the court to extend the scope and impact of European law" (1992, 245).

24. Some authors have pointed out that the ECHR may not always be sufficient in protecting human rights in the EU anyway (cf. Weiler 1986, 1107, 1129; Craig and de Burca 1995, 328).

different states have different notions of fundamental rights). Rigaux's point leads us to recognize that in those instances where the ECJ has the power to review member states' laws, it is possible for some to have more rights than others in the same nation-state. This is quite different from Meehan's optimistic take on the broader options now available to EU citizens to call on different sets of rights. Put simply, under the logic of *Grogan*, economic agents in Ireland can speak more freely than others. We see that what was a hidden social relation in Marx's era has been transformed into something manifestly transparent today. Instead of universal civil rights masking greater inequities of economic status, in the EU we find that differentiations of economic status openly codify inequities of civil rights. The next two sections of the paper continue on this point, and investigate more closely who and what falls within this privileged sphere.

THE FREE MOVEMENT OF GOODS

Because EU law adheres to what is primarily a trade treaty, we should not be surprised to find that first and foremost, commodities fall within its bounds. A brief look at the rights given to goods and the impact of these rights on member state policies will clarify both the connection of goods to people in EU law and the connection between the circulation of commodities and the "leveling" process so focused upon by Marx. Marx referred to commodities as "born leveller(s)" (1990, 179). They have the capacity to break down barriers and "level the playing field" so that no other commodities are unduly favored over others. Marx argued that in the wake of commodity trade, previously distinct regions could unite in formal "objective dependence," as many of their rules and laws became unified in order to accommodate capitalist trade (Postone 1996, 163–64; also cf. Marx and Engels 1978, 476–77). An investigation into the case history surrounding the movement of goods in the EU will attest to the fact that national policies relating to goods must conform, or as the bureaucratic jargon would have it, "harmonize," with the demands of the free market. Later it will be shown that, insofar as humans are treated as commodities, the laws relating to human relations also fall within this harmonizing influence.

In the interests of brevity, this paper will only mention some of the landmark cases. What is significant to grasp is the manner in which the ECJ abolishes member state social policies that serve as trade barriers, especially ones that the court views as being vague disguises of quotas or discrimination. In one of the more famous cases, Case 168/78, *Commission v. France 1980*, 1980 E.C.R. 347,[25] the European Commission took the French to

25. I chose this case out of a number of possible ones (e.g., Case 112/84, *Humblot*, 1985 E.C.R. 1367; Case 170/78, *Commission v. United Kingdom 1978* [the *Wine/Beer* case], 1

court because they imposed higher tax rates on cereal-based spirits than on fruit-based spirits. France, of course, produces primarily the latter, while the former are generally imports, so the policy was viewed as a discreet form of protectionism. This would fall afoul of Article 95, which states "no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products" (EEC 1957 and EU 1992, Article 95). The French responded that the spirits were fundamentally different, one set produced from grain and the other from fruit. Additionally, the cereal-based spirits are generally consumed as aperitifs, while the fruit-based spirits often serve as digestives. Therefore, the French argued, they could justifiably be taxed differently. Here they again cited Article 95, which states that no taxes shall be imposed on "similar" goods. The ECJ remained unconvinced and ruled that France must abolish the tax (*Commission v. France 1980*, paragraphs 5–7, 12–13, 39–41; cf. Craig and de Burca 1995, 568–71). My point here is not to defend France's allegedly protectionist policy, but rather to indicate the extent to which the EU can now penetrate into questions of national policy.

Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649, is often cited as the paradigmatic example of this phenomenon by scholars who study the jurisprudence of the ECJ and matters of European integration. In this case the German authorities refused to allow the importation of the French liqueur Creme de Cassis into Germany, because in Germany, liqueurs must have an alcohol content of at least 25%. This policy was in place, according to the Germans, in order to protect German consumers and public health: paragraph 11 states that the German government believed alcoholic beverages with lower alcohol concentrations were more likely to induce alcoholism. The court countered in paragraph 12 that a large array of alcoholic beverages on the market had an even lower content, so the German stance was considered unsound in this regard. Thus, the court decided that the German practices constituted a violation of Article 30, which states that "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." The court then laid out its judgment: "There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State" (*Cassis*, paragraph

C.M.L.R. 716 [1980] in which the court also struck down discriminatory tax policies) for no particular reason other than that as a student of anthropology, I found the adamant distinction by the French between aperitifs and digestives interesting. The French government's claims of alleged cultural conceptions of similarity and difference between objects had to be assessed by the ECJ: "Nor does the Court think it is possible to adopt as a relevant classification the distinction advocated by the French Government between 'aperitifs' and 'digestives'" (*Commission v. France 1980*, paragraph 36). The law forced them to abandon this distinction in the legal sense; it is yet to be seen what impact this decision will have on French opinions outside the legal sphere.

14). Under the logic of *Cassis*, many member states' idiosyncratic laws had to fall by the wayside and conform to the needs of the greater fluidity of trade.[26] After the *Cassis* decision, it was clear that member states would have to rely on the limited provisions listed in Article 36 (such as public morality, public security, etc.) that allow them to retain any such laws, or they would have to claim that the rule did not even fall within the purview of Article 30.[27]

Such was the case in, for example, the *Cinéthèque* case, wherein a French law about the distribution of movies was held to not contradict Article 30 because it was a law justified by the public interest (allowed for in Article 36) in protecting the French cinemagraphic industry (Craig and de Burca 1995, 316–21). This case along with judgments in Cases C-267 & 268/91, *Keck*, [1993] E.C.R. I-6097; Case 145/88, *Torfaen* 1989 E.C.R. 3851; Case 34/79, *Henn and Darby* [1979] E.C.R. 3795; and Cases C-1/90 & C-176/90, *APESA*,1 C.M.L.R. 887 (1994), reveal that the extent of this deregulation is certainly limited. In these cases, member state rules were upheld as abiding by the treaty framework.[28] But such instances are more the exception than the rule; at the very least they clearly require an astute and adroit team of legal experts to draft the law, and often to defend it before the ECJ. After surveying the case law relating to the free movement of goods, albeit prior to *Keck*, *Torfaen*, *APESA*, and *Cinéthèque*, Kommers and Waelbroeck write:

> The main conclusion that emerges from this study is that the [European] Court of Justice, in the space of less than two decades, has molded a jurisprudence at least as centralized as that of the [U.S.] Supreme Court. In fact, as we have seen, the Supreme Court has upheld local legislation under the dormant commerce clause that the European Court would probably invalidate under the more restrictive language of the EEC Treaty. . . . Americans have historically recognized the need to balance the value of integration served by the commerce clause and other equally valid values of decentralization served by the tenth amendment. *The EEC Treaty, on the other hand, did not*

26. In this paper I cannot address the very interesting question as to whether the German policy concerns were indeed legitimate. Suffice it to say that it is possible (at least in German eyes) that in this instance, concerns for the well-being of people have been struck down in the interest of serving capital's need to expand its market.

27. For a more complete discussion of the *Cassis* judgment, see Kommers and Waelbroeck 1985, 211 ff., and Craig and de Burca 1995, 611–14, passim.

28. Briefly, *Keck* was a case regarding "selling arrangements" (i.e., the rules under which items are sold, not rules relating to the items themselves); *Torfaen* revolved around the rules of Sunday trading; *Henn and Darby* was concerned with the rights of a state to regulate the distribution and importation of pornography; *APESA* was another case concerning alcoholic beverages and the advertising thereof. *Keck* is considered a pivotal case because it allows for member states to regulate the sale of goods without having to worry about necessarily falling foul of Article 30 (cf. Craig and de Burca 1995, 625–33).

> *create a general system of government but rather an economic union whose highest value is the principle of free trade.* (1985, 223–24; emphasis mine)

This quote is additionally useful, even when taking *Keck*, *Torfaen*, *APESA*, and *Cinéthèque* into consideration, for it emphasizes that although the court has been one of the agents of trade liberalization, it is the treaties that constrain its rulings to this limited range of ideologies. As long as the treaty governing the EU is primarily a trade document, we should expect the ECJ to enforce it as such. In this light, *Cinéthèque*, *Keck*, *Torfaen*, and other similar cases then emerge as instances where the ECJ makes a substantial effort to combat the free trading demands of the treaties in the interest of member state laws, much as, according to Kommers and Waelbroeck, the U.S. Supreme Court has occasionally done. In this sense the ECJ behavior meshes with the dialectic described by Braudel. While it must generally follow the treaties that favor capital's self-valorization, it occasionally works to combat capital in order to protect member state interests.

However, since the treaty governing its actions is so exclusively focused on freer commerce, one would expect the ECJ's ability to reason forth such rulings to be rather limited. We should expect instead that the penetration of the needs of commerce into member states' laws might continue. For example, Case 7/68, *Commission vs. Italy*, 1968 E.C.R. 423, showed that policies justified on grounds such as protecting national heritage may not be justifiable.[29] In this case, Italy had imposed a tax on the export of artistic, historic, and archaeological items.[30] The court ruled in the Commission's favor, pointing out that in Article 16 the treaty prohibits taxes on goods having an equivalent effect to a customs duty. It reasoned further:

> By goods, within the meaning of that provision, there must be understood *products which can be valued in money* and which are capable, as such, of forming the subject of commercial transactions.
>
> The articles covered by the Italian law, *whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money* and so be the subject of commercial transactions. That view corresponds with the scheme of the Italian law itself, which fixes the tax in question in proportion to the value of the articles concerned. (Cited in Craig and de Burca 1995, 553; emphasis mine)

In this case we see directly how a social policy as seemingly removed from the market as "national heritage" comes under the sway of market forces

29. For a discussion of the recent legislation addressing the question of trade in "national treasures" and "cultural goods" see Rigaux 1992, 9–12.

30. A tax on national treasures can be viewed as either a fiscal policy measure (to raise revenue) or as a social policy measure (to reduce and discourage the exportation of said objects).

and demands. When the ECJ equates Italian national treasures with all other goods by the mere fact that they have a monetary value (only one of their many values, which the ECJ hints at), one realizes that the judges must follow Marx's dictum that "In their money-form all commodities look alike" (1990, 204). In this formula all commodities are indistinguishable from each other except in their relative price. All other forms of value become secondary or even irrelevant, and the ECJ must grant paramount significance to exchange value when deciding the case.[31]

THE FREE MOVEMENT OF PERSONIFIED COMMODITIES

As it turns out, this fixation with exchange value extends to human beings. The Maastricht Treaty devotes one article to citizens' rights and then moves on to discuss the freedoms and rights of goods, services, workers, and capital at length. A more detailed examination of the case history and the law will reveal that in fact humans assume all of their rights in the EU only when they are bearers of a commodity. In short, the EU assesses the viability of EU law toward humans in the same manner it does with goods; EU law is only relevant to humans insofar as they possess or personify commodities (either money or labor power).

The right to move and reside anywhere in the Union is a frequently exercised right; indeed, as D'Oliveira noted above, it is the central right of EU citizenship (1995, 65).[32] However, this concession to people could easily be viewed through another lens, and case history can be marshaled to support this perspective. One must note the crucial caveat of Article 8, stating that the right to reside and move is "subject to such limits and conditions as are laid down in the Treaty or in secondary legislation." Article 48, which legally clarifies this right in both treaties, only concerns itself with the movement of *workers*. It guarantees free movement, nondiscrimination, and acceptable justifications for limits upon these rights. It has become clear through judicial decisions that generally speaking, a person is defined to have this right only when he/she is economically desirable, or at least economically self-sufficient; in short, when the person represents exchange value. In addition to those people covered under the provisions for movement of students and the families of workers, this has been interpreted as applying only to those who are working or actively seeking work; the free-

31. Beginning at least as long ago as Malinowski's *Argonauts of the Western Pacific* (1984 [1922]) and Mauss's *The Gift* (1990 [1950]), anthropology has been interested in the many cultural significations and values with which an object can become imbued.

32. One immediately suspects a strong common identity between goods and people when one notes that they are both accorded the same central right. But see note 35 below for de Burca's opinion suggesting that the right to movement is more than merely an economic right.

doms granted in Article 8 to EU citizens lose their universality under the scrutiny of Article 48. More succinctly, the EU citizenship granted in Article 8 is restricted to certain people in the EU, albeit quite a large group. One book on EU law, after surveying the legal history up to the present, notes bluntly, "although the right of residence may no longer be dependent on the exercise of an economic activity [which it was for several decades], it is certainly dependent on the enjoyment of a degree of wealth or financial self-sufficiency" (Craig and de Burca 1995, 709).

Thus we see that the freedom to move is accorded only to workers and money owners. The citizen mentioned in Article 8 is reduced to his/her economic activity; he/she is not accorded all the rights of pan-European citizenship unless he/she can prove his/her economic viability or self-sufficiency. Without fulfilling these criteria, he/she is not a fully definable human; or more cynically, *not* a fully definable commodity. As Marx and Engels write in the Manifesto: "It [the bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade" (Marx and Engels 1978, 475). It is only natural that a free-trade area allow the commodity labor power to circulate as freely as all other commodities. What Marx noted as the laws of capitalism 130 years ago are now enshrined in the actual, written laws of the EU. Tangentially, one should note that having a flexible and mobile labor pool is certainly convenient for capital, because workers will go where capital is, and leave where it is diminishing. *Capital* mentions a parallel situation with regard to the movement of immigrants in the section discussing the relative surplus population: "Some of these workers emigrate; in fact they are merely following capital, which has itself emigrated" (Marx 1990, 794).

The *Levin* case of 1982, Case 53/81, 1982 E.C.R. 1035, provides an exemplary starting point for investigating the opinions of the court on these matters. Craig and de Burca provide an excellent compendium of the facts of the case:

> The appellant was a British citizen living in The Netherlands and married to a non-EC national. She was refused a residence permit there on the ground that she had not been in work for over a year preceding the date of refusal of the permit. She argued that she had sufficient income for her and her husband's maintenance, and that she had also taken up part-time employment as a chambermaid in the meantime. The Staatssecretaris van Justitie had submitted that she was not a 'favoured EC citizen' since her employment did not provide sufficient means for her support, equal at least to the minimum legal wage prevailing in The Netherlands. A reference was made from the Dutch court to the ECJ, where the appellant argued that this 'minimum-wage' argument would place other Member State nationals in a less favourable position than

> nationals of the host country who have the option of working part-time for an income below the subsistence level. (1995, 663–65)

Two aspects of this synopsis are worthy of note. First and foremost, the Dutch mention of a "favoured EC citizen" is a direct reference to one of the central points that this paper tries to convey. The EU treaties have created a situation in which certain people are favored with rights and others are not. The Dutch readily believed that they could deny her the rights provided in the treaty because of her economic status; clearly this is an acknowledged aspect of the treaties' configuration. Secondly, Levin's point about discrimination fits into the paradigm emphasized so heavily by Marx. Regulations in one area of the capitalist market demand uniformity in all similar areas. For employment purposes, Dutch people cannot be treated differently from other member state nationals, just as the Treaty of Rome asserted.

Marx would not be surprised. He would most likely point out that it is in the interest of capital for all people to have the same fundamental human rights within a free trade zone, so no one party can manipulate variations in order to gain a competitive upper hand. As he explains with regard to the harmonization of child labor laws, "But since capital is by its nature a leveller, since it insists upon equality in the conditions of exploitation of labour in every sphere of production as its own innate right, the limitation by law of children's labour in one branch of industry results in its limitation in others" (1990, 520).[33] From this perspective, we can find one explanation for why the European Commission is so concerned with a variety of "harmonization measures."[34]

Furthermore, for Levin the right to live below the poverty level was a right to be protected;[35] Marx, on the other hand, would point out that this

33. Postone argues this point further: "In other words, the modern idea of equality is rooted in a social form of equality that has arisen historically concomitantly with the development of the commodity form" (1996, 163).

34. Green et al. openly speculate about the possibility of such influence from the economic sphere with regard to Article 119, the article concerned with sex discrimination: "it does not prohibit sex discrimination in general; it merely provides for equal pay for equal work. . . . Article 119 is not so much to help women achieve equality as to prevent unfair competition between manufacturers in different Member States" (1991, 92 n.1).

35. De Burca points out that although many consider the right to free movement to be an elevation of market rights to a human right, there is another way to look at it. She writes convincingly that the "principle of free movement of workers. . . is not simply a means of enhancing the overall industrial efficiency and economic prosperity of the Community, but is intended to provide a means for each person to raise his or her standard of living, to provide for a family, and to enhance the quality of his or her life" (1993, 299). This points to one of the dangerous dogmatisms of a Marxist analysis, wherein, because of its totalizing claims, everything can be viewed to fit simplistically into what benefits capital, rather than considering how it might benefit others as well. De Burca is certainly correct, but in a Marxist analysis, this right merely appears as the right of a worker to seek out the place that will exploit him/her in the least malicious manner (which is, of course, still better than being more exploited).

was but a sad commentary on the degree of control held by the capitalist market over society. With nothing but their wage labor to sell,[36] workers are presented with Levin's very limited options, which are conditioned by a market that presents itself as a natural and absolute truth. Marx writes that the "advance of capitalist production develops a working class which by education, tradition and habit looks upon the requirements of that mode of production as self-evident natural laws" (1990, 898).[37]

But back to Levin and her real predicament. The ECJ ruled that though Levin was not earning a sufficient living wage, she was at least engaged in part-time work:

> Since part-time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be impaired and the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration. . . . *It follows both from the statement of the principle of freedom of movement for workers and from the place occupied by the rules relating to that principle in the system of the Treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing a genuine economic activity*. (Cited in Craig and de Burca 1995, 664–65; emphasis mine)

The court agreed that Levin had to at least be partly employed or seeking employment in order to fall within the purview of Article 48. Though couched in terms of the rights of the worker, a few aspects of this ruling should emerge from a Marxist perspective. First, the person, as noted above, only receives these rights insofar as he/she is a viable commodity. Second, the proposal of the court that even workers *who cannot entirely support themselves* should retain the right to move (but not the right to any social benefits) is directly beneficial to the creation of what Marx calls a "disposable industrial reserve army" (1990, 784). He continues: "The path characteristically described by modern industry . . . depends on the constant formation, the greater or less absorption, and the re-formation of the industrial reserve

36. "[T]he possessor of labour-power, instead of being able to sell commodities in which his labour has been objectified, must rather be compelled to offer for sale as a commodity that very labour-power which exists only in his living body" (Marx 1990, 272).

37. Although this quote argues that the "working class" is subject to this hegemonic view of capitalism's "natural laws," Marx (e.g., 1990, 180, 279–80) constantly asserts that other classes also believe in the laws of capitalist production as absolute truths.

army or surplus population" (785).[38] What seems like a liberal move on the part of the court to bestow rights on the individual emerges in an entirely different light. Though most certainly not the court's intended outcome, the *Levin* ruling aided the conditions necessary for capital's self-valorization by augmenting the possibility for a "lumpen-proletariat" to develop.

Additionally, we can see that the various policies of the member states to curtail the number of noncitizens available to work within their borders had to give way to the demands of capital for an increased labor pool. Nation-states might like to maintain the legal wage labor available in their country exclusively for their citizens, but under the EU treaties the free movement of the factors of production must be protected. In this instance of the Court balancing the interests of a member state with the interests of capital, the nation-state's interest, as evidenced by the demands of the Dutch Justice Secretary, lost out.

A Marxist analysis of the ECJ's impact on surplus value, the locus of profit, and the conditions useful for capital's self-valorization is open to all the standard critiques of Marxist economics. However, one conclusion of a Marxist analysis that undeniably runs through all ECJ rulings is that people must be defined as bearers of commodities in order to gain the rights granted by EU law. Other examples from the case law attest to this claim. A case Rigaux examines regarding the free movement of those interested in pursuing religious activity is useful in this context. In Case 196/87, *Steymann v. Staatssecretaris van Justitie*, 1988 E.C.R. 6159, a German man, Steymann, lived in the Netherlands working as a plumber. After joining a religious order (the Bhagwan Community) that provided for his living requirements, the court denied him the residence permit for foreign workers in the Netherlands for which he had applied:

> It must be observed *in limine* that, in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law *only in so far as it can be regarded as an economic activity* within the meaning of Article 2 of the Treaty. (Cited in Craig and de Burca 1995, 667; first italics in original, later emphasis mine)

The court went on to argue that since the religious community's services to Steymann (food, lodging, and so on) served as an "indirect *quid pro quo*" (paragraph 12) for his "work," he was entitled to the rights enshrined in the Treaty of Rome. In other words, the court had to envision a convoluted

38. Marx believed that, since capital needs to sap surplus value from workers in order to self-valorize, it depends on a surplus of laborers, separated from any means of production and possibilities for self-sufficiency, in order to constantly maintain downward pressure on wages. In this manner, more surplus value could be extorted from workers (1990, 781–94).

relationship within the religious community in which religious devotion to the community is regarded as seeking material remuneration for services rendered; Steymann had to be transformed into a "factor of production." It is not clear at all that religious devotees regard their lifestyle choices in this manner.[39]

Rigaux cites this case as an example of the broadening reach of EU law into noneconomic spheres, a development that the member states could not have anticipated or envisioned in the Rome Treaty (1992, 4). It is, of course, also a salient example of the manner in which rights are attained in the EU. There must be a connection with *work* or the EU rights disappear.[40] One is not a member of EU civil society (but still of member state civil society, as long as one is a national) unless one can somehow make a connection to employment.[41] In this instance the court appropriated religious activity into economic activity in order that it be protected. The strained interpretation attests to the court's liberalism in interpreting the treaties so that as many people as possible will be brought into the fold of the EU's protections and rights. However, it simultaneously reveals the nature of the rules under which the judges must labor. Mancini, an ECJ judge, tells us that "the Court has done all within its powers to dilute the concept of 'economic activity.' It has even applied it to cases where the work was carried out in the context of activities like prayer and meditation" (1992, 70).[42]

When religion must be equated with economic activity in order for its practice to be protected, it becomes eminently clear that "the laws of the market" are the reigning governing ideology of the EU. As O'Leary asserts, "No matter how progressive and human the ECJ's approach to the socioeconomic rights of Community nationals may have been, their enjoyment of these rights has generally been linked to their status as workers, to their performance of an economic activity, or to their dependency on a worker"

39. The fact that Steymann applied to live in the Netherlands as a "worker" may indicate that he did view his relationship in this manner. On the other hand, it may simply reflect that the only way he could have resided in the Netherlands under the protection of EU law was to file a "residence permit for *workers*" (i.e., he had no other existing alternatives).

40. A series of directives issued in 1990 conferred the right to residence to students, retirees, and persons of independent means who could show self-sufficiency and medical coverage (Green et. al. 1991, 99), thereby decoupling rights from formal work, but not from people's status as bearers of commodities. Green, Hartley, and Usher write that examples of the people not covered by EU law include "tramps, beggars, and persons dependent on supplementary benefit" (1991, 93 n.8). Ward points out that this is actually quite a sizable number, when one considers the number of unemployed persons in the EU, roughly 15–16 million people according to him (1996a, 96–97).

41. See chapter 3 of Keane (1988) for a discussion of the long connection between bourgeois civil society and work, wherein "[w]ork . . . assumes a special and much more restricted meaning: paid employment" (73) and the "modern injunction to work for pay within civil society was a vital ingredient of the morality of the bourgeoisie and its civilizing mission" (69).

42. Ultimately, however, he acknowledges that it is only workers, and not citizens in general, who can receive the protection of the Court (cf. Mancini 1992, 77).

(1995, 162). Mancini's quote indicates that it would be unjust to castigate the judges for lack of efforts to cover all people within the bounds of Community law. It also indicates, however, the extent to which the treaties restrict progressive judges from extending their human rights concerns beyond the economically defined citizen. Capitalism's laws are written down and pledged allegiance, and the court must work within these laws in order to extend rights that are often considered "innate" or "inalienable" by the member states adhering to the treaties.

Having seen how the law can be extended to grant protection to those who are not performing an explicit economic task, it is important now to note the areas in which the court has not interpreted the definition of work in such a liberal manner. In investigating the connection between work and civil society, Keane points out that to be "a worker . . . is to be employed, whereas the activity of a woman who runs a household, services men and brings up children, for instance, is consigned officially and arbitrarily to the category of non-work" (1988, 73).

This analysis, according to Ackers, is true of EU law as well. Ackers has complained that the definition of worker is not adequately taken up in the treaties (1994, 394), notwithstanding the centrality of the notion. Ackers goes on to argue that women are excluded more often than men from the traditional definition of work laid out by the ECJ in *Levin*:

> Despite the broad interpretation of the concept of "worker" to include certain categories of unpaid work or activity of very marginal economic value, entitlement to social rights under the free movement provisions nevertheless remains firmly based on the "male breadwinner" conceptualisation of the family and excludes many areas of work traditionally designated to women. (1994, 393–94)

Thus, many women end up being granted rights merely "parasitically," as spouses to their working husbands, because the ECJ fails to acknowledge certain forms of work more common among women than men, such as caring for the household (Ackers 1994, 395–97; also cf. Weiner 1990, 575–76). Though Ackers notes the still-scarce case law regarding the effects of divorce on a Community national spouse, the possibility remains that such a spouse's rights could be terminated on divorce from a worker if the spouse were not also a worker (1994, 397).[43] If the EU legal apparatus demands exchange value as a primary criterion of protection, then divorce brings with it profound implications for the legal status of the non-"working" partner (1994, 396).

43. Some cases addressing marital relations and EU law include Case 267/83, *Diatta v. Land Berlin* [1985] E.C.R. 567; Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] E.C.R. 3719; Case C-370/90, *R. v. Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department* [1992] E.C.R. I-4265.

If Ackers is correct, then her analysis is extremely useful in clarifying the point that only commodities are protected under EU law. A spouse is not a bearer of exchange value for the market, and as such is not a commodity. The ECJ could not manage to fit such a person into the framework of the treaties.[44]

In today's EU, human rights are only conferred by the EU legal apparatus on those humans who are part of the production and circulation process. As we have seen, participation in this process stands as the essential criterion of personhood that allows one to properly assume status as a "citizen," with all that category's concomitant rights. It is only as a citizen-worker that a person's rights can challenge the economic objectives of EU integration, for only then is one granted the many rights accorded to commodities in the treaties. Marx noted that capitalism could neglect humans' myriad other qualities and reduce them exclusively to their capacity to be bearers of labor power and exchange value. He wrote that "it is self-evident that the worker is nothing other than labour-power for the duration of his whole life, and that therefore all his disposable time is by nature and by right labour-time, to be devoted to the self-valorization of capital" (1990, 375). Since the EU really only concerns itself with people as they are defined economically, it has, in essence, adopted this stance.

And yet it is vital to grasp the Court's mostly liberal interpretation of who falls within Article 48. The Court has tried to extend the rights of the ECHR to a broader range of individuals, but clearly it feels it cannot stretch that interpretation too far. The treaties, rather than a dogmatic commitment to a free market ideology, limit the judges to invoking human rights concerns only in certain areas. Hence, an analysis of the case law finds that in spite of efforts to extend protection to individuals outside this narrow definition of "worker," human protection under EU law is ultimately bound to economic definitions. Every time a fundamental right is invoked by people before the court, it must have a baseline relation to economics, or in Marxist terms, to exchange value. This is not to say that the ECJ has elevated market rights to human rights (Coppel and O'Neill 1992, 242), for Weiler and Lockhart (1995) do a good job of showing that this has not occurred.[45] Instead, it is to say that the Court can only evaluate human rights questions for certain humans, when it can successfully transform

44. This brief analysis of who falls outside EU law is far from exhaustive. It has been addressed on many occasions. See, for example, de Burca for a discussion of rights not recognized by Community law (1995, 34–39); Garth (1985) for an extensive discussion of the rights of migrants from countries outside the EU; and Weiner (1990) for an interesting analysis of the rights of women.

45. Weiler and Lockhart show that it is more of a balancing act between different fundamental rights. But they do note that since the treaties are concerned largely with economic matters, some of the rights to be balanced are market rights: "Want it or not, the four freedoms [free movement of goods, workers, services, and capital] are fundamental in the legal order of the Community" (1995, 602).

someone into a commodity; of course, even in those circumstances the Court retains the right to balance human rights against market rights.[46]

From the Marxist perspective, Coppel and O'Neill's statement that "there is no hierarchical relationship being posited by the European Court between the basic human rights . . . and the free market rights arising out of the Treaties" (1992, 243) is not surprising in the least. Yet this phenomenon need not be attributed to malicious intent on the part of the judges. The treaties dictate that humans be reduced to commodities, and capitalism demands equality of treatment between all commodities, which are only to be distinguished in their relative prices. In order to fall within the purview of the EU treaties' protections, a human being's countless values and beliefs must be reduced to exchange value (like *Steymann*), rendering them "born levellers," just like all the other goods driving the integration process. Any hierarchical relationship between basic human rights and market rights must therefore come from outside the treaties, where people are accorded more rights than inanimate commodities—from a document such as the ECHR. Thus, the court's development of human rights protections can be seen as a lengthy working out of Marx's assessment: "Capital therefore takes no account of the health and the length of life of the worker, unless society forces it to do so" (1990, 381). The judges of the ECJ genuinely care about human rights, and they read the ECHR rights into the EU treaties in order to combat the treaties' privileging of the one right of workers that is most necessary to capital's self-valorization, the right to move freely.

THE PERMEATION OF "LEVELING"

From a Marxist standpoint, the consequences of the treaties' drive for freer trade and of the court's at least occasional legal assistance in this drive are manifold, and largely derived from the "leveling" effect of capitalism. To name one effect, this drive will inevitably cheapen commodities.[47] This claim is hardly controversial, since it is openly touted by the EU government itself. A government brochure entitled "A Single Market for Goods" explicitly states that the single market will bring "lower prices as a result of increased competition" (Commission of the European Communities [CEC]

46. After analyzing the court's decision-making process in just such an instance, Phelan (1992) comes to the blunt conclusion that "where a human right and an economic objective conflict, it is the right, not the objective, which is modified to complement fundamental economic principles" (686). The author also adds that "[u]nder this theory, the rights of man are transformed into the rights of the Euro-market actor, to which national fundamental rights are subjugated where they conflict in objectives or effects" (688). Finally the author asserts that "fundamental rights are not implied by a person's human and moral nature" (689).

47. If one strictly follows Marx and his labor theory of value in this situation, then the cheapening of commodities also increases the "relative surplus-value" extorted from the worker (cf. Marx 1990, 432–38).

1993a, 6). Noticeably absent, however, is any mention that since labor power is also a commodity, wages will undoubtedly also decline as a result of new competition. For example, the ready availability of Portuguese wage laborers will almost certainly dampen the earning potential of high-wage Germans, which in turn, will increase the amount of "surplus value" extorted from German workers (cf. Marx 1990, 283–339).[48] Numerous other consequences follow from trade liberalization, such as the weeding out of inefficiencies caused by hampered competition and localized taxing and customs policies. Again, the brochure proudly asserts that these "tedious and often costly formalities have now disappeared along with around 60 million customs clearance documents a year and the attendant cost to industry of an average ECU 70 per consignment" (CEC 1993a, 4). Though it is hard to regret the loss of unnecessary bureaucracy, one cannot help but note the clear element of laissez-faire philosophy in this comment, wherein the capitalist market's "free and harmonious working [is] *only* disturbed by the intervention of the state" (Marx 1990, 705; emphasis mine).

Because the ECJ's governing document is largely a trade document, focusing primarily upon trade questions, it is concerned with moral or social issues only as they relate to trade (Kommers and Waelbroeck 1985, 214; Ward 1996b, 145). It is fascinating to note the degree to which such a seemingly limited jurisdiction has seeped into countless other sectors of state governance. Herein lies yet another intriguing example of the consequences of the open market; in its wake, regulations are harmonized and general laws are codified, often in spheres seemingly removed from "the market." The idealistic attempt to maintain a separation between economic and social policy is gradually receding. One could make the argument that Norway declined to join the EU at least partially because it recognized the fact that the EU was no longer merely a trading group.[49] A majority of its citizens may have felt that questions of land ownership, fishing rights, and social programs would all come under the pressure of the EU's tendency

48. Cf. chap. 10 of Holland 1980 for a Marxist economic analysis of the impact of EEC expansion to include Spain, Portugal, and Greece.

49. Prior to their separate referenda, both Norway and Sweden belonged to the European Economic Area. This organization formally unites the EU with the European Free Trade Association nations. It allows for the same guarantees for free trade between its members as within the EU (including movement of workers), but without the teeth of supremacy and direct effect. Norway still belongs, which largely dismisses the common argument made that these countries had to join the EU in order to participate in the freer market. Hindley and Howe go so far as to tout the EEA as a current alternative for the British, so that they may withdraw from the EU's political developments and still retain the benefits conferred by its free trade zone (1996, 41–43). Lysen finds the two economic unions so similar that he claims that Swedish membership in the EU will effect little change in the current direction of Swedish commerce. However, he believes that EU membership would mean that "The big differences will be seen at the political and not least at the juridical level" (1992, 180; translation mine). For a more extended discussion of the relationship between the EFTA countries and the EU, see Pedersen 1994 and chapter 4 of Henning et al. 1994. For the details of the EEA agreement, see European Free Trade Association 1992.

toward harmonization (cf. *Economist* 1996b, 48–49). Slowly the EU assumes jurisdiction over an ever-widening sphere of control. Marx and Engels's declaration in the Manifesto seems to hold equally true today: "Independent, or but loosely connected provinces, with separate interests, laws, governments and systems of taxation, became lumped together into one nation, with one government, one code of laws, one national class-interest, one frontier and one customs-tariff" (1978, 477). In a day and age when many countries seem to be dividing more often than uniting, this phenomenon occurring in the EU seems exceptional indeed.

The recent push toward the common currency (EMU) stands as the most current evidence of the drive toward harmonization. Generally speaking, similar consequences are desired from the introduction of a single currency as those desired from other harmonizing measures: cheaper transaction costs, more efficiency, greater harmony of social policies as a result of fiscal constraints, and the like. As far as the market is concerned, the single currency will greatly diminish the impact of local nation-state policy on trade (*Economist* 1997, 88). Hence, one of the most precarious elements of interstate trade will be eliminated. Marx describes this as a natural process of the development of the free market:

> They can only bring their commodities into relation as values, and therefore as commodities, by bringing them into an opposing relation with some one other commodity, which serves as the universal equivalent . . . . *But only the action of society can turn a particular commodity into the universal equivalent.* The social action of all other commodities, therefore, sets apart the particular commodity in which they all represent their values. The natural form of this commodity thereby becomes the socially recognized equivalent form. Through the agency of the social process it becomes the specific social function of the commodity which has been set apart to be the universal equivalent. It thus becomes—money. (1990, 180–81; emphasis mine)

On the basis of this logic, one could pose the argument that the EU's current drive toward a common currency is the outcome of a natural process within the logic of capitalism. As their markets become more and more integrated, the lack of a proper universal equivalent form means that commodity owners are not trading in relation to a common scheme of value, or at least not always. Such an equivalent form has to come into being, or trading becomes rife with inefficiencies.

Marx's emphasis on the necessity of collective action by society to bring about a universal equivalent is interesting in light of the efforts to secure EMU. The freer trade of commodities and the demand for a universal equivalent that it brings about could be two factors in developing a pan-EU identity, wherein the people might see themselves collectively acting as one

society rather than as the separate "peoples" of Europe mentioned in the treaties' preamble. Whether or not the EU can coalesce around the massive and contentious project of creating a universal equivalent may prove just as much a political and social task as an economic one, constrained only by so many statistical criteria. Considering EMU as a social project rather than just an economic one evokes Marx and Engels's claim in the Manifesto regarding the binding nature of capitalist trade as its effects permeate into previously separate regions: "In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal interdependence of nations. . . . National one-sidedness and narrow-mindedness become more and more impossible" (1978, 476–77). While Marx considered money to be "the true *agent of divorce*" between individuals, he also considered it "the true *binding agent*—the universal *galvano-chemical* power of Society" (1967, 129; emphases in original). The degree to which the peoples of Europe do in fact seem to have been bound together via "that single, unconscionable freedom—Free Trade" is certainly worthy of further investigation.[50]

CIVIL SOCIETY AND SELF-INTEREST

Marx viewed such a society, however, bound as it would be exclusively via the self-interest of each individual, as far from ideal. Given that the treaties are so focused on spreading the capitalist market, we should not be surprised to find that such a society has emerged in the EU. The court has helped in spreading the rights of the market by granting new pan-European rights to all economically defined citizens (i.e., all people who have a self-interest in ensuring fairness in the use and sale of their commodities). As commodity owners, citizens are concerned with ensuring that the "leveling" demands of capitalist trade receive the backing of the EU legal apparatus. This concern, in turn, has brought a new sense of commitment and urgency to the agenda of the individual member states; it was one thing for a member state to quietly neglect promises made in the international arena; it would be quite another for it to openly disregard the new rights of its own citizens (Weiler 1993, 422; 1991, 2413–14).

Clearly then, European individuals have played a major role in invigorating the goals set out in the two treaties. The EU readily acknowledges this assistance. The introductory sentences to another brochure, entitled "Consumer Rights in the Single Market" state, "In their role as consumers, ordinary EC citizens are key players in the Community's new frontier-free

50. Weiler points to the ironic possibility that by tempering and diluting nationalism at the level of the member states, the EU could give rise to a new sense of pan-European nationalism just as dangerous as the previous types (1991, 2481).

single market. In fact, it cannot fully succeed without their active participation" (CEC 1993b, 1). Put simply, the EU depends on self-interested economic citizens and companies to aid in the enforcement of the treaty (cf. Everson 1995). Indeed, a large number of the court cases addressed by the ECJ are filed by individual citizens and companies who believe that they have been the victims of unfair trading policies or failure to follow treaty articles.[51] Seen in this light, Marx's satiric description of "civil society" comes to mind. He writes:

> The sphere of circulation or commodity exchange, within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. It is the exclusive realm of Freedom, Equality, Property and Bentham. . . . Bentham, because each looks only to his own advantage. The only force bringing them together, and putting them into relation with each other, is the selfishness, the gain and the private interest of each. (Marx 1990, 280)

The EU has become a giant marketplace, wherein capitalism demands (legal) equality between all those who comprise it. Its law has developed and codified the "laws" of the marketplace, which can be questioned by people only insofar as they are themselves bearers or "personifications" of commodities (e.g., *Steymann*, *Grogan*, *ERT*). The people who comprise this marketplace are defined by their economic status, namely, their ability to freely sell their own property in the form of their labor power or to buy somebody else's. The ECJ, in developing and expanding the concept of direct effect, has made the EU structurally dependent on the notion that every person in the union will seek his or her maximum economic gain.

But Marx's analysis of bourgeois civil society coupled with the analysis of the case law presented here reveals something more. It is vital to recognize several crucial words in the above passage. First, Marx notes that it is only within the sphere of commodity circulation that one finds the innate rights of man, not by any stretch do these rights reign elsewhere (cf. Postone 1996, 272–77). I have attempted to show that this is the case in the EU as well. Second, it is humans only in their capacity as commodity bearers (not humans in their totality) that interact in this law-abiding and respecting manner, for as Marx argues, commodities demand equality in the field of circulation. Thus, humans have become movable and manipulatable objects, rather than controlling subjects. In the EU legal structure, humans as objects, not humans as subjects, are granted "innate" rights (as are plenty of

51. De Burca investigates the possibility that the rights conferred by the treaties may mostly serve to benefit the powerful. She looks at the preponderance of corporate applicants demanding their rights in court and states that these "cases are not examples of the invocation of rights to protect the interest of the disempowered" (1993, 50, 53–54).

other objects). The supposedly innate rights of the human sphere have been transferred to the commodity sphere.

This need not be a completely retrograde development. Though Marx critiques notions such as freedom and equality under capitalism as ersatz renditions of their true potential, Postone points out that these societal values "do have an emancipatory moment for Marx, even if it remains within the framework of capitalism" (1996, 276). Indeed, as the quote from the Manifesto on the elimination of nationalism claimed, these values can sometimes play a role in bringing about greater harmony between peoples. Additionally, workers such as Levin, do in fact receive some protections equal to those of host country nationals, so the demands of capital can play a role in weeding out much discrimination based on place of origin. Applying this logic to the situation in the EU allows us to see how it can claim that human rights are defended so well within its borders.[52] Within a certain framework they are protected well, as well as Marx finds to be the case in the sphere of commodity circulation, and as well as the treaties as interpreted by the ECJ have managed to protect personified commodities. This protection has the potential to usher in improvements for individuals, so long as everyone is a personified commodity. The problem, however, is that by reducing humans to their relationship with commodities, EU law fails to encompass everyone. Those who cannot prove such a relationship are outside EU law, despite its status as the highest law of the land.

Hence, an examination of ECJ case law, together with an analysis of the treaties that govern it, allows us to see a society whose law is based on the commodity form. Nothing is unique about this, insofar as Marx already argued that capitalism is derived from the commodity form. What is unique in the case of the EU is that as a government developed out of a trading treaty, it explicitly makes clear that it is beholden to the commodity form. The exchange of commodities, as evidenced by the treaties of the European Union and the case law following therefrom, has become the basis for the supreme legal document governing these nations' modern existence. Whereas Marx needed to delve deeply into the workings of capitalist society to come to his conclusion, we need not debunk any grand mystifications when analyzing the EU's version of capitalism. Marx's famous comment that it is "nothing but the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things" (1990, 165) assumes full legal status in the EU treaties and confronts us openly. The treaties concern themselves with the relation between things, not people; they are, in short, commodity fetishism enshrined in law.

52. The question of the adequacy of human rights protections, as I hope this paper has conveyed through its citations, is still very contested ground within the legal circles studying the EU. See, inter alia, Coppel and O'Neill 1992; de Burca 1993; Ward 1996a; Weiler 1986; Weiler and Lockhart 1995.

CONCLUSION

Viewing the EU treaties and case law from this perspective brings to light a number of interesting aspects of current EU governance. First, as others have noted, the treaties are designed to favor capital's self-valorization; as Weiler points out, they do not hold some "natural," nonideological position. The treaties thereby reduce humans to their capacity as bearers of commodities, which means that certain Europeans have a more privileged legal status than others, extending beyond their already privileged economic status. As personified commodities, these people put into play through their economic activity (and backed up with all the legal might of the EU), the leveling capacity of commodity circulation. National treasures, religious devotees, liqueurs, and workers all fall into the same category, demanding equal legal treatment among themselves. The ECJ has tried to mitigate this circumstance somewhat. It incorporated the ECHR into its case law, so that as long as humans could show market worth, they would then be accorded more rights than inanimate commodities.

The ECJ's action thus attests to the dialectic discussed by Braudel, cited at the beginning of this paper. Certainly member states often exhibit a strong (but by no means constant) interest in protecting the human rights of their citizens, regardless of the needs and demands of capital.[53] The ECJ has given ample evidence that it, in turn, takes these interests seriously. This means that on occasion the Court must confront the demands of capital embodied in the treaties and favor the protection of other demands. This dialectic elucidated by Braudel then sheds light on the debate between Weiler and Lockhart and Coppel and O'Neill. As Weiler and Lockhart themselves write, "the surface language of their [Coppel and O'Neill's] article is the language of human rights. The deep structure is all about supremacy" (1995, 621). In essence, the two sides are addressing different elements within the EU governing apparatus. In castigating the Court, Coppel and O'Neill are scrutinizing the demands of the treaties (and the ECJ and its jurisprudence are a mere reflection of these), and they find the end product highly undesirable. By employing this strategy, they highlight one side of the Braudelian dialectic, the side that finds the state in favor of capital. Weiler and Lockhart focus their attention more specifically on the court's jurisprudence, and thereby reveal the side of the Court that does not always cave in to the demands of the market. Their analysis provides evidence for

53. Witness Germany's behavior in a 1972 court case, wherein it challenged the doctrine of ECJ supremacy. It stated that "in the hypothetical case of a conflict between Community law and . . . the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism" (cited in Craig and de Burca 1995, 258–59).

the other side of the coin, in which the state combats the interests of capital, in favor of citizen rights. In this instance, the Court struggles to amend the shortcomings of the treaties in protecting individuals.

The Court, in a way, behaves as the fulcrum, balancing the demands of capital as enshrined in the treaties with the demands of the nation-states to uphold the rights they have promised to their citizens. It is not, as Coppel and O'Neill say, that the court uses human rights instrumentally to advance EU power over member states, but rather that the only way to fight the favoritism of capital enshrined in the treaties is to transfer human interaction into the economic sphere, wherein it may be accorded rights equal to or greater than all other economic forces and demands. This process, in turn, forces the spread of EU jurisdiction and the permeation of leveling. However, as noted above, not all human interaction can be attached to commodity circulation. Those who cannot successfully demonstrate that they embody exchange value may not achieve full EU legal citizenship. By coupling legal personhood to the economic sphere, the EU opens up the possibility of transforming economic inequalities into codified legal ones.

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