

# New Marxisms for Old: Contemporary Radicalism and Legal Theory

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## I. THE DISINTEGRATION OF THE MARXIAN SYSTEM

When Marx died in London in March 1883 there were eleven people to attend his funeral. Today, more than one-third of the world's population is led or governed in his name. Politically, Marxism, or at least Marxism-Leninism, has achieved some remarkable successes. The two major twentieth-century revolutions, the Russian Revolution and the Chinese Revolution, ended with Marxist-Leninists in control and Marxism the ruling ideology of an all-powerful state and party. A world-wide communist movement has preached revolution in most countries. With Soviet or Chinese help, the movement has taken power in several countries, often accomplished with great brutality destroying any challengers. For a period, the anti-colonialist and anti-imperialist sentiments that have come to dominate modern international relations and the politics of developing countries were heavily tinged with, or even inspired by, the language, assumptions, and prognostications of Marxism-Leninism. To some extent, they still are, but to what extent the Soviet Union and China still believe in and implement Marxism is a complex question.

In modern, post-industrial societies, the working class and the parties that have that class's main electoral allegiance have neither made nor advocated revolution. They have not adopted or departed from the tenets, tactics, and fundamental concepts that Marx preached. Yet in some countries, a Marxist and neo-Marxist left has strong, often disproportionate, influence. As Marx predicted, capitalism has been significantly socialized from within. Private property and control as the reification of

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individual will and individual rights, as an area in which the citizen or the bourgeois is free from outside interference, stand in glaring theoretical "contradiction" to the increasingly corporate, nonindividual nature of ownership and its ever-growing dependence on the state for economic support. The public perception of the social ramifications, social power, and social dependence of large-scale private enterprise is widespread. Increasingly, such enterprise in welfare states is not distinguished in the public's mind or the worker's mind from state-owned enterprise. Many countries subject large-scale private enterprise to strong political and "public interest" controls. The ideology of *laissez-faire* capitalism and the political and legal beliefs of liberal individualism have come under increasing attack and become more eroded in the new societies of mass production, mass services, and mass consumption. A new "knowledge class" composed of (some) educators, media and social workers, actors, public servants, and technical experts has replaced the "militant" proletariat as bearer of hostility to capitalism. This "knowledge class" is the most receptive to aspects of the Marxist message, especially those Marxist arguments that elevate the public sector against the private sector, compassion against competition, and culture against money.

The revival of Marx-based radicalism and the astounding shift in its clientele were dramatized by student upheavals in 1968, primarily in the prosperous democracies of Western Europe and North America. The largely temporary alliance of students and young workers that emerged in some countries failed to mask that the new radicals and their New Left coalitions saw the universities as the power-house of revolution in modern capitalist societies. The New Left thought that the students, not the proletariat, would expose the "repressive tolerance" and throw off the cultural hegemony of modern "late capitalist" societies of their military-industrial complex and of their alienated and alienating economic, political, legal, and cultural institutions. Once these institutions fell, the capitalist economic system could not survive.

The actual "happenings" of 1968, significantly set in motion by the progress of the Vietnam war, China's Great Proletarian Cultural Revolution, and the enormous expansion in the number of tertiary education students was shortlived. Student strikes do not bring the wheels of industry to a halt. Nevertheless, the sudden revival of radicalism and of Marxist or neo-Marxist sentiment in the heart of Western post-war democracy was both striking and significant. It has had some lasting impact. The movement was hostile to capitalism and the established order, and at the same time, was sharply critical of the dogmatism and repression that characterized the Soviet Union and those communist parties that followed its instructions. The radicals of 1968 elevated

anti-authoritarianism, egalitarianism, and sexual and cultural freedom against the determinism of classical Marxism and its concentration on economic grievances and economic classes. These ideas were popularized earlier in the Free Speech movement at Berkeley and "youth protest" in America as part of a sexual "liberation." The radicals rejected nationalism, racism, male chauvinism, and any authority relations. Within the Marxist tradition the radicals looked back to the unsuccessful revolutions: the Paris Commune of 1871 and the 1918-1919 Workers' Councils Movements in Germany, Austria, and Italy. Their heroes were typical "oppositionists," Rosa Luxemburg, Trotsky, Pannekoek, and Bakunin; or anti-Soviet anti-determinist "Marxists" like the later Mao. Participation was the watchword for the future; alienation the concept that brought out the evils both of capitalism and of the Soviet bloc's communist-dominated "state capitalisms" or "new class" bureaucracies. The New Left was a loose coalition of left radicals, neither pervasively Marxist nor wedded to any common theoretical positions. The New Left emphasized certain sides of Marx, the work of Korsch, Lukács and Gramsci, and the members and followers of the Frankfurt School of Critical Theory, or the anti-authoritarian quasi-Marxist socialism of Erich Fromm and Herbert Marcuse.

The economic recessions of the 1970s somewhat dampened the New Left concentration on the cultural and ideological features of capitalist society as representing its main evils and off-setting ever-increasing affluence for all people in advanced economies. The fall in growth rates and the renewed plight of the poor, blacks, and immigrants in advanced Western economies produced a revival of Marx's economic writings of his mature period. Many Marxists returned to exposures of the contradictions of the capitalist economy in place of the 1960s critiques of the alienation and reification that they saw in capitalist (and Soviet) culture. "Traditional" Marxist analysis of capitalism and attacks on the society of private property in the means of production, distribution, and exchange still have much to say to us. The intellectual feeling that traditional Marxism is relevant has been strengthened and revived in the last ten years by the growth of a new conservatism, the increasing rejection by governments of Keynesianism of an expanding welfare state, and by the increasing concentration and internationalization of capital.

Nevertheless, even "traditional" Marxists now emphasize the role of multi-national corporations in the world economy, the "imperialist" and anti-communist role of the United States "ruling classes" (implicitly treated as power elites), and the limits that these world protagonists and the unplanned world economy place on the capacity for action by

social democratic or socialist national governments anywhere in the world. Most Marxists recognize that neither the industrial proletariat nor the factory owner is the main actor in economic struggles, problems, and decision making today. Marxists believe that one characteristic of late capitalism is the consummated transfer of "control" from the millowner to finance capital, to great international corporations, international banks, and holding companies working in partnership or collusion with state and military bureaucracies. Another characteristic is that the "subjective" class structure and the economic reality in advanced economies resemble a diamond shape rather than the traditional class pyramid. The proletariat forms a steadily decreasing part of the population. Wage earners who see themselves as actual or aspiring members of the middle classes form an ever-increasing part of the population in capitalist countries. The wage earners do own or aspire to own houses, cars, and other consumer goods.

By the 1970s in Great Britain and the United States the term "bourgeoisie" had virtually disappeared from the vocabulary of political writers and politicians. "Bourgeoisie" was replaced by "middle class," and people who worked for wages used the term "working class" less frequently as a self-description. Deviation from the traditional Marxist two-class model was apparent in the nineteenth century. The Marxist R.S. Neale in his *Class and Ideology in the Nineteenth Century* argued that a five-class model was the minimum necessary for recognizing the important differences that the terms "proletariat" and "bourgeoisie" glossed over. An expanded model was necessary to capture the realities recognized in the twentieth century by the ever-growing use of the term "middle classes." The hard-core poor's hostility to the system is easily understood. They are as much the product of cultural, social, religious, and personal disadvantages as of any direct economic "exploitation." The vast majority of working poor are not receptive to the revolutionary message. Many Marxists, therefore, view them as in thrall to capitalist culture, ideology, and political illusions rather than direct physical or economic repression.

The greater appeal of the Marxist message to under-developed countries has kept alive and even revitalized the "capitalism is to be destroyed through its weakest link" theory elaborated by Lenin. Primarily agrarian populations today suffer from "feudal" (*i.e.*, landowner) repression, military dictatorship, and "neo-colonial" exploitation. Recent Marxist re-examinations of Marx's political writings tend to stress that these interpretations do not conform to interpretations of Marx that have him predicting revolution in advanced industrial economies coming first. Much of Marx's political sympathy, like that of revolu-

tionary socialists generally in the nineteenth century, focused on Ireland as Britain's economically most backward and politically most troublesome possession and on Poland as a symbol of the ideology of national liberation. The practical political policies of Marxist movements today have largely kept to these realities, seeing South America as the weakest link of United States imperialism and Asia, Africa, and now the Pacific, as the sites where European "colonialism" and "neo-colonialism" might be humbled. Some Marxist writing has emphasized an independent dimension of political enthusiasm and social dislocation in the making of revolutions. Some Marxists argue that this produces revolutionary situations in the early development of capitalism or in its initial unsettling intrusions into pre-capitalist economies more readily than in an established capitalist economic system.

As a result of all this, contemporary Marxism in the Western world has become an infinitely more complex movement in doctrine and ideology than it was in the days of monolithic communism. During that period the term "Marxist" was increasingly abandoned to those who called themselves Marxist-Leninists or communists and who claimed to find in capitalism the simple struggle of bourgeois and proletarian. Marxist thought now displays neither a common set of beliefs nor a common methodology. Different types of Marxist thought are less sharply distinguishable from one another than Marxism once was distinguishable from radical and revolutionary movements and individuals who did not see themselves as "orthodoxly" or "properly" Marxist. Marxist thought varies considerably in the critique of capitalism — some concentrating on one set of evils and some on another. Few Marxists now believe that all these evils can be simply and directly reduced to a single determining factor, such as private property or commodity-production. Few Marxists now argue that the evils of capitalism can be removed simply and with logical inevitability by abolishing both. Behind this is an implicit, unacknowledged but increasingly important recognition of the fact that there is a difference between traditional capitalist (*laissez-faire*) economic assumptions and the present "capitalist" social order: its politics, its ideologies, and its culture. In the nineteenth century, it may have looked as though the economic "base" of capitalist society inevitably created a powerful and superficially coherent version of the "superstructure." Economics, politics, and culture appeared to exemplify the same dominant assumptions, values, and ideology as capitalism. Today, the economic order of modern private enterprise societies, the political order, and the cultural order have parted company. As Daniel Bell has argued, the economic order emphasizes efficiency, the political equality, and the cultural "self-express-

sion." This parting is due to many factors: partly as a result of a disillusionment with economic progress and the growing importance of planning and "rationalization" of production; partly as a product of political democracy, trade union power, and the increasing subjection of private property and private interest to various forms of state and public control; and partly as a consequence of a striking alienation of a new "knowledge class."

In advanced post-industrial societies, this conflict is at least as important and often more evident than any bitter conflict of class interest and class ideology within the economic system. This, too, helps to explain the extent to which Marxists no longer simply reduce the political and the ideological to the economic even though many would reject our analysis or at least be uncomfortable with it, insisting that the political and the ideological are at best only "relatively autonomous." In the end, the traditional Marxist argument runs, they all still serve capitalism or express the intrusion of working-class demands.

"Lenin lives," say the posters in the Soviet Union. They are right for much, indeed most, of the world. Marxism as a social science and Marxism as the philosophy of human emancipation have taken some very hard knocks. Increasingly, they now are viewed by intelligent Marxists as intellectual and political programmes requiring careful rethinking and re-examination in the light of twentieth-century history and of deeper historical knowledge and social understanding. Politically, Leninism, as the Marx-based strategy for gaining and keeping power in agrarian societies undergoing the dislocations and rising expectations that follow the impact of the industrial and post-industrial world, is doing well. In the most difficult conditions, by abandoning democracy, communist parties and governments have so far been remarkably successful in maintaining internal "order" and external security. They have climbed into the well-worn seats of power and made their states stronger than ever at whatever cost to their peoples. They have imposed major social and economic transformations, destroyed traditions, and reshaped cultures. They are finding non-Marxist and quasi-Marxist imitators from Uganda to Burma. However, the social and the economic costs of these programmes have been great. The capacity of communist countries to maintain economic efficiency in terms of their own goals has become increasingly questionable. But state and law — in a certain sense of the word "law" — flourish in these Leninist societies. There is now nothing utopian or legally "nihilist" about these countries' conceptions or methods of state and legal control. Their own practice, and to a significant extent their theory, now constitute a daily rejection of the belief that state, politics, and ideology express or

reflect existing economic realities. For communists, the state exists to create them.

Post-industrial Western societies have their own, rather different, problems, which is why Marxist or pseudo-Marxist "critiques" of law and even legal nihilism in Western societies have not become totally unfashionable, especially among younger law teachers. Such radicals are happiest ignoring, or knowing as little as possible about, social ideology, law, and legal theory in the communist countries. Their outlook is firmly provincial, selecting the parts of the world that suit them best. These Marxists especially rely on those cultures closest to home or most favourable to their concerns. They hold little belief in the Soviet Union and Eastern Europe, although they may still prefer these societies to "United States imperialism" and "liberal bourgeois individualism." If these primarily younger thinkers call themselves Marxists without qualification, they are likely to treat communist societies as not "truly" Marxist; as having been created in adverse conditions and consequently departing from the proper path. Implicitly, though, many carriers of this sort of Marxism and of a Marxist critique of law in English-speaking societies abandon Marxism as an unproblematic science, as a body of general laws and attested conclusions organized and organizable into a plan of history and historical development. They are concerned, rather, to choose sides against the power of capital and the profit motive and to support the cause of peace, community, and "rational" social relations. They draw from Marx a committed attitude and a radical research programme. They emphasize economic and class interest, social conflict, the insensitivity and prejudice of ruling groups and élites, "the structure of domination," the longings, interests, culture, the fate of the poor and exploited, and the view of law from below. This approach provides such younger Marxists with themes, rather than with laws. Some find in selected aspects of Marx's thought all that they need; others adhere to his categories and pronouncements very loosely.

Increasingly, these newer radicals see themselves as post-Marxist, "radical," or "critical" theorists. For some, "patriarchal" oppression and "exploitation" of women throughout history is now more important and more pervasive than the exploitation of serfs and workers. For others, blacks or "coloured" races and indigenous peoples, or even the "poor" (not a Marxist category), are the most important categories. These people are the truly exploited on a world scale. Many thinkers may have started with classical Marxism, but much of their radicalism has turned to a loose coalition of those with reasons for dissatisfaction with "bourgeois" society and ideology or "European" domination.

These viewpoints span the radical continuum, from women to the nuclear disarmament and "gay" liberation, from indigenous peoples who have lost their land and culture, to the poor nations taking part in what is alleged to be international class struggle between South and North, or between allegedly noncapitalist, nonindividualist ideologies such as Islam and the individualist decadent West. Even former members of the Old Left, as historians, find more inspiration in studying rural bandits than in looking at the proletariat today; the leading "revisionist" Marxist, Roger Garaudy, expelled in the 1960s from the French Communist Party for substituting "salarariat" for "proletariat," has been converted to Islam and attended the UNESCO-sponsored commemoration of the centenary of Marx's death as an observer from the World Muslim Federation.

In recent years, "exploitation" again has begun to replace "alienation" as the key word expressing and mobilizing hostility toward capitalism and capitalist firms among many classical Marxists. This is especially true for an intelligent new sector of "analytical" Marxists. But for all the economic overtones or undertones of that word, the fragmentations sketched above have undermined further the political centrality and effectiveness of economics and the notion of economic determinism in Marx. The new radicals increasingly emphasize cultural and ideological factors over economic factors, although they intermingle them with economic factors. Above all, the socialist and Marxist belief in the superior rationality and efficiency of public ownership and the planned economy of the socialist mode of production is almost completely eroded. Planned, state-run economies have their own problems promoting innovation, flexibility, productivity, and capacity to deliver goods that consumers want. Such economies can be and are just as dehumanizing and production-oriented as capitalist economies, except in so far as workers are "undisciplined" and opt out of the system. Nor have these state-run economies continued to deliver economic growth. Increasingly, third-world countries no longer admire the Soviet Union or China as economic models or as economic patrons (though they often like the Soviet legal model for its simplicity and its elevation of state power). Increasingly, Western Marxists and radicals no longer criticize capitalism for failing to deliver the goods that a socialist economy can or could produce. They criticize capitalism for producing too much, for creating excessive consumption and hopes of consumption, for creating *international* inequality, for ravaging the environment and not only exploiting people, but elevating an internalized but still enslaving work ethic.



## II. NEW RADICAL LEGAL GROUPS AND CONCERNS

Since the remarkable revitalization of Marxism and radical thought in the Western world accompanying and following the events of 1968, in which the official communist parties played no important role and in which universities and university intellectuals were central, discussions in Western Marxism have been increasingly independent, pluralist, and multi-faceted. These discussions are no longer subject to any consistent or coherent attempt at centralized communist party direction or the imposition of dogmatic orthodoxies, although Marxists remain an internally quarrelsome lot, constantly accusing each other of departing from Marx or Marxism. The decline of allegiance to a dogmatic Marxism as a coherent and universal science has been so great, indeed, that interest has shifted, especially among the growing number of academically trained Marxists, to exploring Marxist lines on and in particular fields and thus seeking to throw fresh illumination both on Marxism and the field in question. More and more would-be Marxist intellectuals earn their living as tutors, assistants, younger lecturers, or radical, new-wave professors in universities, polytechnics, and teacher training colleges. They do not seek to elaborate a Marxist theory for the proletariat, but rather a Marxist approach and programme for their own discipline, to radicalize the understanding of their subject, to transform "bourgeois" university courses into radical university courses and thus undermine capitalist culture. We now have schools, or at least discussion groups and conferences that explore Marxism and philosophy, Marxism and literature, Marxism and sociology, Marxism and anthropology, Marxism and history, or rather Marxism and particular histories, and Marxism and law. In some areas, such as sociology and "revisionist" history, Marxists have become both organizationally and intellectually very prominent, but by adopting, to some extent, the wider jargon and concerns of their trade. In other areas, including classical and seventeenth-century English history, they have been able to latch on to and build upon the widely recognized achievements of a somewhat older generation of politically committed but intellectually independent Marxists and neo-Marxists. These older Marxists have brought out the fruitfulness of the Marxist approach and shown a sense of its limitations.

Like leftist groups generally, such like-minded groups — "conferences" and "collectives" — have tended initially to be organized by and around a "hard core" of committed people, often not more than one or two. These usually have been more conscious and wide-ranging in their "Marxism" than the rest, both at the level of theory and of involvement

in practical action, at least within the academy. Nor do such groups display striking permanence or stability: in Continental Europe, where there has been a richer tradition of past Marxist philosophical and other academic endeavour to draw on, their membership and their interests shift as new social problems, new radical causes, and new intellectual trends or disagreements come to the fore. Thus, the very non-Marxist work of Professor Bodenheimer reflects the philosophical seriousness and sophistication of Continental Europe and the capacity of non-Marxists to deal with Marxism. European Marxists are somewhat less academically amateurish than Marxists in English-speaking countries, where the general background education of professionalized academics, especially lawyers, in the wider subjects of philosophy, history, and modern European thought often has been far more deficient. In all countries, seeing the universities as politically and academically conservative institutions and not emphasizing or openly respecting ability independently of political commitment, such Marxist groups have pursued organizational as well as intellectual influence. They seek to promote, in any way that will succeed, the appointment of like-minded teachers and the framing of "Marxist" courses.

However, the removal of dogmatic constraints by a number of Western European Communist Parties, including the British, has led to some important and basic discussions of Marxist methodology and Marxist conceptions of the relation between theory and history, and economics and culture. In Continental Europe much of the Marxist discussion concerned the relationship between Marx and Hegel and the correct understanding of the philosophy of Marxism. There also was important discussion of the rise, character, and internal dynamic or lack of dynamic of social formations, *e.g.*, feudalism, the Asiatic mode of production, and how to classify African history. In Britain, a series of works by the late Raymond Williams — *Culture and Society* (1958); *The Long Revolution* (1961); and *Marxism and Literature* (1977) — attracted widespread popular and radical attention. These works led to a major debate between Raymond Williams and the editors of the *New Left Review* on Marxist methodology and the relation of culture to the economic base.<sup>1</sup> Williams, emphasizing popular culture against the abstract reification and categorization imposed upon social thinking by historical élites, nevertheless insisted on the relative autonomy of popular culture and literature. He specifically rejected a past Marxist tendency to overemphasize the economic and political and to treat culture

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<sup>1</sup> R. WILLIAMS, *POLITICS AND LETTERS* 350-51 (1979).

as superstructural. In *Marxism and Literature*, Williams argued for the "materiality" of culture as a form of production. Human beings create language, meanings, and values, just as they create products. They do so out of the "living experience" of ordinary people and not just that of artists and writers. Language is thus a form of practical consciousness and not merely a reflection of practical activity:

The social and political order which maintains a capitalist market, like the social and political struggles which created it, is necessarily material production. From castles and palaces and churches to prisons and workhouses and schools; from weapons of war to a controlled press: any ruling class, in variable ways though always materially, produces a social and political order. These are never superstructural activities.<sup>2</sup>

For the Marxists of the *New Left Review*, this was more than they could take. They complained justly, but without sharpening the issue or facing deeper confusions involved in the term "material," that Williams had lapsed into "a new circularity in which all elements of the social order are equal because they are all material."<sup>3</sup> In truth, the *New Left Review* Marxists said, "some forms of matter are more materially effective than others"<sup>4</sup> (shades of Mr. Pickwick!). More intelligently, Terry Eagleton in *Criticism and Ideology* commented that "Williams often manoeuvred himself into the contradictory position of opposing a crippling hegemony whose power he had simultaneously to deny because not to do so would have suggested that ordinary people were not after all the true creators of meanings and values."<sup>5</sup>

More solid and significant was the attack launched by the Marxist historian E.P. Thompson, author of *The Making of the English Working Class* (1968) and *Whigs and Hunters: The Origin of the Black Act* (1975). Thompson dismissed Althusserian and economic-technological determinism on behalf of an empirically based and historically based Marxist writing of history. In *The Making of the English Working Class* Thompson set out to show that class was not the product simply of economic developments, steam power, and cotton mills. The formation of the English working class was a fact of political and cultural history as much as of economic history. The former was not reducible to the latter. The foundation texts of the English working-class movement were Bunyans's *Pilgrim's Progress* and Paine's *The Rights of Man*. The movement drew on an older and wider tradition of protest

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<sup>2</sup> *Id.* at 351.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> T. EAGLETON, *CRITICISM AND IDEOLOGY* 28 (1978).

on behalf of liberty of conscience, trial by jury, communitarianism, a ("slumbering") sense of democracy, and the notion of a free-born Englishman. These were formed in the struggle against arbitrary arrest, absolutism, rising food prices, the disruption of paternalism, and the moral economy, which was represented by the concept of the "just price" through the pre-industrial eighteenth-century growth of *laissez-faire*, the free market, and the cash nexus. Field labourers, artisans, and weavers were among the most radical in popular protest. Thompson argued in his *Patrician Society, Plebeian Culture* that cultural hegemony was only secondarily an expression of economic or physical (military) power.<sup>6</sup> Cultural hegemony rests on "images of power and authority" with which the rulers — described for eighteenth-century England variously as the "patricians," "the ruling class," "the great," and "the gentry" — exercise cultural hegemony and social control and on the "popular mentalities of subordination" that make this possible. In the eighteenth century, the regular and practical exercise of patrician paternal authority and responsibility declined. Authority was increasingly expressed in symbolic gestures and occasional dramatic interventions which masked the fact that the patricians were becoming distant from the village and from plebeian cultures. Cultural hegemony by the patricians more and more required the "theatre" of the law and politics to establish an image of social order and social control. The people, given more space to develop a plebeian culture by the withdrawal of the patricians, developed their forms of popular action — anonymous letters, arson, houghing of cattle, opening of fishpond sluices — and the counter-theatre of the poor, threatening "sedition" by burning effigies, hanging a boot from the gallows, illuminating windows, and punishing plebeian offenders against popular norms by *charivari*.

Thompson, in rejecting the base and superstructure model, wanted to reject the direct determining role of economic structures and relations as well. In an article on Folklore, Anthropology, and History,<sup>7</sup> he quoted with approval a passage in the *Grundrisse* in which Marx speaks of a specific or determinate production and its relations as a "general illumination in which all other colours are plunged which modifies their specific tonalities" — a view that is neither causally nor structurally determinist.

Thompson's specific attack on Althusserianism, published as *The*

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<sup>6</sup> Thompson, *Patrician Society, Plebeian Culture*, 7 J. SOC. HIST. 382, 405 (1974).

<sup>7</sup> Thompson, *Folklore, Anthropology, and History*, 3 INDIAN HIST. REV. 247, 261 (1977).

*Poverty of Theory* in 1978, saw structuralism as promoting elitism and vanguardism and as deliberately obscuring or denying the role of ordinary people as active historical agents. Structuralism is a dangerous reversion to Stalinism, just as Marxism is liberating itself by seeing facts and caring about people. For the structuralist, Thompson writes:

[W]e are *structured* by social relations, *spoken* by pre-given linguistic structures, *thought* by ideologies, *dreamed* by myths, *gendered* by patriarchal sexual norms, *bonded* by affective obligations, *cultured* by *mentalities*, and *acted* by history's script.<sup>8</sup>

Against this, as a historian and not only a Marxist, Thompson insisted that

there is a real and significant sense in which the facts are "there" and . . . determining, even though the questions which may be proposed are various, and will elucidate various replies . . . the facts will disclose nothing of their own accord, the historian must work hard to enable them to find "their own voices." Not the historian's voice, please observe; *their own voices*, even if what they are able to "say" and some part of their vocabulary is determined by the questions which the historian proposes.<sup>9</sup>

An essential part of the historian's task is "getting it right" and no theory can do that alone or without recognizing an objective, independent "it" for historians to explore and interrogate. There was no shortage of Marxists to tell Thompson that he had failed to understand that historical facts are "valid" only if they are arrived at through theory and consistent with theory. This will surprise no one acquainted with Marxism or with the extent to which the word "valid" has become fashionable as a substitute for recognizing the objectivities of truth and of true assertions. The scope of Thompson's empirical and humanist revolt against Marxist abstraction, Marxist dogma, and Marxist elevation of theoretical categories can be gauged by the fact that Thompson distinguishes the younger Marx from the older Marx. He sides with the humanist Marx of the 1840s against the abstract economist Marx of the 1850s and later. Political economy, for Thompson, had sucked the later Marx into a "theoretical whirlpool" in which such abstractions as value, capital, labour, and money re-appear again and again, are interrogated, categorized, re-interrogated, and recategorized.

The debates that have surrounded these pronouncements and others like them range from re-examinations and re-interpretations of Marxist theory to disputes over the relations between history and theory and over the facts themselves. These discussions are reflected in Perry An-

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<sup>8</sup> E.P. THOMPSON, *THE POVERTY OF THEORY* 345 (1978) (emphasis in original).

<sup>9</sup> *Id.* at 222-23 (emphasis in original).

derson's *Considerations on Western Marxism* (1976), in his *Arguments within the English Marxism* (1980), in the pages of the *New Left Review*, the *Socialist Review*, *Marxism Today*, the annual *Socialist Register*, *Telos*, *Contemporary Crises*, and other Marxist and radical journals. Some argument is sharp, knowledgeable, and important, some obtuse and scholastic. The basic difficulty in resolving the disputes lies in the imprecision and open-endedness, sometimes even the systematic ambiguity, of such key Marxist terms as "material," "economic," "productive forces"; and "relations of production," "determines," "in the last instance," "structure," and "mode of production." To the non-Marxist, it seems clear that Marxists become more interesting, and their Marxism becomes less dogmatic and theory-laden, as they work with more knowledge and in greater detail on any history or social situation. Increasingly, for the most intelligent, Marxism suggests themes to explore, hypotheses to test for possible falsification, approaches that may be fresh, and areas that may have been under-investigated. By and large, the results of honest investigation have complicated Marxist theory at best and in many respects undermined it, though often demonstrating its initial fruitfulness as an approach to be revised or modified in the light of what actually happened. Marx's reflections on the significance of the Silesian weavers' revolt, after all, were derived principally from a poem on the subject by Heinrich Heine, not from any investigation of working-class or artisan unrest. In others, this threat to Marxist dogma and general theory produces a sharp reversion to elevating theory over and against "the facts" or denying that there is any question of "fact" independent of theory.

Together with a considerable loosening of Marxist discussion in the Western world and a willingness to grapple in more detail with historical and theoretical problems has come a more serious discussion of the relationship between Marxism and the study of law. Some of the discussion reappraises the orthodox Marxist-communist conception of law as the command of a state that expresses and serves the interest of the ruling class. This discussion draws on the more complex view of state, politics, and ideology presented in the work of Gramsci and Althusser, in Nicos Poulantzas's *Nature des choses et droit* (1965) and his *Political Power and Social Classes* (1968, T. O'Hagan trans., 1973), in Ralph Miliband's *The State in Capitalist Society* (1969), and in the writings of Perry Anderson. Others have come to their critique of law through criminology — studying either the history of crime or the concept of crime or both. In the United States, a critical legal studies movement has developed out of the initially non-Marxist radicalism of Students for a Democratic Society (SDS), drawing on and developing

conflict sociology and social theory, the exposure of legal impartiality and the authority of legal rules by American realism and a host of other contemporary trends. Certainly, the last fifteen years have seen no major Marxist legal theory or Marxist legal work comparable to Renner's work or Pashukanis's work. However, there has been a rediscovery of both these thinkers and active discussion and publication of Marxist "critiques" of law. Most of these are "exposures" of the way in which law abstracts, reifies, conceals repression and ideology behind a facade of impartiality, represents or consolidates class interest and the structure of domination, produces "fetishistic" attitudes and responses in its practitioners and exacerbates the social evils it is meant to cure. But debate also exists over the specifically legal — "the form or forms of law" — and the bases for cultural hegemony as the "mobilization of consent."

In France, Germany, and Italy, re-appraisals of Marxism and the theory of law began in the late 1950s and early 1960s with the renewed consciousness of Marx's early writings on law and a subtler interest in Marxist approaches to law as a form of alienation and reification. The Gramscian emphasis on the state and cultural hegemony and the Althusserian interest in the nature and relative autonomy of political and ideological instances or levels or substructures had pushed this further and exercised more direct influence on English-speaking lawyers and sociologists. So had the work of Poulantzas. By the late 1970s, Z. Bankowski and G. Mungham had published their *Images of Law* (1976); I. Taylor, P. Walton and J. Young published *The New Criminology* (1973); I.D. Balbus produced the widely discussed *The Dialectics of Legal Repression* (1973); and M. Cain and A. Hunt had issued their selection *Marx and Engels on Law* (1979) and launched the British journal *Law and Society*. A debate on law and ideology had taken off in a major way with three books published in 1979: P. Hirst's *On Law and Ideology*, J. Larrain's *The Concept of Ideology*, and C. Sumner's *Reading Ideologies*. J. Holloway and S. Picciotto edited *State and Capital: A Marxist Debate* (1978) and B. Fine, R. Kinsey, J. Lea, S. Picciotto, and J. Young edited, for the National Deviancy Conference, *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (1979). In the same year, B. Edelman's *Ownership of the Image: Elements for a Marxist Theory of Law* was translated from the French. A debate on Pashukanis and his "commodity-exchange theory of law" also developed in several journals on both sides of the Atlan-

tic.<sup>10</sup> Soon, standard and conventional texts in jurisprudence, such as Lord Lloyd of Hampstead's text, were devoting space to Marxist jurisprudence and considering both communist legal theory and legal systems and the new Western Marxist critique of law. The 1979 British Sociological Association Conference began with a plenary session on "law and the capitalist state"; the opening speaker was Nicos Poulantzas, who tragically committed suicide in September of that year.

In radical discussions of Marxism, philosophy, and legal theory, allegiance to a specific brand of Marxism or radical faction is now neither required nor always evident. Some of those taking part in contemporary "radical" discussions of law and mentioned as authors above prefer not to describe themselves as Marxists but as radicals, critical theorists, or sympathetic to anarchism. In the United Kingdom increasing discussion within the British Communist Party was accompanied by the founding of the Conference of Socialist Economists held at Cambridge University in 1970. The Conference, which began issuing a Bulletin in 1971, was originally conceived as a nonsectarian discussion group for socialist economists of all persuasions, but between 1972 and 1975, Marxists became dominant and many non-Marxists withdrew. The Conference is organized into regional and interest groups. Its law and state interest group, though small in membership, was centred mainly in Warwick University, the Middlesex Polytechnic, and Edinburgh University, and was of some importance in introducing and furthering serious Marxist discussion on law and "the legal form" in the United Kingdom. Younger Oxford dons have now jumped on the bandwagon.

The United Kingdom discussion of law originated largely with Marxist economists, sociologists, and historians who took interest in Marxist analysis of law, radical criminology, and eighteenth-century criminal legislation. In America, the principal radical group, the Conference on Critical Legal Studies (CLS), was formed by left liberal, radical, and Marxist lawyers concentrated at Harvard University Law School and the Wisconsin Law School. Founded in 1978, CLS described itself as "a national organization of lawyers, teachers, students, social scientists and others committed to the development of a critical theoretical perspective on law, legal practice and legal education."<sup>11</sup>

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<sup>10</sup> Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC. REV. 571-88 (1977); Kinsey, *Marxism and the Law: Preliminary Analyses*, 5 BRIT. J. LAW & SOC. 202-27 (1978); Warrington, *Pashukanis and the Commodity Form Theory*, 9 INT. J. SOC. OF LAW 1-22 (1981).

<sup>11</sup> For details and an indication of the extent to which the group can adopt a child-



The group is not officially Marxist and began as a break-away group from conflict studies, legal realism, and the "law and development" approach. It was based on the radicalism of the SDS founded at Wisconsin in the 1960s rather than on any native Marxist or communist intellectual heritage, which it discovered later in the work of Sweezy, Genovese, and others. CLS sharply rejected the liberal jurisprudential approaches of Rawls, Posner, and Dworkin. It was strongly influenced by the earlier work of CLS member Roberto Mangabeira Unger at Harvard, and it sees itself as developing and transcending legal realism with the aid of Marxian and other radical insights. In recent years it has done much of its most serious work in the area of legal history, though that, too, has been subjected to sharp criticism which alleges inaccuracy and selectivity.

Marxist critique of law, even in Britain, did not burst fresh upon the world in the 1960s. The communist parties of the 1920s and 1930s contained a number of active lawyers in Germany, France, Italy, Spain, Great Britain, and many other countries, including the colonies. There were even more Marx-influenced leftists and social democrats who, in the Weimar Republic for instance, earnestly set about "socializing" the law and its concerns by emphasizing public interest legislation, industrial law, and social welfare provisions. In Britain, the National Council of Civil Liberties was founded in 1934 by social democratic and leftist lawyers, and the Haldane Society of Socialist Lawyers was established soon after. After World War II the Society of Labour Lawyers also campaigned for socialist legal reform rather than against law. Generally, communists completely rejected law as a form of class justice, while social democrats believed law could be reformed and shaped for socialist ends. Depending on the wider political situation, Marxist and social democratic lawyers could either cooperate in specific protests and demands, or denounce each other.

Before the Second World War and for a period thereafter, the typical subjects and interests of the radical lawyer were criminal law, industrial and especially trade union law, political trials, and civil liberties. The radical lawyer, such as the communist D.N. Pritt, put his legal skills — his advocative powers, his expertise in the law as it was, his capacity to convince the judge and persuade the jury — at the service of "deserving" clients. These clients included trade union leaders and

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ishly undergraduate tone, see the Symposium on Critical Legal Studies, 36 STAN. L. REV. 1-674 (1984) and D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (copy on file at U.C. Davis Law Review).

members, poor tenants, political protesters and detainees, student rioters, "subversives," and agitators in the colonies. For some, whose view Taylor summarized, the law became, in practice at least,

a body of rules that can be used to arbitrate between conflicting interests in an essentially neutral fashion. In so far as law has operated otherwise in the twentieth century, and in so far as it has appeared to operate in the interests of property as against labour, it has done this because of the undemocratic and class-bound procedures of recruitment of judges and magistrates and the narrow and unsociological training of professional lawyers. Law has been an instrument through which the hierarchies of class society and the pre-eminence of propertied interest are reproduced, but it is not an essential feature of law that it must operate instrumentally in this direction. The remedy for this bias in law has been seen to be the reform of the class character of recruitment of legal personnel, and in particular, in some writing by social democrats, the introduction of a full-time professional magistracy and the radical reform of the training of the judiciary as a means of wresting [sic] control of law from aristocratic amateurs.<sup>12</sup>

J.G. Griffith's *The Politics of the Judiciary* (1977) is principally devoted to this sort of "American realist" exposure of the alleged class bias of (U.K.) judges. This approach is always welcome to Marxists but is considered inadequate theoretically if it is accompanied by the belief sketched by Taylor (and sharply repudiated by him) that law is in principle, as a formal system, neutral. Even D.N. Pritt, in his four-volume *Law, Class and Society* (1972), was affected by the European post-war labour-liberal consensus in favour of social democratic reform of the law. He writes:

The law is not, therefore, the merely automatic reflection of a particular economic structure, but takes shape, develops and changes in ways determined by actual class interests and class struggles. . . . The ruling class by no means uses its power impartially for the benefit and protection equally of all classes that make up the community. Nor are its servants, including the legislators, judges and lawyers, in any sense neutral. It governs in its own interests, which it professes to believe, and perhaps sometimes does believe, to be identical with the interests of the whole people.<sup>13</sup>

But in modern democratic society the ruling class cannot govern without the acquiescence or approval of the working class, which is a significant constituent of society. Therefore, for Pritt, law is not entirely engineered by the ruling class: the worker and his fellow citizens contribute every day to its formation and development. They do so "by their resistance to — or their acquiescence in — the proposals of their

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<sup>12</sup> I. TAYLOR, *LAW AND ORDER: ARGUMENTS FOR SOCIALISM* 165 (1981).

<sup>13</sup> D.N. PRITT, *The Apparatus of the Law* in 2 *LAW, CLASS & SOCIETY* 7-8 (1972).

rulers, by their positive demand for reforms, and by their apparently intangible but real and indeed powerful influence on the formation of public opinion." From this it follows that "the working class today has much more influence on the development of our law than appears on the surface, and working people have a corresponding responsibility to maintain continuously the greatest possible pressure on public opinion and on the government to secure the most healthy development possible."<sup>14</sup>

With the collapse of the protest decade of the 1960s and the swing back to conservatism in Britain and other parts of the Western world, hostility to law once again increased among Marxists. One area that helped to shape aspects of this new "legal nihilism," — although it also provided some more complex considerations of law and its social role — was the radical criminology and historical studies of crime and criminal law that came to the fore in the late 1960s.

### III. CRIME AND CRIMINOLOGY

In both the United States and the United Kingdom, indeed, a wider stream of Marxist or radical approaches to law arose out of a pre-history in criminology. The Marxist Willem Bongers' *Criminality and Economic Conditions*, first published in French in 1905 and translated into English by H.P. Horton for the American Institute of Criminal Law and Criminology in 1916, was re-discovered by English-speaking Marxists only recently. Bongers published two further books in English translations, *An Introduction to Criminology* (1936) and *Race and Crime* (1943). Two members of the Frankfurt School, George Rusche and Otto Kirchheimer (joint authors of *Punishment and Social Structure*, published in English in 1939) also had introduced Marxist approaches to criminology to an English-speaking public before the Second World War; Kirchheimer taught in New York City at the New School for Social Research and, later, at Columbia University until his death in 1965. By the late 1960s, a new generation of criminologists was also drawing on the conflict theory in sociology associated with C. Wright Mills, Ralph Dahrendorf, and Austin Turk to argue that law does not represent the institutional concerns of all segments of society or an impartially just social order. Law secures the interests only of particular segments or classes, those that have power to shape public policy and define crime to suit their interests. In the United States, the work of Richard Quinney (*The Problem of Crime* (1970), *Critique of*

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<sup>14</sup> *Id.* at 10.

*Legal Order: Crime Control in Capitalist Society* (1973), and *Class, State and Crime: On the Theory and Practice of Criminal Justice* (1977)) moved from a pluralist conflict of interests version of structural-functionalism and sociological jurisprudence to an enthusiastic and then more considered Marxism. In the United Kingdom, *The New Criminology* published by Taylor, Walton, and Young in 1973 had similar impact. Both Quinney's work and personal influence and *The New Criminology* produced a group of American radical criminologists, especially associated for a period with the School of Criminology at Berkeley and calling themselves The Crime and Social Justice Collective.

In the United Kingdom in 1968, a National Deviancy Conference was formed, consisting of sociologists, criminologists, legal academics, and radical activists. They were held together by their rejection of the assumptions of "conventional" criminology which studied the criminal as a "misfit" instead of studying the society that produced him or her and the protest inherent in his or her action. Conventional criminology, they said, failed to see that society's rulers defined and created the offender's "crime." Marxists were especially critical of the work of the United Kingdom's Cambridge Institute of Criminology and of its Director, Leon Radzinowicz, whose four-volume *History of English Criminal Law and its Administration from 1750* (1948-1968) has long dominated the field. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* and D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson, and C. Winslow, *Albion's Fatal Tree* (1975) were shots in the war against Radzinowicz's influence.

These books reflect the thinking of E.P. Thompson and of those associated with the Centre for the Study of Social History at the University of Warwick who were interested in class conflict; economically and politically based protest from below; and the use of law to suppress such protest, not only by physical force, but also by the mobilization of consent and the use of imagery and theatre. *Whigs and Hunters* grew into an independent book out of an essay originally meant for inclusion in *Albion's Fatal Tree*. Both volumes explore what appears to be an explosion of "crime" in eighteenth-century England (the facts are admittedly in dispute). The authors prefer to put "crime" in inverted commas in this context and stress that there are two types of criminals. The "good" criminals are premature revolutionaries or reformers, forerunners of popular movements, and perhaps all kinds of rioters, smugglers, poachers, and "primitive rebels in industry," who commit "social crime." The other criminals are "those who commit crime without qualification: thieves, robbers, highwaymen, forgers, arsonists, and

murderers. (Around the thieves of all degrees, with their necessary and concomitant organization of receivers, informers, the drink and sex trades, it is deceptively easy to borrow contemporary criminological terms of 'deviance' and 'sub-culture.')"<sup>15</sup> While *Albion's Fatal Tree* is more weighted toward social crime than the contributors originally intended, the authors claim their research made it "less possible to sustain any tidy notion of a distinction between these two kinds of crime." Still, the book contains a real difference of emphasis at each end of the continuum and in the conclusions reached by the various contributors.

Marxist discussion of the books (and also widespread consideration of the books by others as empirical pieces of social history) has focused on Douglas Hay's theoretical opening chapter in *Albion's Fatal Tree*, "Property, Authority and the Criminal Law." In a less criminological context, E.P. Thompson's postscript in *Whigs and Hunters*, setting out his attitudes to the concept of justice and the recognition that law has a certain limited integrity, has also attracted much Marxist discussion.

For Hay, the central issue is that the eighteenth-century criminal law is a law based on terror, used to enforce the radical redefinition of property that gentlemen made in their own interests during the eighteenth century. Yet while the number of offenses carrying the death penalty was drastically increased, the actual number of executions did not rise drastically. Why? Because, Hay responds, the ruling class recognized that terror alone could not establish and secure the connections between property, power, and authority necessary to define and condemn theft. "The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests."<sup>16</sup> Law is a system of selective terror, but it is also an ideological system which combines imagery and force, ideals and practice. In the eighteenth century, law with its customs, courtroom theatricals, its specialized jargon, and its internal closed intellectualism came to dominate the discussion of property and social relationships and replace religion as the dominant form of ruling class

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<sup>15</sup> Unsigned preface, D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 14 (1975) [hereafter *ALBION'S FATAL TREE*]. One of the contributors, Peter Linebaugh, ascribes the preface to E.P. Thompson. Linebaugh, *Marxist Social History and (Conservative) Legal History: A Reply to Professor Langbein*, 60 N.Y.U. L. REV. 212, 215 (1985). For a devastating critique, see Langbein, *Albion's Fatal Flaws*, 98 PAST AND PRESENT 96 (1983).

<sup>16</sup> Hay, *Property, Authority and the Criminal Law*, *ALBION'S FATAL TREE*, supra note 15, at 25.

ideological hegemony. As ideology, law elevates and acts out in rich imagery and social theatre the concepts of majesty, justice, and mercy. All of these concepts have considerable psychic force but help to conceal that the new justice of property can come into sharp conflict with natural justice and the moral economy and that "the claims of class saved far more men who had been left to hang by the assize judge than did the claims of humanity."<sup>17</sup> Yet, Hay insists that the concept of justice in eighteenth-century law is not mere nonsense. The effectiveness of law

lies first in its very elasticity, the fact that men are not required to make it a credo, that it seems to them the product of their own minds and their own experience. And the law did not enforce uniform obedience, did not seek total control; indeed, it sacrificed punishment when necessary to preserve the belief in justice. The courts dealt in terror, pain and death, but also in moral ideals, control of arbitrary power, mercy for the weak. In doing so they made it possible to disguise much of the class interest of the law. The second strength of an ideology is its generality. Provided that its depths are not explored too often or by too many, it remains a reservoir of belief throughout the society and flows into the gaps made by individual acts of protest. Therefore, those using it are concerned above all with surface appearances. Undoubtedly the gentleman accepting an apology from the man in his power, the thief or the rioter, would have been gratified to know that the contrition was absolute, from the soul. But provided that the act of contrition was public and convincing, that it served to sustain general belief in the justice of the social order, it sufficed. It became part of the untested general idea, the ideology which made it possible to stigmatize dissent as acts of individuals, of rogues and criminals and madmen.

The hypothesis presented here is that the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army. The ideology of the law was crucial in sustaining the hegemony of the English ruling class. This argument, if sound, helps us to explain their resistance to suggestions for drastic legal reform. It also casts some light on the membership of that ruling class, and the character of their society.<sup>18</sup>

By contrast, Taylor, Walton, and Young's *The New Criminology* was an ahistorical, strongly ideological, and much more stridently Marxist work that rejected all forms of meliorism. It called for fundamental social change and rejected the futilities of "social welfare oriented criminology," "reformism," and "correctionism." The authors argued that a criminology that is not normatively committed to the abolition of inequalities of wealth and power, and in particular of inequalities in property and life-chances, inevitably falls into correctionism — a correctionism that must be broken with entirely. For

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<sup>17</sup> *Id.* at 44.

<sup>18</sup> *Id.* at 55-56.

the abolition of crime is possible under certain social arrangements . . . under conditions of a free division of labour, untrammelled by the inequalities of inherited wealth and the entrenchment of interests, of power and authority (by those who were not deserving of it). . . . The task is to create a society in which the facts of human diversity, whether personal, organic or social, are not subject to the power to criminalize.<sup>19</sup>

The new criminologists reject the traditional criminologist's search for specific characteristics that distinguish a class of criminals from a class of noncriminals. There are simply no such differences. J.G. Poveda makes this point when he writes:

This false dichotomy has usually taken expression in the characterization of criminals as belonging to some criminal type. Where earlier criminal type myths attempt to link the criminal to certain physical characteristics or mental deficiencies, the modern myth of the criminal type persists in identifying the criminal with a particular type — poor, lower class, slum dweller.<sup>20</sup>

The immediate effect of this, of course, is to convert such lower class "role-bearers" into putative criminals, to fix a label on them, and thus to make them criminals. But Poveda argues that it is a mistake "to take crime out of its social context and to try to explain it as the product of a minority of unfortunate individuals apparently 'outside' the bounds of conventional society,"<sup>21</sup> or to look for the explanation of criminal activity in the personal background and immediate social environment of the offenders as "deviants." The population cannot be divided into two groups: criminals and noncriminals. The causes of crime cannot be located by finding factors that significantly differentiate the two groups. Sociological studies in the United States and elsewhere show that the vast majority of individuals in society (in some studies as many as ninety per cent of respondents) report they have committed offenses for which they could have been gaoled. Why, then, are social control mechanisms so highly selective in the legal norms they choose for enforcement, in their disposition of organizational resources for control, and in

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<sup>19</sup> I. TAYLOR, P. WALTON & J. YOUNG, *THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE* 281-82 (1973) [hereafter I. TAYLOR].

<sup>20</sup> Poveda, *The Image of the Criminal: A Critique of Crime and Delinquency Theories*, 5 *ISSUES IN CRIMINOLOGY* 59 (1970), cited in Brown, *The New Criminology*, in *LAW AND SOCIETY: THE CRISIS IN LEGAL IDEALS* 81 (E. Kamenka & E.-S. Tay eds. 1978) [hereafter *LAW AND SOCIETY*]. We have drawn on Dr. Brown's paper at several points in this Article.

<sup>21</sup> M. PHILLIPSON, *SOCIOLOGICAL ASPECTS OF CRIME AND DELINQUENCY* 245 (1971), cited in *LAW AND SOCIETY*, *supra* note 20, at 82.

those individuals they choose to control?<sup>22</sup> To understand and account for individual participation in criminal activity, we must look at the wider structure of society and the power and property relations in it. We must also look at "the derivation of the 'criminal' label (whose content, function and applicability . . . will vary across time, across cultures and internally within a social structure)."<sup>23</sup> The new criminologists believe, as Robert Brown puts it:

that the sorts of behaviour which are made subject to the penalty of the criminal law in Western industrial societies are those that threaten the property rights and privileges of the power-holding groups. Crime of this type is a primitive form of class warfare by working people against their economic superiors, and the latter try to hold the former in check by means of the criminal law. The police and judiciary are conditioned to penalize severely offenses which arise from the precarious and unjust conditions of working-class life; but these same officials treat middle-class offenses with the utmost sympathy. Working-class offenders are treated as serious threats to the social order whereas middle-class criminals are treated as being simply mischievous. Thus it is no mystery . . . why criminals come to be thought of as predominantly young, working-class males. Everything in the society conspires to cast them in the role of dangerously criminal youth, and once selected and convicted, the young male offenders will be taught by hard experience to label themselves as permanently criminal.<sup>24</sup>

Crime, in short, is the product of inequalities between social classes — private wealth, private property, social power, and life-chances — and of the fact that those on top have the power to declare and define the crime and to direct law-enforcement in conformity with their interests and prejudices. The criminal as a "type" — that is, as a recidivist — is created by the criminal label attached to him or her, by the conditions of life forced upon the "criminal."<sup>25</sup>

Richard Quinney's conversion to Marxism from a more pluralist structural conflict sociology of crime came in his second book, assertively and unambiguously entitled *Critique of Legal Order: Crime Control in Capitalist Society*. Here he sees law as the legal order, as the product of the capitalist ruling class, and the state as the servant of that ruling class. Criminal law is quite simply an instrument of the

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<sup>22</sup> Cf. LAW AND SOCIETY, *supra* note 20, at 83, citing M. PHILLIPSON, *supra* note 21, at 83.

<sup>23</sup> I. TAYLOR *supra* note 19, at 224.

<sup>24</sup> Brown, *supra* note 20, at 84.

<sup>25</sup> For a careful and trenchant criticism of these positions, see Brown, *supra* note 20, at 85-107; for a critical discussion of how these beliefs relate to penology, see Hawkins, *The New Penology*, in LAW AND SOCIETY, *supra* note 20, at 108-27.



ruling class and its state is required to perpetuate the existing order. The legal system is essentially repressive in function. Crime control is carried out by state functionaries, a government elite, which simply represents ruling class interests of maintaining control of the means of production and the state apparatus; and in contemporary conditions, represents the United States maintaining imperialist or neo-colonialist power abroad. Quinney's book vacillates between a simple conspiracy theory of law and an emphasis on law as ideology, although a violent and repressive ideology:

The legal ideology has done little more than perpetuate an oppressive system that depends on the domination of one class by another. Not to have seen beyond the dominant legal ideology represents a lack of critical imagination. To do better is the objective of a critical philosophy of legal order. . . .

As I have argued throughout, the capitalist state is a tool of the ruling class, maintaining the dominance of that class over the classes oppressed by the capitalist system. The capitalist state, in turn, makes and enforces law for the purpose of securing and perpetuating the interests of the capitalist ruling class. The legal order of the capitalist state is a device to maintain the domestic social and economic order. It follows from this, then, that the capitalist state and its legal system can continue to exist only as long as there is need to secure the dominance of the ruling class. With the achievement of a socialist society, devoid of classes, bureaucracy, and centralized authority (that is, characterized by equality, participatory democracy, and decentralized control), the state may no longer be necessary. And following this, there may be no state law. Law as we know it today will be relegated to the history of a former age.<sup>26</sup>

For Quinney, as for Engels, both law and state as instruments of coercion arise from, and depend upon, the division of society into antagonistic classes. A true decentralized and participatory society would re-establish the communal solidarity lost when states and private ownership began to dominate society. The communal solidarity was not regained in the oppressive state socialisms of the communist world.

In his third major work, *Class, State and Crime: On the Theory and Practice of Criminal Justice*, Quinney retreats from a simple (often conspiratorial) class instrumentalist view of law to an approach that he claims is firmly grounded in the political economy of material production. He now sees the state as only an indirect or mediated reproduc-

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<sup>26</sup> R. QUINNEY, CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY 140, 189-90 (1974). In the discussion of Marxist criminology that follows, as in other places in this part, we owe something to summaries and critical assessments prepared for us by Mr. Andrew Frazer.

tion of class rule and criminal law as primarily protecting and projecting the interest of the state:

The state exists as a device for controlling the exploited class, the class that labors, for the benefit of the ruling class. . . . Moreover, the capitalist state is oppressive not only because it supports the interests of the dominant class but also because it is responsible for the design of the whole system within which the capitalist ruling class dominates and the working class is dominated. The capitalist system of production and exploitation is secured and reproduced by the capitalist state.

The coercive force of the state, embodied in law and legal repression, is the traditional means of maintaining the social and economic order. . . . Law and legal repression are, and continue to serve as, the means of enforcing the interests of the dominant class in the capitalist state. . . .

Those who rule in capitalist society — with the assistance of the state — not only accumulate capital at the expense of those who work but impose their ideology as well. Oppression and exploitation are legitimized by the expropriation of consciousness; since labor is expropriated, consciousness must also be expropriated. In fact, *legitimacy* of the capitalist order is maintained by controlling the consciousness of the population. A capitalist hegemony is established.<sup>27</sup>

For Quinney, although the state was meant to protect ruling-class interests and capitalist appropriation, it now produces and furthers a crisis in late capitalism and real prospects of a transition to socialism. The economic function of the state leads to more and more “unproductive” workers in state employment as well as students and welfare recipients. These results produce a fiscal crisis as well as a crisis in legitimation, for they develop a political consciousness that threatens the legitimacy of the state. The state, to ensure domination over this unproductive and politically conscious part of the population must increase coercion especially through the criminal law.

Thus, the capitalist state itself makes us political, making class struggle obviously a political struggle. Just as the capitalist economy appropriates our labor power, the capitalist state attempts to appropriate our political power. Politics within the capitalist state becomes alienated politics, just as work under capitalism becomes alienated work.<sup>28</sup>

Quinney argues that crime, like the state, is a complex and contradictory phenomenon: it may reinforce and maintain the capitalist mode of production and accumulation; crime may simply accommodate itself to

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<sup>27</sup> R. QUINNEY, CLASS, STATE AND CRIME: ON THE THEORY AND PRACTICE OF CRIMINAL JUSTICE 45, 47 (1977).

<sup>28</sup> *Id.* at 87.

these modes; or crime may react against and resist these modes. Further, crime subverts private property without necessarily questioning property relations. Although crime potentially is a revolutionary activity, it may be counter-revolutionary; the poor robbing the poor reinforces demands for law and order, even by the poor, which results in strengthening hegemony while rejecting it. The aim of a Marxist criminology must be to help develop working class consciousness and channel action into revolutionary activity by developing a concept of popular justice based on community and workplace-oriented cooperation.

A similar shift from pluralist conflict sociology toward a Marxism influenced by Gramsci, Habermas, and more complex analysis of the state is displayed in the work of William Chambliss in the United States. Chambliss worked in a sociological vein on the history of vagrancy law. In 1971 he published, with Robert Seidman, the criminology textbook *Law, Order, and Power*. It had a basic quasi-Marxist theme that saw law as a state sanctioned normative system of social engineering and control whereby one part of the population uses state power to coerce another segment. Chambliss and Seidman argue:

It is our contention that, far from being primarily a value-neutral framework within which conflict can be peacefully resolved, the power of the State is itself the principal prize in the perpetual conflict that is society. The legal order — the rules which the various law-making institutions in the bureaucracy that is the State lay down for the governance of officials and citizens, the tribunals, official and unofficial, formal and informal, which determine whether the rules have been breached, and the bureaucratic agencies which enforce the law — is in fact a self-serving system to maintain power and privilege. In a society sharply divided into haves and have-nots, poor and rich, blacks and whites, powerful and weak, shot with a myriad of special interest groups, not only is the myth false because of imperfections in the normative system: It is *inevitable* that it be so.<sup>29</sup>

The book also discussed the class bias in legislative enactments and case decisions, and linked this class bias with the social backgrounds of legislators and judges as an integral part of the ruling class. The book tended to present law as an instrument of (non-Marxist) ruling class interest almost conspiratorially and to expose the legitimacy of law as a deception.

By 1982 Chambliss moved into a consciously Marxist position. The second edition of *Law, Order, and Power* is almost a new book, no longer confined to criminal law, but ranging more broadly into the sociology of law and legal anthropology. The book rejects the simple choice between conflict and consensus models in sociology and follows Cham-

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<sup>29</sup> W. CHAMBLISS & R. SEIDMAN, *LAW, ORDER, AND POWER* 4 (1971).

bliss's earlier suggestions in an article on *Conflicts in Law Creation* (1979). Chambliss argues that we must use a dialectical paradigm which sees law creation as a process aimed at the resolution of contradictions, conflicts, and dilemmas in the structure of a particular historical period.

The "dialectical" approach enables Chambliss and Seidman to straddle — they would say reconcile — divergent Marxist tendencies in the treatment of law. Law, for them, "reflects social organization, but at the same time and to a degree affirmatively directs its change."<sup>30</sup> Law is both an emanation of the state and a cultural phenomenon; it reflects the strength and the limitations of ruling class influence on the legal order. Like many contemporary Marxists, Chambliss and Seidman vacillate between determinism and indeterminism; they want to link law with the economy but stop short of saying that the economic, productive forces, or even relations of production, determine law or the actions of state and legal officials.

Role-occupants act by making choices within an arena of constraints and resources that includes rules and sanctions of the law. To understand the amount of autonomy that a particular member of the state or government has, one must examine his or her particular arena of choice — including, of course, the legal constraints and resources, but also including all of the other factors that we have earlier suggested bear upon the choice. If we examine these constraints, we suggest the following hypothesis: Where the decision of a role-occupant affects *relations of production*, the role-occupant will have relatively little autonomy. Where the decision *affects the amount of profit* (i.e., capital accumulation), the role-occupant will have relatively greater autonomy.<sup>31</sup>

Chambliss and Seidman, the most radical of the new criminologists, returned to the utopianism of Marx's vision of a society without classes, external determination, state coercion, or law. They accomplished this in their rejection of social reform and "meliorism;" in their call for total social transformation; and in their absolute refusal to conceive a problem of crime in socialist, egalitarian societies. Of course, one need not be a Marxist to recognize that some crimes do represent forms of unorganized class struggle or a response to deprivation. Many non-Marxists would recognize that these are overwhelmingly lower-class crimes, committed in much larger numbers by those at the bottom of the economic heap or in a marginal economic position. The new criminologists are less comfortable with crimes against the person, especially homicide. Nor do they wish to know why crime rates are strikingly higher

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<sup>30</sup> *Id.* at 73.

<sup>31</sup> *Id.* at 311-12.

in some poor countries of great social inequalities than in other poor countries with similar social problems; or why crime rates are high in "socialist" countries like the Soviet Union, China, and Eastern Europe. The new criminologists' appreciation that there is a serious subject called the "sociology of crime" is vitiated by their selectiveness in the questions asked and their utopianism about the future. This approach makes Marxist criminology a one-sided simplistic version of modern sociology of crime generally.

Marxist criminologists in Britain and the United States have concentrated on those crimes and those aspects of crime most likely to bring out vividly the instrumental class character (or, on another non-Marxist view, distortion) of criminal law. These aspects of crime are police and policing, corporate crime, organized crime and corruption, prisoners and prisons, theft and the alleged link between multi-national corporations and poverty, and crime and insurgency in third world countries. Social historians have done good work on working-class culture and crime. However, little serious and empirical work has been accomplished on the nature and incidence of crime in general.

By 1975, indeed, Taylor, Walton, and Young were insisting that there are no "pure" economic, legal, or political categories in Marx's work. Further, Marx knew that social relations that hang upon people's consciousness were not as amenable to objective scientific study as the material foundations of society. Thus, their argument leaves only the *method* of seeing and analysing given problems in terms of on-going processes in their social totality. Law, as Renner had seen, was part of a historical and social process, but its specificity could not be *derived* from production. For law, by affecting the relations of distribution, affected production itself. A materialist criminology would have to establish the role of law in affecting production, and via production, the whole life-style and culture of a given society. By 1975, Taylor, Walton, and Young saw law as a complex phenomenon with relative autonomy and subject to important cultural and political, as well as economic, influences.

However, unlike *Whigs and Hunters* and *Albion's Fatal Tree* but like Bankowski's and Munghams's *Images of Law*, much of the new criminology has been legally nihilist. It treats law as a selective and prejudiced means of social control in the interest of protecting property and the power of the ruling class. It calls for a total social transformation in which socially internalized norms and techniques for conciliation will replace class conflict, "labelling," and repression. In doing so, the new criminology has drawn on a wider and perfectly proper trend, evident since the 1960s, of "exposing" inequalities of power, opportu-

nity, and outcome through sociological research. Lack of power and of representation, denial of access to courts and to benefits, continuing inequalities of outcomes in spite of proclaimed equality of opportunity, suspiciously stark differences in arrest rates, convictions, and sentences have all been brought out by sociological and statistical inquiries. Whether Marxist explanations of these inequalities, most striking when race and other cultural factors are involved, are at all convincing is another matter.

Radical criminology has also drawn sustenance from a wider radical but non-Marxist phenomenon which began in the 1960s. It has been evinced in the work of Ivan Ilyich, Thomas Szasz, and Michel Foucault and in the growing critique of knowledge as "ideological" power. The arguments of these thinkers fueled increasing criticism and suspicion of professional castes and professional expertise in education and in medicine, especially psychiatry. Their criticism then spread to other areas including law and social work. The "objectivity" of professional knowledge and behaviour was increasingly challenged on behalf of the autonomy and individuality of those who were "treated" or controlled. Professional castes were denounced as adopting techniques that suited their own convenience and elevated their own importance but were neither necessary nor beneficial, whether in the hospital, the prison, the refuge, or the school. Above all, the critics of professionalism argued that such castes required and furthered an esoteric mystique. This mystique was in truth an ideology with organizing concepts, definitions, and norms which subordinated the individual subject to dominant or domination-seeking social and caste prejudices and interests.

In the last few years, especially in Britain, there has been a widespread recognition of the need for socialists to discuss law and crime in a less nihilistic way. To some extent, radical criminology in its nihilistic British variant has been eclipsed by the riots in Brixton and Toxteth, and the advent of Mrs. Thatcher's defense of law and order. The same cannot be said for the American radical criminology. The British variety has very different roots, a less obvious heritage from the school represented by Chambliss and Quinney. It also has much stronger connections with Marxist theory and the concept of the proletariat. Whereas the American version of radical criminology was an outgrowth of the romantic radicalism of the 1960s and early 1970s and its largely untheoretical demands for "relevance" in law as in other spheres of social life, the British variant was more strongly based in Marxism as well as deviancy theory. The British group tended to be smaller, more theoretical, and more isolated from main-stream academic trends. The Americans created a *movement*, part of the generalized radicalism of the day;

the British founded an *organization*, the National Deviancy Conference.

For the Althusserians, of course, no Marxist theory of crime was possible. Paul Hirst, in an oft-cited and reprinted article in the new Althusserian journal *Economy and Society*, claimed that radical deviancy theory was not compatible with Marxism; it represented a dangerous revisionism:

There is no "Marxist theory of deviance," either in existence, or which can be developed within orthodox theoretical concerns and the specific scientific object of Marxism. Crime and deviance education are no more a scientific field for Marxism than education, the family or sport. The objects of Marxist theory are specified by its own concepts: the mode of production, the class struggle, the state, ideology, etc. Any attempt to apply Marxism to their pre-given field of sociology is therefore a more or less "revisionist" activity in respect of Marxism; it must modify and distort Marxist concepts to suit its own pre-Marxist purpose. . . . Thus the criminal "individual," or spontaneous mass actions of an illegal character, are of interest to Marxism from the standpoint of political and ideological struggle alone. They are of interest only in so far as spontaneous mass action is the point of departure of a political critique and a political struggle which transforms it into an organized and theoretically-based politics.

To glorify illegal struggle, to argue that the State is *only* the obedient creature of the ruling class, and to argue that all legal struggles, and all attempts to use the representative means and the political freedoms protected by State law, are a sham since the State is a *mere* expression of force, is to do the bourgeoisie's own ideological job for it. To cringe before legality and State power, on the other hand, to reject all forms of struggle proscribed by the State, is to cut the political movement off from the revolutionary road.<sup>32</sup>

Other Marxists, of course, have seen sport, the family, and education as excellent fields for Marxist historical writing.

#### IV. LAW AND LEGAL THEORY

The serious formal discussion of law, legal systems, and legal theory from a Marxist standpoint is a recent and still poorly developed aspect of Marxist endeavour in the English-speaking world. It is a phenomenon principally of the 1970s and early 1980s. It tends, therefore, to endorse modern "interpretations" and re-interpretations of Marx; it distances itself both from the dogmatism of Stalin and his heirs, and from the "reformism" and "revisionism" of the Second International

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<sup>32</sup> Hirst, *Marx and Engels on Law, Crime and Morality*, *ECONOMY AND SOCIETY* 1 (1972), in *CRITICAL CRIMINOLOGY* 203-32 (I. Taylor, P. Walton & J. Young eds. 1975).

and of contemporary labour parties. It ignores the legal systems, the legal history, and the legal theories (regarding law under socialism) of Marxist-governed countries. Some of this "Marxist" writing reflects a tone of strident non-responsibility — the non-responsibility of those who do not see themselves as having to participate in the work of society or even to carry out the sustained work of social transformation. There is also a totally un-Marxist resentment of a world that does not instantly and directly satisfy the needs and assuage the insecurities of the young, especially of the not very able young, by making them feel important and central to the work of society. That society, in much of this radical writing, turns out to be the law school and the underlying values, those of a strident rights-oriented post-historical individualism, elevating relevance, emotional security, and "fulfilment" above all.<sup>33</sup>

Marxists used to distinguish themselves from anarchists by saying, "The anarchist wants to know when the revolution will come, Marxists ask, 'What must we do in the hour of a revolution?'" Given the rather different cultural climate and social niveau in which those developing contemporary analyses and "critiques" of law now operate, it is not surprising that these writers should increasingly moralize Marxism, turn it into an ideological *praxis*, and see it as having a life independent of historical determinism and great mass movements, at least in their own societies. More and more, some writers avoid calling themselves Marxist and prefer to speak of themselves as "working in the Marxist tradition." Others react to this by emphasizing that one cannot be in the Marxist tradition without being a Marxist. Nevertheless, there is an increasing tendency to insist — at least some of the time — that Marxism is not a finished or dogmatic set of conclusions, an objective science of society, or a form of economic determinism. For many of the writers, we are discussing whether Marxism provides a philosophical basis, a theoretical framework, and a set of fundamental concepts for understanding how the social world is organized and how it changes and develops.<sup>34</sup>

Almost all of these new radicals now deny that Marxism is properly interpreted as asserting a one-way economic determinism between base

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<sup>33</sup> For a remarkable and often embarrassing display of such emotionally centered juvenile self-importance based on the reluctance to recognize that insight and achievement require *sustained* work and *technical* skills, see generally the symposium on Critical Legal Studies Symposium, *supra* note 11. The issue is devoted to letting the Critical Legal Studies movement speak for itself.

<sup>34</sup> The view taken, for instance, in the radical pamphlet prepared by the *Critique of Law Editorial Collective*, CRITIQUE OF LAW: A MARXIST ANALYSIS 8-15 (1978) [hereafter CRITIQUE OF LAW].



and superstructure. Many deny that the base-superstructure analogy is appropriate at all. They prefer, with Althusser, to focus on social modes of production, on structured totalities and practices, or sub-structures within those totalities. Some attach great, if mysterious, importance to denying that Marx elevates the economic, insisting instead that he elevates the "material" process of production and reproduction. This claim is mysterious because the substitution of "material" for "economic" illuminates nothing and does not in any way alter the discussion of what Marxism means. Courts, police forces, and schools are as "material" as factories. If Marx is saying that factories and what they imply — the system of ownership, production for a market, etc. — are more central, more important than courts, schools, and police forces, he is not doing this by focusing on the materiality of factories or of what they produce, but on their economic functions. If the "materialists" say that production is production only when it produces material objects, and not when it results in services, administrative organization, or the promotion of knowledge — all of which have economic functions and uses — they are saying something silly.

The simple and basic point is that Marx's conception of "material" in the materialist interpretation of history has nothing to do with the "materialist" doctrine in philosophy incorporated into Soviet "dialectical materialism." There, materialism quickly was reduced to the claim that there is an objective, independent reality prior to and distinguishable from the consciousness or conscious being that apprehends it (the implications of which many "Marxist" philosophies now seek to evade) and not to the claim that only matter exists (indeed, matter is now seen as convertible to energy). On the social side, in "historical materialism," the term "materialism" means the elevation of a process of production (material production or material process?) as central to the understanding of society. The alleged centrality of such a process of production is better expressed by speaking of the economic activities in a society than by confusing a host of issues in the term "materialism." Marx himself, in consonance with the most obvious feature of early industrial production, concentrated on the making of material objects — a path along which Marxist socialist societies followed him with disastrous results.

Clearly, "economic" is a wider and more apposite term to describe production that satisfies human needs and demands than the term "material." One of the important strands in contemporary Marxism and contemporary Marxist theory of law needs these wider terms precisely because an entire mode of production, rather than a technologically determinist conception of productive forces evoking relations of production

is the central explanatory tool with which Marxism operates. Contemporary Marxists, we would argue, are mistaken in thinking that they convey this by using the term "material" instead of "economic." In the end, they simply are talking about the *social* and failing to distinguish clearly the economic or the material as a specific structure within it. This is made even more evident by the contemporary Marxist predilection for replacing the term "economics" with the older term "political economy." Suddenly, the new Marxists imply that one cannot understand the economic except as it relates to the political, that is, as a part of the whole society.

Others, while never abandoning the primacy of the economic, put special weight on Marxism as a doctrine of human *praxis* and interpret that to mean a rejection of "blind" determinism. These writers emphasize the role of human consciousness and activity in history and elevate class and ideological struggle. For them, state and law are essential features of an oppressive social system that now relies on more than physical and economic coercion. They reach this view by elevating the strength and importance of cultural and political institutions — some writers rely on Gramsci's conception of cultural hegemony, others on Althusser's elevation of the relative autonomy of political and ideological "practices" in society. Gramsci's conception of a pervasive, or at least very strong, cultural ruling class hegemony that goes beyond physical repression and the institution of the state into educational systems, political parties, professional groups, art, literature, religion, family, etc., makes the ideological critique of law important and worthwhile. The Althusserian view maintains that there is no "economic base," and no determining ruling class interest that forms the "essence" of state and law or of political and ideological practices in society. To lawyers, Althusser's conception of his own science as a closed and self-validating system is more familiar and less suspect than it is to those whose intellectual endeavours deal more directly with actual, infra-legal human, or natural behaviour.

All of these developments, of course, take account of and reflect important social changes that have occurred since Marx did his work. Marxists now recognize that capitalism has passed through several stages: an early mercantile capitalism; the industrial capitalism of individual factory owners and firms; a further stage of finance and monopoly capital, variously described but representing a movement of economic power from factory owners to banks and trusts or corporations (these stages were all described or predicted by Marx); and a "late" capitalism (not directly predicted by Marx) that saw the rise and development of the welfare state and an economically increasingly interven-

tionist, semi-independent, state apparatus. The function of the latter, most Marxists would still hold, is to save the capitalist system by conceding what can no longer be withheld, but the relative independence and direct significance of the state and law is now widely recognized among Marxists. This becomes even more important as many Marxists implicitly accept what Gramsci argued in his *Prison Notebooks*: that a Leninist *coup*, a communist seizure of power, was not a viable political strategy for Western societies. In Russia, Gramsci argued, the state was overwhelmingly powerful while civil society, the entire network of non-state relations and institutions, was weak. Russian society could be transformed from the top. In the West, when the state trembled, a sturdy structure of civil society was at once revealed. That civil society was a network of fortresses and earthworks that remained standing even when the state's outer ditch had fallen. If law and legal ideology are such earthworks, they need to be captured and destroyed by specific, planned assault based on detailed reconnaissance.

The contemporary critique of law "in the Marxist tradition," then, represents as many views as there are ambiguities in Marx's thought and as there are subsequent interpretations and emendations of his work. Of course, as Marxists become more "open," they increasingly fit in with wider developments in the contemporary discussions of law, with the greater emphasis on social and sociological context and function, with the historicization of legal values and principles, and with the "demystification" of law. Their intellectual guns, trained at natural law and legal formalism, now simply point the wrong way. Marxists also emphasize, not uniquely but especially sharply, the need to go beyond mere intellectual criticism, to oppose, destroy, transform, and rebuild society, laws, and human relations. The emphases vary as much as, and inversely with, the quality.

For some, for example, Zenon Bankowski and Geoff Mungham in their *Images of Law*, and the young Lukács, revolutionary practice, including the critique of law, must be inspired by a merciless revolutionary intention and a missionary consciousness. Decisions and resolutions must be the masters and not the slaves of facts. The circle within which Lukács himself operated in 1918 strove to propagate these aspirations by working out the most radical methods and by completely breaking with every institution and mode of life stemming from the bourgeois world. Lukács, in such lectures and pamphlets as *Terror as Source of Law, Legal Order and Violence, Tactics and Ethics*, and *The Changing Function of Historical Materialism*, sharply emphasized that law was organized violence. As an institution, it was only an institutionalization of means subordinate to external ends. These concepts of order

at most possessed a relative validity; they were based on violence and its acceptance. Therefore, communists should be fearless in the face of the law. "The risk of breaking the law should not be regarded any differently," Lukács wrote in *History and Class Consciousness*, "than the risk of missing a train connection when on an important journey." Bankowski and Mungham say that the message of their book is simple:

[L]aw, in the forms that it is practised and taught, means domination, oppression and desolation. Law does not help but rather hinders people in the way to free society. In this book we concentrate upon a particular brand of law and a particular way of teaching law. What we have in mind here are movements to liberalize law; to give it a "human face." We claim that this liberalization and the concomitant idea that law can be used to transform society by alleviating its problems cannot work; that there is no difference in form from this sort of law and the traditional "rich man's" law.

[W]e want society to be transformed and the socio-legal enterprise prevents this. We want to get across what trying to solve the problems of the world with the help of law and men with "lawyer-like" skills really means. We do not want to create "radical law" for law is locked in the interstices come together and decide how to run their lives.

[O]ne thing that we know is this: law is an imperial code, it emasculates man by offering the solution of his problems to "experts"; it reflects the professionalized society. The only way out is for men to seize their lives and transform themselves and the world.<sup>35</sup>

For others, as for Lukács himself in a subtler mood, and for Bankowski and Mungham in the less conspiracy-mongering parts of their book, law is above all, but necessarily, a system of abstraction, reification, and alienation. Law subordinates human activities and human beings to abstract categories. Laws are treated as having an actual independent existence to which these activities and beings are subordinated. That theme, perhaps the most subtle and most interesting Marxist critique of law, has produced the revival of interest in Pashukanis, the enthusiastic reception of Bernard Edelman's *The Ownership of the Image*, and a debate among Marxists concerning the legal form. Yet a third strand, never totally absent from any Marxist work, sees law as based on economic requirements or economic interests whether these be those of a class or a "system." Some Marxists have criticized radicals over-concentration on criminal law and slowness in looking at the role of law in ordering and regulating the economy.

An Australian Marxist pamphlet, *Critique of Law*, distinguishes "infrastructural laws which serve to structure and bolster the economic

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<sup>35</sup> Z. BANKOWSKI & G. MUNGHAM, *IMAGES OF LAW* xi-xiii (1976).

power of the capitalist class over the working class" from

superstructural laws . . . essentially concerned with regulating social behaviour and consciousness. . . . Whereas infrastructural laws are primarily concerned with ensuring that capitalist economic activities are most effectively developed, superstructural laws are primarily concerned with the social and political domination of the working class and repression of those elements of that class who undermine or challenge the reality and ideology of capitalist ownership of the means of production.<sup>36</sup>

The Crimes Act, the Mental Health Act, the Summary Offences Act, the Education Act, the Social Services Act, and laws governing mass communication are cited as examples of the latter, but so are criminal law and family law. The law of contract, law of trade practices and labour regulations, and the law of torts on the other hand are examples of infrastructural law. Ultimately, though, all Marxists want to insist that law as oppression, law as alienation, law as the furtherance of class interest, or law as the requirement of an economic system, are all related facets of a system based on private property, the appropriation of surplus value, and the pursuit of power and profit by the capitalist class. Alternatively, they argue that this is a system based on the power and requirements of capital and the contradiction between capital and labour, and the private and the public sectors.

A fundamental difficulty in writing about contemporary Marxist critiques of law remains: most such critiques adopt or parallel the unresolved lacunae and ambiguities of Marx's position, especially fatal in the case of law, without taking law seriously enough. These theories of law do so even when they initially claim to the opposite: to develop a Marxist theory of law. Marx's most recent disciples for the most part reject any view of law as an independent force or as a social institution or tradition. However, some of them, as we shall see, are becoming more ready to concede or even emphasize that legal forms — structured laws and regulations and systems of interpretation and appeal within such structures — will not disappear under socialism. A recent sympathetic, but not especially perceptive or tough-minded expositor of their views, Hugh Collins, writes (as though this were sufficient excuse): "To demand a general theory of law from a Marxist is to ask him to run the risk of falling prey to what can be termed the fetishism of law . . . the belief that legal systems are an essential component of social order and civilization."<sup>37</sup> In line with this, many Marxists, with sup-

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<sup>36</sup> CRITIQUE OF LAW, *supra* note 34, at 37, 45 and, more generally, *id.* at 47-123.

<sup>37</sup> H. COLLINS, *MARXISM AND LAW* 10 (1982).

port from Collins, launch an attack on what they take to be the centre-piece of "liberalism" (a term of abuse in Marxist and radical American quarters): the elevation of the rule of law. Marxists do, and according to Collins should, reject the view that "law is a unique phenomenon which constitutes a discrete focus of study"<sup>38</sup> and they should not endorse the rule of law, which is the doctrine "that political power should be exercised according to rules announced in advance."<sup>39</sup> (One needs to live in Oxford, not in Moscow or Beijing, to be as silly as that!) Collins does, however, recognize a fundamental tension between historical materialism as "class-instrumental" explanation of law and the "relative autonomy" thesis, which he has some commitment to:

If [Marxists] stick to a purely instrumental explanation of legal reasoning, . . . then the whole enterprise of ensuring coherence and consistency in legal reasoning has to be dismissed as false consciousness, perpetrated by lawyers who are concerned to mystify their desire to support the interests of the ruling class. On the other hand, an acceptance of the autonomy thesis poses a threat to the whole theory of historical materialism.<sup>40</sup>

The doctrine of relative autonomy of law, if derived from or constituted by "the plasticity of the dominant ideology," has the greatest difficulty in relating law to relations of production or the material base alone. Collins, who espouses this view, is promptly attacked by some other Marxists for being insufficiently emancipated from positivism and Herbert Hart. These Marxists argue that Collins remains constrained by the habit of drawing distinctions and does not see the problem of "legal form" or Marxism subtly enough. Reviewing *Marxism and Law*, Alan Hunt insists that Collins' theory of "relative autonomy" fails because it cannot or does not provide an explanation of what determines the limits to the degree of relative autonomy. Collins' concept of "dominant ideology" is not adequately or coherently explained in connection with either the state or social relations of production. For Hunt, ideology is not simply and unproblematically superstructural:

This solution is in my view inadequate and ultimately contradictory. The proposition that legal rules are "superstructural in origin" says no more than that they have their origin *in ideology*. If ideology is unproblematically assigned to the sphere of the superstructure, then it follows that legal rules are in some fundamental or primary sense (which Collins seeks to capture by his reference to "origin") superstructural. As soon as we question the simple assumption that ideology is part of the superstructure the solution proposed by Collins collapses. For just in the same way as legal

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<sup>38</sup> *Id.* at 11-12.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 70.

relations (for example, as property relations) are part of or constitutive of the relations of production so too is ideology inseparable from an empirical description of the relations of production. Or to put the same point in a different way, ideology is a necessary condition (or "condition of existence") of the relations of production. Ideological elements such as language, normative environment, elementary labour discipline are all inescapably part of or constituents of the relations of production.<sup>41</sup>

Here, fundamental and damaging criticisms of Marxism suddenly appear as its proper interpretation. Hunt, indeed, proposes that the problem of law in historical materialism can only be solved by pursuing a different approach which

. . . lies in abandoning rationalist and empiricist assumptions in favour of the adoption of a focus on "Marxism as method" in which a radically different understanding of the relationship between concepts as "abstractions" and the "concrete" in which the concepts function not to embrace or incorporate the concrete, but to propose lines or stages of inquiry in a process of successive movements between the realms of abstraction and the concrete. Such an approach abandons any assumptions that concepts such as "social relations of production" or "mode of production" correspond to concrete economic practice. The concepts function to specify or give priority to certain sets of relations, for example, the relations of separation and possession (which are of special importance with respect to legal relations) or class relations.<sup>42</sup>

The withering away of law and Pashukanis's conception that law under socialism will be replaced by policy and regulation in the light of socio-technical norms are similarly modified and reinterpreted by Hunt into a question to which there are several possible answers:

[T]o what extent will the *legal form* or *legal forms* (of rules, procedures and institutions) be the characteristic mechanisms necessary for the resolution of different forms of conflict?

Without engaging in a full examination of this re-formulated problematic, certain possible answers may be sketched.

- (i) Increased consensus over primary social rules diminishes need for legal form;
- (ii) Increased political democracy will result in decisions of economic and social priorities taking a political form (*e.g.*, the political resolution supplanting the legislative device);
- (iii) The need to secure conditions of democratic participation will require protection against centralist or bureaucratic tendencies; hence the need for a stronger legal form of civil and political liberties;
- (iv) The complex interrelation between public institutions and

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<sup>41</sup> Hunt, *Marxist Legal Theory and Legal Positivism*, 46 MOD. L. REV. 236, 238 (1983).

<sup>42</sup> *Id.* at 239-40.

agencies will continue to require legal form(s) governing interinstitutional relations.

I repeat that this scenario is advanced for illustrative purposes only and that the argument is in no way dependent upon any particular conclusion. Its essential feature is the insistence on the need to abandon a simplistic conception of the consensus-conflict opposition so as to facilitate a more adequate analysis of the *forms of conflict* and their conditions and their relationship to the *forms of law* in order to more adequately address the problem of the role of law under socialism and communism, and for that matter under capitalism.<sup>43</sup>

Thus, against Collins's position that the principal aim of Marxist jurisprudence must be a programme for demystifying the preponderant bourgeois ideology of the rule of law, Hunt argues that a programme for Marxist jurisprudence must put behind it the naive radicalism of conflict theory of the 1960s. Hunt argues that the Marxist programme must recognize that Lenin's picture of communism as involving universal participation, abolition of the division between legislation and administration, and the instant recall of delegates, is theoretically coherent only at the level of the city-state and small communities. A legal framework that posits representative institutions and universal participation on a larger scale requires a developed or augmented rule of law — a socialist rule of law based on the development of a socialist theory of rights, of the socialist judicial process, and of socialist justice. On the other hand, Collins, on the last page of his book, presents Marxists and non-Marxists with a dilemma. Marxists cannot have any wider belief in the intrinsic merit of preserving the legality of government action and defending individual rights without making the mistake of taking at face value the ideology of the Rule of Law, which obscures class domination. But can we believe in the importance of these principles under socialism without supporting some version of the concept of the Rule of Law and of the pretensions of legal systems? Soviet and Chinese communists, whose experience is more relevant than ours, no longer do so.

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<sup>43</sup> *Id.* at 242.