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On the Limits of Political Emancipation and Legal Rights

In 1844 Karl Marx published ‘On the Jewish Question’ (OJQ) in the *Deutsch–Französische Jahrbücher*.¹ Marx was just 25 when he wrote the essay and yet it is arguably the best analysis of the dilemmas of the modern nation-state. However, despite the importance of OJQ the essay has many difficulties. Most notoriously, in the second part of the essay Marx presents a critique of commerce that is widely interpreted as antisemitic [11, p. 101-102; 15; 27]. The essay is also notoriously difficult to understand and it leaves many readers discouraged or without a full understanding of its key ideas. In part this is because Marx was a young thinker, exploding with ideas. In OJQ he is pushing together big themes and trying to draw connections between various lines of critique. Marx is also writing about thinkers and conversations that we don’t know very well. He is inside a discourse and set of arguments that will be foreign to most contemporary readers. He is pounding away at something but it can be hard to decipher what his concerns are.

Another difficulty for those encountering OJQ is that while Marx is wrestling with concepts like property, religion, the state and freedom, he does not yet have his own distinctive voice and does not ground his analysis in the economy or a theory of capital. He is struggling with these things without a clear language for articulating them or understanding their influence. In fact, as we encounter Marx in OJQ, he is not yet a communist or an obvious opponent of capitalism. As Sidney Hook noted ‘...Marx himself was not yet, so to speak, a fully-fledged Marxist’ [41, p. 112].

Marx is also at the early stages of developing his critical method. For Marx, critique does not mean abolishing or rejecting something. Rather, critique is concerned with understanding what assumptions and preconditions underlie a problem. What does a problem symptomatize or say that is larger than itself [56, p. 13]? In OJQ Marx offers critiques of modes of thinking, modes of representing problems and the problems themselves and he is going to relate all three. These will range from – why democracy cannot realise true equality and liberty for all subjects; the failure of the political revolutions to deliver real emancipation; the place and play of religion in society and the state.

As these questions demonstrate, the Jewish question itself is not Marx’s central concern in this essay. Rather than focusing on the issue of Jewish enfranchisement, Marx is interested in how the debate about the Jewish question represents a larger problem in political life – what is it about constitutional democracies that mean they cannot make good on their promises for equality and equal rights [11, p. 103; 61, p. 80]?

In this paper, I offer a new interpretation of OJQ and place it in conversation contemporary political debates [56, p. 26-52]. The uniqueness of my interpretation is grounded in my focus on the distinction between political emancipation and full human emancipation, the limits of liberalism, and Marx’s critique of legal rights and struggles for political emancipation or equality before the law. In focusing on these areas, I am attempting to highlight those aspects of the argument that I think are most relevant to legal scholarship today. It is not my intention to erase the anti-Semitism in Marx’s essay or deny its existence. However, to properly engage Marx’s prejudice requires a separate study and should be done alongside other writers in his period [11, p. 101 fn 10; 50].

This essay is divided into four parts. In part one I provide a background to the debates and philosophers that animate Marx in OJQ. This background will help us understand Marx in his own terms. Following this, in parts two and three I provide a close reading of two short sections of OJQ. Part two focuses on Marx’s distinction between political emancipation and full human emancipation. Part three continues on from this discussion and looks at Marx’s critique of legal rights and documents like the rights of man and citizen. Due to space constraints, I do not attempt a broader summary of the essay. Finally, in part four I turn to the contemporary relevance of OJQ for thinking about legal and political debates.

¹ The Jewish Question itself concerns the status, standing and freedom of Jewish people living in European states during the 19th century [23, p. xxi-xxiii].

Because OJQ is a demonstration of critique it does not offer positive proscriptions or suggestions for change. Its utility lies in the way it can help us think about the limits of resolving deeply entrenched power-relations without a thoroughgoing engaging of how those powers are created and enacted in civil society. With this in mind, I read OJQ alongside the recent campaign to legislate for marriage equality in Australia and the movement to recognise environmental human rights. While both movements might ameliorate instances of discrimination and harm, I argue that they cannot resolve those powers that limit certain kinds of access or render people and things subordinate to other interests.

1. Background and Interlocutors

In OJQ Marx is writing inside a discourse and set of arguments that belong to the 19th century [10; 60]. Nevertheless, to properly grasp Marx's argument, it is necessary to provide a short overview of the key strands of his argument. As noted in the introduction, I do not attempt to cover his whole essay and will limit myself to the major figures and arguments relevant to his discussion on human emancipation and his critique of legal rights.

Although he is barely mentioned in the text, G.W.F. Hegel stalks Marx throughout the essay. This is hardly surprising because Hegel was the reigning philosopher of Marx's time and it was impossible to engage in philosophy without encountering his ideas. As we will see, Hegel also had an enormous influence on a range of intellectual offshoots which range from political right to political left. Hegel's idealism was particularly important to Marx's early writing. While colloquially we interchange the term 'idealism' with other words like unrealistic or impractical it has a specific meaning in philosophy – namely the notion that ideas are what generate material reality and make history. Idealism expresses the notion that consciousness and the dominant ideas of an age (as codified in law and other structures) drive history and move the human world forward [62, p. 4].

This sentiment is captured in phrases such as 'an idea whose time has come'² and can be seen when social movements interpret their success in terms of riding an inevitable wave of progress [8]. Most importantly for our discussion, it should be noted that most liberals also subscribe to some version of idealism. This is evident in the argument that social problems such as racism and homophobia can be countered by a combination of logical argument, fact checking and popular education. At a different level, liberal lawyers might also seek to alter history through law reform i.e. desegregation, progressive taxation, or legislating for marriage equality. Another example which I will return to in section 3.2 is the argument that legal rights are flexible enough to capture all kinds of justice claims and that human societies evolve morally to protect a widening circle of subjects [68, p. 5]. Underlying all such reforms is the idea that law can embody higher moral truths and position itself at the vanguard of social change.

In OJQ we learn that Marx is critical of this perspective and he is starting to lay the groundwork for a competing idea– historical materialism – which posits that it is material life and the way things are organised at the economic level that generate history and the dominant ideas of an epoch.³ Thus, Marx will argue that constitutional democracy and liberal ideas emerge from the nature of capitalist production – not because they embody some effervescent truth that cannot be denied. This does not mean that ideas such equality before the law or legal rights are bad⁴ – but a focus on material reality provides a firmer position to make sense of historical change and understanding why governing ideas embody some of the contradictions and possibilities they carry.

² This phrase is usually attributed to Victor Hugo [42, p. 409]: 'An invasion of armies can be resisted; an invasion of ideas cannot be resisted.'

³ Marx developed this idea further in [56]. For an analysis of materialism in law see [18, p. 20]: 'materialist jurisprudence is concerned with the social and economic forces directing the course of legal development.'

⁴ Marx says repeatedly that formal legal equality is an improvement. See for example [56, p. 33, 35].

Marx's method in OJQ involves thinking about a problem by first thinking through the limitations about how others have conceived it. That is why the essay begins with Marx unpacking the conditions under which Bruno Bauer thought Jewish people might be emancipated within a constitutional state. Throughout his engagement with Bauer, Marx is trying to understand why the Jewish Question materialised as it did during the 19th century. What was it about this historical moment that has led to the Jewish Question being presented in the way that it has? What are the contradictions in the existing political and social and economic life that keeps us from being able to resolve it? Thus, for Marx, critique is not the same thing as trashing.⁵ It is a systematic analysis of a theoretical formulation or a political problem that tries to bring to light premises and presuppositions that might not be readily available on the surface. Even if those foundations are wrong or misplaced (as Marx thinks they are) we can still learn something about what their wrongness systematises or represents.

This aspect of Marx's method runs counter to the commonly held view that he was a dogmatist [7, p. 18]. In fact, Marx is suggesting that critique has the potential to displace dogma and can help us understand contradictions such as when legal proclamations of freedom and equality exist side by side with lived unfreedom and inequality. This contradiction is what motivates Marx throughout OJQ. And yet, Marx is not simply condemning constitutional democracies for being hypocritical. He wants to understand *what it is about liberal states* that produces the contradiction and what sustains it over time. Moreover, because Marx believes that people yearn for freedom, equality and universality he also wants to know what would eliminate or resolve the contradiction and give rise to genuine human emancipation.

These convictions are part of what makes OJQ hard going at first. Marx is not interested in what the working class think about the Jewish Question and he does not cite the views of the political class or the press. Rather, Marx engages writers like Hegel and Bauer because he believes their writing represents an important representation of the world as it is and that his critical method will help him understand what needs to be done to bring about the world that is being yearned for.

Before we move on to discuss OJQ it is important to note that Hegel's philosophy inspired followers on the political right and left. Hegel's politics are difficult to characterise but he believed that human history's quest for freedom had been realised in the form of the Prussian Empire and the Christian state [39, p. x].⁶ Those who subscribed to his view maintained that the existing state and social structures represented the completion of history. A contemporary example is Francis Fukuyama who famously declared the 'end of history' following the fall of the Soviet Union in 1991 [30, p. 59-69 & 194-200]. However, there were other Hegelians who thought that the project of human history had not been completed and that further critique of existing social and legal formations was necessary.

This philosophical difference manifested politically in terms of how right and left Hegelians responded to issues such as the Jewish Question. Because those on the right were committed to the idea that the existing state embodied freedom, if individuals or groups experienced oppression or exclusion it was their responsibility to fix the problem. This might involve converting to Christianity and only then would Jew's be regarded as men first and considered eligible to participate fully in the 'rights of man'. I will explore this point further in section 3.1 in the context of identity based struggles. Suffice to say for now that something similar happens today when minority peoples are asked to comport themselves to mainstream identities. In contrast to this view, left Hegelians, took a different view and critiqued the state for discriminating against people based on their religion. Bauer, for example, argued that the state needed to be reformed so that it was free of religious consciousness. Bauer also argued that Jewish people should sublimate their Jewishness as a political identity and identify primarily as legal citizens of the state. They need not convert to Christianity or identify as secular but religion should be reduced to a private matter. Today we call this assimilation, secularism or simply adhering to a distinction between the public and private spheres.

⁵ Trashing is the term developed to describe the critical method of critical legal studies [28; 47].

⁶ This is not to suggest that Hegel was an apologist for the Prussian state and this is not a view that Marx expressed in [58, p. 53-65].

Bauer's position is where Marx begins his critique. It is his entry point into the Jewish Question and the larger questions he wants to explore about the limited character of freedom, emancipation and inclusion in the modern constitution state or in the liberal democratic state. With this background in place, let's turn now to consider the important moments in his argument.

2. The Limits of Political Emancipation

The first critical idea which Marx unpacks in OQJ is the difference between political emancipation and full human emancipation. This is a simple idea but, as we will see in section 4.1, it is frequently ignored or underplayed in contemporary legal arguments. To conduct this analysis, I will walk the reader through a short section of OJQ. This will enable me to not only extract the key ideas but also give a sense of Marx's method and the kinds of questions he asks. The latter is particularly important for scholars seeking to apply this critique to contemporary political debates.

Marx is thinking about the meaning of emancipation from the very beginning of his essay. His opening sentence displaces Bauer and opens up the meaning of emancipation to various interpretations. Marx writes:

The German Jews Seek emancipation. What kind of emancipation do they want? Civic, *political* emancipation [56, p. 26].⁷

Here Marx is telling his reader not to assume the meaning of familiar terms like emancipation. The important question is – what kind of emancipation are Jewish people seeking? Emancipation is not just a theoretical concept. It has a lot of different forms – conditioned, lived and material. Bauer, Marx contends, fails to grasp the complexity of emancipation and so misdiagnoses religion as a defect and a consciousness that must be overcome for both Jewish people and the state. Marx, by contrast, argues that religion is historically produced and so cannot be shed like 'snake skins' [56, p. 28]. Moreover, rather than seeing religious consciousness as a defect, Marx argues that it is a sign of something much deeper – namely that human beings are not in control of their lives [11, p. 103-104]. Religion is a symptom of a much greater problem and signals a larger order of unfreedom. Religion is but the tip of the iceberg – not the problem itself.

Marx further demonstrates the limits of Bauer argument by considering emancipation in the United States which he describes as a formally secular state [9; 59]. Marx writes: 'Only when the state exists in its completely developed form [i.e. secular] can the relation of the Jew, and of the religious man in general, to the political state appear in a pure form, with its own characteristics' [56, p. 30]. However, at this point Bauer runs out of steam and he has nothing to say about emancipation because his ideal conditions have been realised. In Marx's words – 'where the question ceases to be theological, Bauer's criticism ceases to be critical' [56, p. 31]. And yet the state was still an instrument of inequality in the United States. Even today states entrench certain privileges, and few would deny that Christianity enjoys a privileged status in Western democracies. Perhaps the most obvious example in Australia is when the House of Representatives opens with Christian prayers [82]. Bauer cannot help us understand these problems or see the limits of political emancipation. However, Marx is learning a lot from critically engaging Bauer and identifying the problems of his analysis.

For Marx, political emancipation is when the state ceases to discriminate based on a person's identity or status i.e. wealth, ethnicity or religion. It would be a mistake to equate Marx's critique of political emancipation with a rejection of formal equality. For Marx, political emancipation is a good thing and

⁷ Marx fleshes out this question at [56, p. 29]: 'It was by no means sufficient to ask: who should emancipate? Who should be emancipated? The critic should ask a third question: *what kind of emancipation* is involved? What are the essential conditions of the emancipation which is demanded?'

an improvement on expressly discriminatory laws [56, p. 33 & 35].⁸ However, he argues that political emancipation does not free human beings from the power and effect of inequality or discrimination. Legislating for equality does not emancipate us from class power, racism, sexism or homophobia. What it does, Marx argues, is emancipate the state so that it does not need to be preoccupied with it anymore [56, p. 31].⁹ The state now appears universal, neutral and indifferent. But individuals still need to navigate those powers on their own and in a depoliticised way. Marx notes:

...man frees himself from a constraint in a *political* way, through the state, when he transcends his limitations, in contradiction with himself, and in an abstract narrow and partial way. Furthermore, by emancipating himself *politically*, man emancipates himself in a *devious* way, through an intermediary, however *necessary* this intermediary might be [56, p. 32].

So far, I don't think there is anything particularly controversial in Marx's argument. One can find plenty of examples in Australian legal history – from the introduction of the *Racial Discrimination Act* in 1975 to the *Sex Discrimination Act* in 1984 – where the Australian state has sought to address positive discrimination. And yet while both reforms ushered in improvements for women and Aboriginal and Torres Strait Islanders, nobody could claim that they have emancipated either group or stamped out the powers of racism and sexism that course through civil society, the economy and foreclose certain kinds of access (a fact which the #BlackLivesMatter and #Metoo movements powerfully attest). For Marx, a politics which promulgates equality before the law will always be at some distance from daily life of concrete subjects. Wendy Brown explains further: '[t]he subject is thus *ideally* emancipated through its anointing as an abstract person, a formally free and equal human being, and is *practically resubordinated* through this idealist disavowal of the material constituents of personhood, which constrain and contain our freedom [11, p. 106].' Here we can see a dialectic between an idea statement about legal personhood and a material reality which reinscribes subordinate identities.

Marx's second critique of Bauer concerns his suggestion that Jewish people simply assimilate into the state. For Marx, this is a very narrow and partial kind of freedom. He writes:

The limits of political emancipation appear at once in the fact that the state can liberate itself from the constraint without man himself being *really* liberated; that a state may be a free state without man himself being a free man... Thus the state may have emancipated itself from religion, even though the *immense majority* of people continue to be religious. And the immense majority do not cease to be religious by virtue of being religious in *private* [56, p. 32].

What does Marx mean? Here he is arguing that even if Jewish people assimilate and become secular, they are still enmeshed in various constraints related to property, racism and prejudice. This is a very limited view of freedom and would Jewish people to seek freedom by pretending that existing power relations do not matter to their social standing – we are all just people. Marx continues this thought by noting:

The state is the intermediary between man and human liberty. Just as Christ is the intermediary to whom man attributes all his own divinity and all of his religious *bonds*, so the state is the intermediary to which man confides all his non-divinity and all his *human freedom* [56, p. 32].

This analogy between the state and Christ is complicated and requires unpacking. Marx is arguing that both the State and Christ have become a repository for human freedom and our divinity [61, p. 81]. That is, we imagine that the state confers freedom upon us by agreeing to treat us as though we were truly free and we imagine that Christ confers a blessed status upon us [11, p. 106]. But the state and

⁸ Marx argues that political emancipation is 'the final form of emancipation within the framework of the prevailing social order' [56, p. 35]. In other words, it is the best outcome under a liberal constitutional state.

⁹ Commenting on the limits of political emancipation, Marx argues that the 'state can liberate itself from a constraint without man himself really being liberated.' See also [60, p. 20]: 'The limits of political emancipation were shown by the fact that the state could free itself from religion without its citizens being freed.'

Christ only deal with human subjects that are abstracted from their material lives and thus require us to lead ‘a double existence – celestial and terrestrial’ [56, p. 32]. Brown explains further: ‘As Christianity consecrates a ghostly ideal of man as divine and leaves actual man to suffer on earth, so the state liberates its ideal of man and abandons actual man to the actual powers that construct, buffet, and subject him [11, p. 107].’ Moreover, the very fact that there is such an intermediary, already indicates that we are not truly free. True freedom, for Marx, is something that humans generate. It is not something that the State gives us. He thinks that we are transferring our power to some other entity which must eventually be overcome.

Once again, Marx is not trashing or rejecting political emancipation. He thinks that it is a positive step and the best that can be hoped for under a liberal constitutional state [56, p. 33 & 35]. However, it is also devious and feigns indifference to concrete forms of social power. Marx also believes that indifference consecrates existing power relations and presupposes their existence. He makes this point with reference to the legal institution of private property:

The political elevation of man above religion shares the weaknesses and merits of all such political measures. For example, the state as a state abolishes *private property*...when it abolishes the property qualification for electors and representatives, as has been done in many North American states [56, p. 33].

In other words, once the state declares that holding property is irrelevant to whether a person can hold office or vote – at the political level – private property has been abolished and it does not matter to a person’s standing in the eyes of the state. Marx offers a further interpretation:

...*the masses have gained a victory over property owners and financial wealth*. Is not private property ideally abolished when the non-owner comes to legislate for the owner of the property? The property qualification is the last political form in which private property is recognised [56, p. 33].

This is a politically significant moment – when a person, who is not a member of the owning class, comes into elected office and passes law in favour of the wealthy, the political significance of property has been abolished. Where does private property go? Marx continues:

...the political suppression of private property not only does not abolish private property; it actually presupposes its existence. The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty, and treats all the elements which compose the real life of the nation from the standpoint of the state. But the state, none the less, allows private property, education, occupation, to *act* after *their* own fashion, namely as private property, education, occupation and to manifest their *particular* nature. Far from abolishing these effective differences, it only exists so far as they are presupposed; it is conscious of being a *political* state and it manifests its *universality* only in opposition to these elements [56, p. 33].

We need to follow his reasoning closely here. Marx notes that even after the state has said that we are politically emancipated it still allows private property and other forms of social power to ‘act after their own fashion’ [56, p. 33]. They go from being categories that qualify a person for a position in the state to now just operating in civil society. They don’t lose their power even as they cease to be a formal political force. Marx also argues that when the state officially declares that property (or we might add race, gender etc) does not matter to a person’s political and legal status, it is also presupposing the existence of those powers. It is recognising their impact in daily life. Otherwise, the state would not seek to neutralise them through law.

In fact, Brown argues the state is ‘premised upon that which it pretends to transcend’ and gains a significant part of its authority through its claim to resolve inequalities which it actually entrenches and can only think about in a depoliticised way [11, p. 109]. Unfreedom and inequality are pushed into civil society where they are not named as political but are seen as the product of bad luck, the absence of

hard work, or as natural. While Marx could not have foreseen it, there is also a link between his analysis of 19th century liberal democracies and the governing rationality of neoliberalism [14] which continues to encourage citizens to personalise and individualise their problems [74].

We can expand Marx further here to make an additional point. To suggest that the most important task of the state is to enact formal equality and produce a level playing field upon which we can all compete is not a neutral position. To be indifferent to the powers that organise society – powers of wealth, education, race, gender, class etc – is to side with the status quo. Neutrality sounds prejudice free. But if gender, for example, is a site of social power and something that limits a person's access to certain opportunities, experiences and institutions, then for the state to insist on blindness is to side with privilege. One can see this tension playing out in demands for positive discrimination, the redistribution of wealth, changes to the means of production or when justice claims are articulated in terms of sharing power and radically depending democratic institutions.¹⁰ Marx will eventually take up some of these positions but for now he shifts the focus of his critique to the dominant tool the liberal state uses to attenuate inequality – legal rights.

3. Critique of Legal Rights

Today legal rights are a ubiquitous discourse and the dominant way people in liberal democracies articulate claims for social and environmental justice. This was not the case when Marx was writing OJQ but he identifies rights as the tool most proper to a state which proffers abstract representations of people in civil society [11, p. 109]. His analysis of rights comes, once again, through a critique of Bauer, and in particular, Bauer's suggestions that Jewish people cannot claim 'the rights of man' so long as they identify as Jew's first and then as members of humankind [56, p. 40]. When Marx was writing the various articulations of the 'rights of man' were quasi sacred documents and the rallying cry of the French revolution [31]. Marx subjects them to critique – not to trash them – but to see what presumptions and presuppositions they carry. He also wants to understand why they are an insufficient tool for realising the states commitment to freedom and equality.

For Marx, the key question is whether the rights of man are an *embodiment of our universal participation in the idea of humanity?* Marx answers in the negative and argues instead that the rights of man 'are simply the rights of a member of civil society, that is, of egoistic man, of man separated from other men and from the community' [56, p. 42]. There is nothing in the various articulations of the rights of man that articulates human beings as members of a public association or as participating in the politics of a community. Consequently, there are no grounds for withholding membership to the Jewish people or another other group based on their class or faith [11, p. 110]. Rights for Marx are not natural, they are historically specific and have manifested to give expression and legitimacy to 'egoistic man' in civil society [61, p. 83].

It is from this perspective that Marx offers a further critique of rights which seeks to 'expose the way rights encode rather than emancipate us from the social powers and social formations that are the conditions of our unfreedom' [11, p. 110]. Thus, Marx interprets constitutional rights to liberty not founded upon the 'relations between man and man' but on the 'separation of man from man' [56, p. 42]. It is the 'right of the *circumscribed* individual, withdrawn into himself' [56, p. 42]. In similar terms, Marx describes the right of property as:

the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest [56, p. 42].

¹⁰ Today we have such an impoverished dialogue on the meaning of emancipation and liberation. But for a good introduction see [76].

Marx identifies freedom and private property as the cornerstones of the liberal constitutional state. But while promising freedom the combination of these ideals ‘leads every man to see in other men, not the realization but the *limitation* of his own liberty’ [56, p. 42] To the extent that there is a community, it exists to secure these rights. The political community, where we have universality, equality, has been turned into a mere means for our individual pursuits. The state is merely facilitating individual desires, in the context of powers that it does not control or even comprehend. The promise of equality is also a term that ‘has no political significance’ since it is ‘only the equal right to liberty...every man is equally regarded as a self-sufficient monad’ [56, p. 42]. Far from constituting citizens as part of a political community or addressing substantive inequality the liberal state only guarantees that citizens will be treated as isolated individuals [11, p. 110].

This critique of rights is fundamental different from that presented in Critical Legal Studies [48] or those presenting moral or ontological claims about rights [6]. Marx argues that documents like the ‘rights of man’ casts claims to property and liberty as natural and entrenches certain social powers in civil society. Against this reading, Marx argues: ‘the liberty of egoistic man, and the recognition of this liberty, is rather the recognition of the *frenzied* movement of the cultural and material elements which form the content of this life’ [56, p. 45].¹¹ Put another way, documents like the ‘rights of man’ are not natural but have emerged from historically specific and contingent circumstances. The concerns that they highlight are not neutral and reify bourgeois social relations which in turn generates a political culture that is centred on a kind of anxious egoism that puts people into competition for property, liberty and security [11, p. 113].

This brief analysis of legal rights makes sense from inside the critique Marx has just rendered of the state and his homology between the state and religion. However, his analysis can and should be subjected to the same scrutiny that he offers Bauer. Here we might highlight that Marx seems to assume that rights are the natural end of the liberal state and that citizens desire something greater than formal legal equality.¹² One might also conclude that Marx is being insensitive to minority groups who are forced to struggle or articulate justice claims with whatever tools they have at their disposal. In this sense, rights might not be ideal but they are essential if that is the only power one has [83].

Moreover, Marx only offers a vague presentation of what true or full emancipation might look like and does not talk about how it might be secured in the long-term. At this early point in his career Marx has not really figured out a strong position on emancipation and only offers some brief thoughts which will be developed in subsequent work. For example, he argues:

Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (forces propres) as *social* powers so that he no longer separates this social power from himself as *political* power [56, p. 46].¹³

There is a lot to unpack in this long sentence and Marx is also thinking with concepts that his more mature work will abandon.¹⁴ However, the essential point is that true emancipation will only be accomplished when there is no longer a split between political society and civil society. When there are no longer political and legal proclamations about who we are abstractly. Once who we are concretely in civil society really does amount to freedom, equality etc we no longer need a separate state proclaiming those these things in contradistinction to who we are. Marx does not have the language yet to explain how to bring about this change but he has diagnosed the problem and posing important questions that will be foundational to the development of his thinking in the coming years.

¹¹ The term *frenzied* might also be translated as ‘unbridled.’

¹² We might also argue Marx overstates the relationship between the state and religion and sets up simplistic oppositions between idealism v materialism and the state v civil society. See further [11, p. 111]. See also [51, p. 248] Marx ‘allows himself to become the prisoner of the ideological version of rights without examining what they mean in practice, what profound changes they bring to social life.’

¹³ For more detail see [60, p. 19; 61, p. 81].

¹⁴ For example, the notion of *species being* is of much less importance in *Capital* [38, p. 112].

4. Reading OJQ Today

It is an interesting historical moment to be reading Marx. We are long past the time when intellectuals felt the need to offer public recantations about their past radicalism [21] and a younger generation of thinkers and activists are turning to Marx for his critique of liberalism and to understand the system of global capitalism [45]. Marx's early writing has received much less attention and has been eclipsed by the Communist Manifesto and the first volume of Capital. Moreover, as noted in the introduction, Marx was just 25 when he wrote OJQ and he developed many of the arguments in his more mature writing.

Further to these points, the world has changed considerably since Marx wrote OJQ. The rest of this essay could be filled enumerating the differences and yet I think that two points stand out. First, while citizens in the 19th century might have believed in the promises of liberalism and the potential for constitutional states to provide equality and emancipation that is not true today.¹⁵ Liberal democracies are no longer broadly seen as the essential model for government [49] and political parties around the world are increasingly separating from any notion of a social base [36, p. 210; 52]. Marx forecasts this in OJQ when he argues that by presenting an image of civil society as otherworldly the state is detaching itself from its subjects and laying the groundwork for its future irrelevance [56, p.45; 11, p. 112].

The clearest articulation of this phenomena in contemporary writing can be noted in the term 'anti-politics' as developed by Elizabeth Humphrys and Tad Tietze [43, 74]. This is easy to observe in countries like Australia where rolling political crises has given rise to electoral volatility and the hollowing out of major political parties [37]. The data is even more striking in countries without compulsory voting. For example, in the European Union – whether measured in terms of voting, membership to a political party, party allegiance or membership in unions or guilds – there has been a dramatic decline in engagement with politics [53]. Thus, to the extent that the power of Marx's critique rests on the conceit of a promise betrayed, one might respond that today people no longer invest the same hope in the liberal state.

Second, while documents like the 'rights of man' inspired generations of liberals and radicals during the 19th century they also coexisted alongside guilds, workers organisations and eventually major political parties. Today, those who promote liberalism have adopted right-discourse the dominant language through which to articulate a range of justice claims from housing to a healthy environment. This reflects not only the apparent flexibility of rights to accommodate disparate concerns but also the gradual erosion of alternative social formations and languages for people to advance emancipatory demands. Moreover, rather than seeing the proliferation of rights-talk as an expression of an idea whose time has come, one might equally regard it as reflecting the weakness of left movements to advance bolder demands about emancipation and liberation.

Here it should also be noted that while legal rights often present themselves as neutral or empty signifiers they are marked their ability to limit who or what counts as a rights holder [34, p. 88; 78, p. 13] and the historical conditions that gave rise to their prominence. With respect to this second point, Samuel Moyn has argued that human rights gained prominence during the 1970's precisely because they were perceived to offer an ideological neutral alternative to the demands being made by the decolonial movement and through the spread of international communism [66; 62; 81]. One could champion human rights without agitating for deeper social change and human rights could also be expressed in a way that was consistent with capitalism [19]. Thus, Moyn argues that human rights gained prominence because they represented a last utopia for those interested in maintaining existing power relations and those disenchanted by emancipatory movements [66, p. 118].

With these shifts noted we can turn to consider the contemporary relevance of OJQ to contemporary political and legal debates. This section will be divided into two concerns – struggles around identity

¹⁵ It is not even clear that young people think democracy is essential [65].

and the environment. In each instance my primary concern is to think about how an understanding of OJQ might help us think about those struggles, understand their presumptions, presuppositions and limits and the conditions required for a deeper vision of human emancipation.

4.1 Identity Based Struggles

Identity is at the core of Marx's critique in OJQ. The fact that he engages not only Jewish identity but a variety of state forms gives his essay a particular relevance for thinking about contemporary struggles by feminists, first nations, the LGBTIQ community and others who seek recognition from within a state that implicitly reflects powers of masculinity, whiteness and heterosexuality [11, p. 102]. As Brown argues: '...precisely because Jews sought political rights as secular Jews in Christian as well as "secular" states, precisely because the Jewish question does not issue from a wholly liberal claim to generic personhood on the part of the historically disenfranchised, Marx's essay has potentially rich contemporary resonances' [11, p. 102].

Today it is commonplace for discussions about identity to be framed in terms of "identity politics". This is a weighty term and carries connotations of exclusivity and the ranking of oppression [52; 72]. However, a more nuanced reading should note that claims to equality and emancipation have always rested on some notion of identity. This is true whether we seek to unite the working people of the world [54] or when conservative movements fight against the extension of freedom to previously oppressed groups. [2; 70]. Moreover, while neoliberal rationality encourages an increasingly individualist notion of identity, the phrase identity politics was originally coined to describe networks of solidarity. For example, the Combahee River Collective theorized identity politics in a way that validated experiences of oppression and forged opportunities for solidarity. Keeanga-Yamahtta Taylor explains: 'Solidarity did not mean subsuming your struggles to help someone else; it was intended to strengthen the political commitments from other groups by getting them to recognise how the different struggles were related to each other under capitalism' [77, p. 11].

In Australia, the most recent identity-based struggle concerned an amendment to the *Marriage Act 1961* to empower same-sex couples to marry. Thinking about this struggle in the context of OJQ reveals several immediate points. Most obviously, we might describe the success of the marriage equality campaign as an example of political emancipation and affirm legislative changes that remove discriminatory standards [17]. Further, keeping in mind Marx's distinction between political emancipation and human emancipation we might recognise that legislating marriage equality does not challenge those powers in civil society that perpetuate homophobia and limit certain kinds of access to the LGBTIQ community. Thus, a short time after marriage equality was legislated one could observe state governments attacking the safe school program [69] and growing rates of people undertaking gay-conversion therapy [20].

To be clear, I am not suggesting that anybody involved in the struggle proposed marriage as a panacea to homophobia [16] and several excellent critiques were made about the limits of attaining emancipation within the confines of an oppressive institution [73; 79]. However, it was common for commentators to undergird their arguments with the presumption that 'law can lead the way in eliminating...prejudice by upholding a standard of equality as sameness' [22]. This may turn out to be true but the experience of past identity based struggles ought to give one pause about the ability of law to lead transformative change [26]. Clearly Marx is sceptical about this as well and that is why he describes political emancipation as a tool which enables the state to emancipate itself from sites of struggle. With respect to marriage equality, the state can now hold out an abstract representation of who we are in civil society – we are equal before the law – and LGBTIQ people are left to negotiate social powers around marriage in a depoliticized way. That might be an advancement, but it also reflects Marx's argument that forms

of social domination are less eliminated than depoliticized through political emancipation [56, p. 45; 24, p. 158].¹⁶

Further to these points, we might pick up on Marx's method and ask questions like: why the question of marriage equality has arisen as it has in the early 20th century? What does such a demand reveal about the strength of our movements to effect change in civil society? What is about this historical moment that has led to marriage equality being presented in the way that it has? A lot could be said but a basic point to note is that campaigns for marriage equality are at some distance from the liberatory/intersectional demands that defined gay movement in the 1970's [26, p. 1-50]. As Michael Warner observed:

No one was more surprised by the rise of the gay marriage issue than many veterans of earlier forms of gay activism. To them, marriage seems both less urgent and less agreed-upon than such issues as HIV and health care, AIDS prevention, the repeal of sodomy laws, antigay violence, job discrimination, immigration, media coverage, military antigay policy, sex inequality and the saturation of everyday life by heterosexual privilege [79, p. 261].

Prior to the early 1990's marriage was not a demand of the gay movement [79, p. 261]. In the United States Warner argues that it 'depended for its success on the courts' and that it was directed by a 'relatively small number of lawyers, not by a consensus of activists' [79, p. 261].¹⁷ Scot Nakagawa supports this reading and argues that marriage equality gained traction because it presented LGBTIQ people as 'conservative in our demands' and the 'model minority' [67]. Duberman agrees and notes that advocates for marriage equality were required to present their constituency in the abstract form – as 'just folks' – who were exactly like the rest of society in terms of their hopes, dreams and aspirations [26, p. 98]. This is certainly preferable to being degraded as 'other' and Duberman is not trashing or bashing this approach. However, it gives rise an important question: 'When making that claim [to conformity], are we disguising or disavowing the many ways in which we do in fact stand culturally apart from the mainstream—essential ways, of value not only to ourselves but also potentially to the mainstream?' [26, p. 98].

This discussion is reminiscent of Bauer's proposed solution to the Jewish question – give up your Jewish identity and present publically as members of the nation state. This is a very narrow conception of freedom and we might add that in practice it often pits minorities and vulnerable people against one another.¹⁸ This critique of marriage equality was made by transgender activists [32; 46] and as and Nakagawa warns: 'when we argue that being able to wield this shield is a right we deserve because we conform with the values of good people, that shield can become a weapon against those who are still excluded' [67]. In this sense, political emancipation might also a barrier to solidarity and intersectional activism where oppressed peoples organise around common experiences of oppression.

4.2 *The Environment*

While OJQ has primarily been used to think critically about identity based struggle, other scholars have mined it for critical insights into legal rights and human rights [11; 12; 24; 25; 33; 34; 63]. Further to these arguments I want to think about whether OJQ provides tools for critically engaging the notion of environmental human rights (EHR) which emerged in 1972 following the United Nations Conference

¹⁶ Marx discusses this point with reference to the shift away from feudal monarchy [56, p. 45]: 'The political revolution therefore abolished the political character of civil society....A specific activity and situation in life no longer had any but an individual significance.'

¹⁷ See also [79, p. 261]: 'The decision is no longer up to us. The legal system of the United States has its own momentum. The last thing the courts are likely to care about is whether marriage is a good idea from a queer point of view.'

¹⁸ See for example Hannah Arendt's discussion of the 'exception categories' in anti-Jewish legislation [3, p. 132]: 'What was morally so disastrous in the acceptance of these privileged categories was that everyone who demanded to have an "exception" made in his case implicitly recognized the rule.'

on the Human Environment. This idea has many formulations but is commonly described as a duty on states to ensure that citizens have access to a safe, healthy and sustainable environment [80]. Like other rights-based justice claims, EHR have gained in prominence since the 1970's to become the *lingua franca* of liberal environmentalism. In fact, we might go further and argue that EHR and rights-talk more generally have crowded out alternative discourses and more radical demands for environmental protection [13, p. 461].

Thinking about EHR alongside Marx's critique the first point to note is that rights are an attempt to defend something from a greater power [56, p. 42]. While Marx argued that liberal rights isolate humans and perpetuated egoism we might similarly claim that EHR do not challenge some of the deepest causes of the environmental crisis such as the notion that human beings are separate and superior to the environment. Even the phrase "environmental human rights" is species specific, focuses on individualistic rights and sets up a dichotomy between the "human" and the "environment". This is not a promising start for ecological thinking and it does little to elevate the subordination of the environment to human needs and wants. Thus, while a human right to clean water may provide limited protection from exploitation it also reinscribes subordinate status of the environment through that designation. Put another way – human beings are 'interpellated' [1, p. 117-120] as separate from nature when we invoke EHR.

Against this reading, one might point to the proliferation of collective rights in liberal legal systems [29]. Collective rights are most fully developed in the context of first nations peoples [44] and to protect access rights to a resource [35]. The application of collective rights to the environment is less developed but there is an emerging literature that focuses on resource management and third generation rights 'to self-determination, economic and social development, cultural heritage, natural resources and...a satisfactory environment [5, p. 19].' Collective rights recognise bonds of solidarity and they can apply across ethnic, religious and linguistic identities [5, p. 19]. In this sense, collective rights go some way toward addressing the radical individualism or egoism which Marx highlights. However, here we must also note that collective rights are frequently framed in terms of hierarchy and competition. This is particularly true in the majority world where communities face choices between development and pollution or when economies are geared toward extractive industries such as mining or forestry. Similarly, EHR have been deployed in response to environmental problems in a way that preferences economic growth and market based solutions [38, p. 49].

Pheng Cheah has explored this in detail for developing countries in the majority world [19]. For example, in South-East Asia, Cheah argues that development strategies that focus on rights lead to the entrenchment of capitalist values [19, p. 148]. There are many reasons for this but Cheah pays attention to the ways economic growth comes to trump the wishes of indigenous peoples or other alternatives to development that are grounded in feminism or the desires of the subaltern [19, p. 148-149]. Unless local people are empowered to actualise these alternatives, the standard response to development is economic growth and the expansion of markets into communities that have been largely untouched by globalisation. Rich countries like Australia are also able to feed into cycle as well by claiming special privileges to sell coal to the majority world as part of an effort to lift people out of poverty [40].

In these cases, EHR might serve to mitigate instances of environmental harm but they are not designed to offer a radical alternative. They do not challenge anthropocentrism, extractive industries or growth economics even as they offer some limited protections. Further to these points, EHR close off more radical demands to do with sharing power [56, p. 42] or empowering communities to express a diversity of responses to an environmental problem. For example, rather than a right to a healthy environment, a community might wish to simply say no to a development or an indigenous group might want to be empowered through a process of prior and informed consent. EHR are designed to protect human beings from an overweening power. As Patricia Williams has argued, those rights are critical if that is the only shield that one can wield [83]. But protections are not the same things as justice and they may not resolve or address the underlying factors that led to environmental exploitation in the first place.

5. Conclusion

In this essay, I have presented an interpretation of Marx's OJQ and sought to put his essay into conversation with recent political struggles. Implicit to this endeavour is my belief that political theory is not only relevant to legal thinking but that it can help us see legal and political problems in a new light. The capacity to see from multiple perspectives is a foundation of critical thinking [4, p. 49]. Further, because Marx is not offering a positive proscription for change, perhaps the most uncomfortable thought he offers is that some problems are fundamentally irresolvable from within a liberal state. A liberal state might grant legal freedom and equality to all individuals but can these goals be realised without addressing the multiple ways that power is formed, shaped and interpreted in civil society? In modern language – can a society where social reproduction centres on the nuclear family, ever truly adapt to the end of homophobia? Or alternatively, can a legal apparatus which centres on human rights ever challenge the subordination of the environment to human needs? What other languages for liberation or emancipation do we displace when we frame demands in the language of rights?

For those seeking deeper notions of emancipation there are also other considerations to acknowledge. As noted above, neoliberal rationality continues to shape human beings as atomised market actors, economises our values and does not provide the conceptual tools for a truly liberatory project [14]. As a corollary to this, unlike radical struggles in the 19th century or in the 1960's there is no shared language or understanding of what emancipation means today. How many of us, for example, can give a coherent description of emancipation and articulate how it differs from movements about equality before the law? Put another way, those seeking true human emancipation – 'when the real, individual man has absorbed into himself the abstract citizen' [14, p. 46] – need to grapple with how such demands can be progressed by an unemancipated people.

These are challenges which can only be overcome incrementally and fortunately present unfreedom does not determine the future. Current movements from #BlackLivesMatter to the resurgence of socialist politics [71] are beginning to articulate demands that reflect a growing unease with the limits of equality before the law and toward deeper notions of emancipation. In this sense, contemporary struggles for a richer notion of emancipation are furthering a conversation which young Marx started over 150 years ago.

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