Few can doubt that the past two years will be remembered as turning points in world history. The collapse or decline of communism in Central Europe, the accelerating pace of change within the Soviet Union (including strong secessionist movements), the first steps toward democracy in South Africa, the reunification of Germany, and now the Persian Gulf crisis (with ramifications throughout the Mideast and for the world economy). What is the direction of world history and how should we respond? Martin Krygier repeats the dominant refrain—a mixture of “we told you so,” “hey, ho, the witch is dead,” and “never again.” The collapse of communism demonstrates to Krygier that Marxism has failed as a social, economic, and political system and an ethical ideal. The only alternative to Marxism is capitalism. The failure of Marxism proves both the inevitability of capitalism (an ironic inversion of Marxist dialectics!) and its moral superiority.\(^1\) Krygier advances his case in elegant English and decorates it with erudite citations. But the argument is full of logical flaws, leaps of faith, and unsubstantiated generalizations.

Krygier presents himself as a defender of the rule of law. But who is attacking it? Others will comment on the accuracy of Krygier’s reading of Marx. But Marx’s skepticism about the protection law offered 19th-century European workers was well justified. It is profoundly ahistorical to fault Marx for failing to anticipate the gains that workers achieved through law a century later. Krygier also makes some dismissive references to critical legal studies, especially the pathbreaking work of Karl Klare and Alan

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Freeman demonstrating the limitations of legal strategies for the labor and civil rights movements. But though he invokes critical race theory as an ally, many of those writers also acknowledge the deficiencies of law as a means of achieving racial equality, although they continue to see it as an essential weapon in the civil rights armory. The only strand in critical legal studies fundamentally hostile to legal rights is the work of Peter Gabel, whose roots are more in existential psychology than in Marxism (although there are parallels to Pashukanis). Krygier reproduces some damning quotations from former communist rulers and their apologists. But who takes their positions now? If his quarrel is with authoritarian rule in Cuba, China, or Cambodia, I fully support him. It is not clear, therefore, that the rule of law needs Krygier to defend it, or that the enemy is contemporary Marxism.

Krygier seeks to demonstrate the theoretical and historical incompatibility between Marxism and the rule of law. He attacks Marx's critique of bourgeois law and his (admittedly incomplete) theory of socialist law. He faults Marx for characterizing bourgeois law as repressive. But it was highly repressive during the first half of the 19th century. And bourgeois law continues to repress workers, women, racial minorities, and political dissidents. He faults Marx for characterizing bourgeois law as ideological. But the belief that capitalism guarantees "equal justice under law" is profoundly ideological: a myth, factually false, politically conservative, and deliberately fostered by the most visible embodiments of law (chief executive, legislature, and supreme court). And he faults Marx for analogizing law to the commodity form (though he actually relies on Pashukanis, who wrote more than half a century later). But Krygier's own concept of law demonstrates the power of that analogy. He portrays capitalist contract law as a system of "clear general rules necessary for these atoms [individuals] to coordinate their activities and hold each other to bargains or sue" (at 655). This displays either ignorance (unlikely) or deliberate disregard of the wealth of scholarship (most of it by liberals) arguing that labor and consumer contracts display none of these essential characteristics.

Although Marx had relatively little to say about the nature of law

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under socialism, Krygier is equally critical of that fragmentary vision. Marx hoped that the transfer of ownership of the means of production from capitalists to workers would eliminate classes and end class conflict. He was tragically wrong; but is he any more to blame for being unable to foresee the future than are the Founding Fathers for failing to anticipate that the free market would lead to monopoly capital or do irreparable damage to the environment?

Pashukanis (not Marx) hoped that socialist planning could displace individual legal rights in criminal law as well as civil (at 655). Krygier characterizes this view as distinctively Marxist and uniquely repugnant in its threat to the rule of law. But it merely exemplifies the long-standing (and unresolvable) debate between neoclassical and utilitarian views of crime and social control. All capitalist legal systems have adopted such utilitarian approaches as juvenile courts, parole boards, probation, and community corrections. The chief administrator of the New York State Courts, Matthew T. Crosson—hardly a Marxist—recently called for the creation of “community courts” in each of New York City’s 75 police precincts, staffed by neighborhood volunteers with the power to jail offenders for up to 90 days. Sol Wachtler, Chief Judge of the New York Court of Appeal, approved the plan, as did Milton Mollen, Deputy Mayor for Public Safety.

Krygier is equally critical of Marx’s concept of freedom. As a liberal, Krygier associates coercion exclusively with the state; he seems to believe that freedom is always increased by curtailing state power and action. But Marx rejected the “public-private” distinction, insisting that “civil society” also could be the locus of coercion. He saw 19th-century religion and nationalism as private limitations on freedom. Was Marx wrong? Is it sometimes desirable—even necessary—to use state power against private constraint? Victims of racial discrimination argue that state action is necessary to redress historical injustice and inequality in order to free both oppressor and oppressed from racial stereotypes. India, for instance, has been struggling for decades to overcome the evils of caste. More than ten years ago the Mandal Commission concluded that the persistence of the caste system “lies not in upholding the supremacy of the Brahmin but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as the natural order of things.” It recommended that the state break the “magic web” of mythical distinctions. Prime Minister V. P. Singh recently tried to do so by setting aside 27% of federal government jobs for so-called “backward castes,” in addition to the

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22.5% already allocated to outcastes and tribal groups. Some feminists have argued that pornography perpetuates patriarchy. Would it diminish or enhance freedom if the state outlawed “snuff” films, in which women appear to be tortured, sexually abuse, and killed? Hate speech—racist, anti-semitic, and homophobic—clearly abridges the freedom of its targets. Should the state seek to enhance that freedom by restricting such propaganda? What about advertising for addictive and harmful substances, like tobacco and alcohol? Or television commercials directed at children? Would Krygier view all forms of state action that combat private constraint as somehow “Marxist?” These are not academic questions. The “rule of law”—which Krygier champions against its alleged detractors—has been invoked, with some success, by whites, hate groups, porn merchants, and cigarette and liquor manufacturers to resist all forms of state control.

Krygier’s historical argument is harder to address because it is less explicit. He seems almost embarrassed to make it. At the outset he denies that Marx can be blamed for what others have done in his name. Having made that ritual disclaimer, however, he repeatedly insinuates Marx’s guilt. He concludes that Marx is responsible for the totalitarian attack on mediating institutions not because he criticized them but because he failed to advocate them.

Is Marx uniquely guilty for what others have done in his name—such as Mao, or Pol Pot, or even Khaddafi? Or is Christ equally responsible for the Inquisition, Christian antisemitism, the murder of “witches” in medieval Europe or colonial America, the apartheid ideology of the Dutch Reformed Church in South Africa, and two millennia of Christian patriarchy? Is Mohammed responsible for Ayatollah Khomeini, Saddam Hussein, Yassir Arafat, the Sudanese civil war, every jihad? Is Moses responsible for Zionism, Meir Kahane, Ariel Sharon, Gush Emunim, and those who wish to expel all Arabs from what they call Judea and Samaria? Is Adam Smith responsible for Ronald Reagan, Margaret Thatcher, Pinochet? Are Nietzsche and Wagner responsible for Hitler? This form of argument is unworthy of reply.

Not surprisingly, Krygier’s approach is exclusively idealist. How would a materialist examine the relations between Marxism and the rule of law? The test is not whether the rule of law prevailed under what Krygier, like others, calls “really existing socialism” (at 634). That would identify Marxism exclusively with the Soviet Union and the countries it dominated or inspired—a form of McCarthyite red-baiting that has no place in academic discourse. Like other democratic socialists, I characterize the Soviet Union as an instance of state capitalism, not communism. The question is

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whether any form of Marxism is structurally compatible with the rule of law.

Three elements of Marxist theory might conflict with the rule of law: state ownership of the means of production, the dictatorship of the proletariat, and the destruction of civil society. Would Krygier argue that there is no rule of law in Western Europe, where the state owns or has owned most utilities, much of the transportation and communications network, the system of medical care, and certain key industries? Or that Thatcher's sell-off of public ownership increased the rule of law in England (whatever dubious benefits it conferred on the economy)? Is state ownership of educational institutions incompatible with the rule of law? Does Krygier advocate privatization of his own employer? There is a strong case to be made that public employers are more respectful of the rule of law in the workplace than are private employers. In any case, state ownership of the means of production is not the only form of Marxism—some would deny it is Marxist at all. Democratic socialism—worker ownership—offers an alternative vision. Krygier never asks whether it is compatible with the rule of law.

Marx hoped that transfer of ownership of the means of production from a tiny class of capitalists to the vast mass of workers would abolish class. For this reason he saw the dictatorship of the proletariat as profoundly democratic—indeed, the only true form of democracy. He was clearly wrong. The attempt to direct a large, complex economy and polity from the center inevitably creates an elite—the apparatchiki of the bureaucracy, the nomenklatura of the party, and the military—what Djilas decades ago called the "new class."10 But Krygier offers no evidence that this is more true of Soviet state capitalism than of American "market" capitalism. Eisenhower's warning against the military-industrial complex and C. Wright Mills's critique of the power elite were roughly contemporaneous with Djilas.11 And certainly economic and political power has become more, rather than less, concentrated in the capitalist West during the succeeding four decades. The problem is the concentration of power, not whether it is formally public or private.

Krygier's last argument is that Marx was indifferent to the mediating institutions of civil society, which are essential to the rule of law. But this does not help Krygier's case for several reasons. First, Marx had good cause to suspect civil society in 19th-century Europe. Nationalism had caused millions of deaths and would be the cause of millions more. Organized religion often was a source of oppression, not liberation: the church tended to be complicit with both state and capital, and its teachings coun-

When the War? Their law. When law? Watergate? Tries bad. As state reveals autonomy with ownership capitalist. It resided in diverse or one side. Concerted, their capitalism or a Bikini? Rescue, the autocracy with education. Krygier can argue that capitalism and Leninism is compatible with the rule of law. Witness neo-Nazi parties, racist organizations, Operation Rescue, and conservative campaigns against freedom of expression and the autonomy of educational institutions.

If one half of Krygier’s argument is that Marxism is not compatible with the rule of law, the other half must be that capitalism is compatible with it. He advances the latter claim through two strategies: selective definition and convenient oversight.

Although he offers no single, concise definition of the rule of law, he reveals his conception of it at various points. Its core is the restraint of state power.

When governments do things, an important source of restraint on power is to require them to do them openly, announce them publicly, in advance, in terms that people can understand; according to laws with which officials are required to comply, which are overall fairly stable and general, and which are interpreted within a relatively stable and independent legal culture of interpretation. . . . People can predict what governments will and can do, and can predict what others can and will do. (At 642–43)

As I argue in detail below, if this definition is intended as a description of capitalist government, it is both mythological and incomplete. Does it, for instance, capture the experience of those who receive government benefits or the relationship between regulated industries and government?

Krygier repeatedly emphasizes the necessity that high officials be constrained by law. Does this characterize the recent American experience of Watergate? The Iran-Contra affair? Does the CIA exemplify the rule of law? Are capitalist governments constrained by law in the conduct of foreign policy? Did American officials act under and in support of the rule of law when they overthrew democratic governments in Guatemala and Iran? When they assisted Pinochet (a capitalist who mocked the rule of law) in his coup against Allende (a Marxist who respected it)? The Contras in their war against the Sandinistas? When the U.S. tried to oust Castro? When it invaded Grenada and Panama? In the conduct of the Vietnam War? When it supports dictatorships too numerous to mention? Or does the rule of law, like party politics, stop at our borders?

Krygier’s one concrete example of high officials respecting law is par-
ticularly telling. He contrasts the experience of Afghanistan and Australia (two countries that have nothing in common but their first initial). But in praising Australian capitulation to the governor-general's removal of the prime minister (at 643-44), Krygier conveniently overlooks the fact that this action was profoundly undemocratic: the representative of the Queen of an imperial power ousted the popularly elected head of government of a former colony! Democracy seems dispensable in Krygier's concept of the rule of law.

This indifference becomes clearer when Krygier addresses (or rather disregards) the substantive content of the rule of law. "[D]etailed specification of the rights one should have is not my present subject" (at 644). Nor is any specification. Krygier's rule of law is entirely compatible with gross economic, political, social, and cultural inequalities, even with a very high level of repression. He is equally uninterested in how the content of the law is shaped. He refuses to make distinctions among "liberal democracies, whether governed by conservatives, liberals or social democrats" (at 640). Indeed, dictatorship is perfectly compatible with his rule of law. He notes the "bare possibility" that "government operating by and under law could allow itself almost anything and forbid its subjects almost everything" (at 644) but quickly dismisses this as merely "conceivable" and "extremely unlikely." Unfortunately, this "bare possibility" all too often becomes the painful reality in a capitalist world that pays lip service to the rule of law: the United States during slavery and segregation, the extermination and expropriation of the Indians, the detention of Japanese-Americans during World War II; Nazi Germany; South Africa. All three countries claimed to respect the rule of law—and could have made a good case under Krygier's lax criteria.

Krygier is equally selective in his historical account of the connections between capitalism and the rule of law. He begins by invoking "the thesis of Max Weber that the great economic and political transformations in western Europe over the past several centuries did not occur (and could not have occurred) anywhere else because elsewhere there were no predictable legal frameworks for individual enterprise and decision" (at 643). "[I]t is clear that economic chaos is not unrelated to an absence of legal predictability and that in turn to the insignificance of the rule of law" (at 647). This is bad history.

Weber's thesis has been such criticized. To begin with, there is the notorious "English problem": the common law did not meet Weber's criteria for formal rationality, yet England was the most advanced capitalist nation of his time. Indeed, the exceptions seem to overwhelm the rule.

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Many other countries have enjoyed capitalist “take-offs” without a highly rational legal system: Japan, Italy, and Brazil, to take examples from three different periods and continents. And numerous lawyer-bashers in the United States insist that our legal system inhibits economic growth. All capitalists really need is the ability to accumulate surplus and to translate that economic power into political muscle. Political patronage, organized crime, and corruption can, and often do, take the place of law.

Furthermore, there is no necessary connection between the legal infrastructure used by capitalists and those aspects of the rule of law that protect individuals against the state. Most successful capitalist nations have grossly violated the rule of law. I already mentioned the American experience, which has parallels in much of 19th-century Europe. The Axis countries—Germany, Italy, and Japan—were thoroughly capitalist, whatever they called themselves. The four Asian dragons (South Korea, Taiwan, Hong Kong, and Singapore) are hardly exemplars of the rule of law. Nor are most other “successful” developing countries in Latin America (Brazil, Argentina, Chile), Asia (India, Pakistan), Africa (Nigeria, Zaire, Ivory Coast), or the Arab world (Iraq, Kuwait). Many are military dictatorships. Most of the rest have highly undemocratic systems of single-party rule. Money corrupts the political and legal systems in all. And it is notable that Krygier’s exemplar of the rule of law—the United States—supports or has supported every one of these (at 643).

Krygier can maintain the link between capitalism and the rule of law only by perpetuating all they myths of capitalism. Look at his depiction of “normal societies” (at 636–37).

1. "their stores have goods to sell, their people money to buy.” Yet one out of every five to eight Americans lives in poverty.

2. "mail gets to its destination, unopened.” Not to many recipients of government benefit checks, and certainly not to the homeless.

3. "phones work.” So did the trains under Mussolini. And even in American 7 percent of households lack telephones.

4. “state agencies are not suffocatingly omnipresent.” Tell that to the disabled whose social security benefits were terminated under Reagan, veterans seeking to obtain medical care from a hostile or indifferent Veterans’ Administration, anyone who has served in the military or quarreled with the IRS, single mothers on welfare who suffered mid-

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13. Krygier argues only that the two are “not unrelated.” This is as evasive as his claim that Marx’s words are somehow responsible for the actions of those who later invoked him. Indeed, Krygier uses the double negative in both places: “not an outrageous step” (at 20), "not an unimportant [oversight]” (at 30).
night raids by police looking for men in their beds, minority youth hassled by the police, or the nearly one out of four black men 20–30 years old who are in jail or on probation or parole.17

5. “citizens elect governments.” I don’t know where to begin: with the constraints of the two-party system? The undemocratic primary process? The distorting effect of money? Voter apathy? Judith McGowan recently wondered what kind of mandate she obtained when she was elected Democratic District Leader in the 80th Assembly District of New York State in a race in which only 4 percent of the residents voted.18

6. “economies are not deformed by the surreal consequences of monopolistic political domination and administrative ‘steering.’” Don’t private monopolies and oligopolies deform the economy and polity? Krygier shows ideological consistency in opposing “administrative steering,” but how does he reconcile that with the role of the Federal Reserve Bank? Or MITI in the most successful capitalist economy in the world? Or corporatism in Germany—no slouch as an economy and quite proud of its rule of law.

7. “the exercise of political power is mediated and restrained by, among other things, law.” Is it? I offered a long list of American violations above.

Krygier’s excoriation of the “abnormal societies” of communism has equally disturbing parallels with our own experience (at 647).

1. “extra-legal ‘administrative measures’”: the CIA, the FBI (the Cointelpro operation, for instance), persecution of government enemies by the IRS.

2. “special invisible sentencing boards”: American judges and parole boards are more visible but can be just as arbitrary.

3. “secret tribunals”: decisions about government benefits for all but the few who challenge them.

4. “police”: ask any minority youth.

5. “informers”: consider the corrosive effect of the “war on drugs.”

6. “torturers”: read Amnesty International about some of the leading capitalist nations, e.g., South Africa, Chile under Pinochet.

7. “‘partinost’”: try fighting the political machine in many major American cities.

8. “socialist legal consciousness”: the cant about the “free market.”

9. “campaigns”: the war on drugs, the invocation of “family values” or “Christianity,” campaigns against affirmative action, or taxes.


Krygier’s argument that capitalism is necessary or sufficient for the rule of law is unpersuasive as both theory and history. Perhaps the opposite is true: the structures of capitalism are incompatible with full realization of the rule of law. Such a conclusion would be profoundly disturbing and important. For whereas Krygier maintains (at 647) that “Marxism has been the most influential, certainly the most invoked, combination of social theory and secular prophecy of the modern world,” I would respond that “capitalism has become the most influential, certainly the most invoked, combination of social theory and secular prophecy of the postmodern world.”

Let me sketch how one might think about the tensions between capitalism and the rule of law. I begin by defining the rule of law differently from Krygier. Its foundation is democracy in the determination of the content of laws and their execution. Law must protect fundamental rights, particularly those of oppressed groups. It must ensure equal access to and use of the legal system to correct injustice. And it must produce equality of results, not just opportunities. Do the legal systems of “actually existing capitalism” meet these criteria? Could they ever do so?

I start with lawmaking, which Krygier entirely disregards. Liberal capitalism may be inconsistent with the rule of law in two respects. First, private power translates into political influence. This always has been true, but the degree of influence has intensified. Economic power has become more concentrated. As the state and the scope of regulation have expanded, the stakes have increased and hence the amount of money spent on politics. Incumbents are primarily interested in reelection and must amass a war chest for that purpose. The media have become indispensable and more expensive. Contributions give donors access and influence. Money also can defeat initiatives, if not pass them. Organized interests possess enormous advantages over those that are not: consider the struggle over gun control between those who shoot and those who are shot—the National Rifle Association and the rest of us. Efforts to limit the influence of money on politics have been largely unsuccessful, either because money has defeated them or because the very tenets of liberalism protect the power of money.

Second, some versions of liberalism are inconsistent with the substantive requirements of my vision of the rule of law. In western iconography, statues of justice wear a blindfold to declare that the law is no respecter of persons. Krygier sees only the beneficent side of such universalism: the powerful must obey the law. He fails to see the underside: formally

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"equal" laws can have grossly unequal consequences. A century ago, Anatole France mocked the law for forbidding both rich and poor from sleeping under the bridges of Paris. Santa Barbara has just reenacted an ordinance forbidding them from sleeping in many public areas. Although tort law makes damages available to everyone injured through another's negligence, male victims recover more often than female, employed more than unemployed, those in their middle years more often than the young or old. Over the past ten years, the most outspoken champions of capitalism—such as Ronald Reagan and George Bush—have fought against laws that would recognize inequality and seek to correct it, or at least to prevent it from being reproduced within the legal system. Krygier has little to say about law and inequality—suggesting it does not bother him—and what he says does not reassure. Equality is "approximated to greater or lesser degree in different societies, among different classes, races, and sectors of social life" (at 645). This is the pluralist myth: equality is the norm; deviations are random and trivial and cancel each other out.

The rule of law presupposes that the rules of law are enforced. This, in turn, requires that all have equal access to legal arenas and equal influence within them. That obviously is not true under any capitalist regime. Indeed, it could not be true. Even a government committed to equalizing access to legal services (and Bush, like Reagan, has been an unrelenting enemy of the Legal Services Corporation) could not do so. It might be possible to provide lawyers (but not equal lawyers) for every litigant (although the Supreme Court has repeatedly refused to recognize a constitutional right to representation in civil matters), but it would be impossible to equalize access to lawyers for the much more important and numerous facilitative tasks they perform. Furthermore, equal access would require withdrawing legal services from those who are overendowed—a step that liberal ideology would never tolerate.

Krygier praises the rule of law for constraining the powerful: Nixon resigned, Patty Hearst, Ivan Boesky, Michael Milken, Leona Helmsley, and Marion Barry were convicted. No doubt the more visible the violator, the greater the pressure to enforce the law. But what about all the low visibility decisions by police, prosecutors, prison officials, welfare officers, and other street-level bureaucrats? Or the innumerable situations in which ordinary people encounter the civil law: debt collection, eviction, contract

negotiation, divorce, child support enforcement, consumer disputes, or personal injury claims? Do these fulfill my criteria for the rule of law? Or even Krygier’s? Is the behavior of officials predictable? Stable? Governed by general rules?

Nothwithstanding conservative rhetoric, capitalism cannot operate without extensive government regulation. The regulatory state clearly does not meet either set of criteria for the rule of law nor could it do so. Regulatory capture is not an aberration, a mistake that can be corrected by another rule about ex parte contact. As long as private power is profoundly concentrated and overwhelms public power, it will shape the ways in which regulations are made and enforced. The revolving door between administrative agencies and private lobbying and lawyering is turning faster than ever as the gap widens between the rewards of public service and private employment.

Each of the incompatibilities between capitalism and the rule of law identified above has the same root: private power. And the blindness of liberalism is its inability to see private power. For liberalism, the private—civil society—is the realm of freedom. Constraint is located exclusively in the public—the state. That may be the lived experience of upper-class white males; because they enjoy economic, social, and cultural power, the only constraints they encounter are governmental (and even those are rare). But it certainly is not the lived experience of most people. For workers, it is the boss who wields power; a statutory minimum wage, the right to organize, the regulation of health and safety are liberatory. For women, it is men who wield power: the regulation of spousal abuse, rape, sexual harassment, and economic discrimination are liberatory. For racial minorities, it is whites who wield power: affirmative action in education, jobs, and housing are liberatory.

Let me sum up the deficiencies and dangers of Krygier’s position. His argument seems to reduce to the following: Some regimes have called themselves Marxist. They also have violated the rule of law. Therefore Marxism is incompatible with the rule of law. Capitalism is the opposite of Marxism. Therefore capitalism is compatible with the rule of law. Some capitalist regimes sometimes respect a restrictive concept of the rule of law. Therefore capitalism is necessary for the rule of law. Krygier illustrates this argument by carefully chosen pairs: one communist and one capitalist. But two can play “match-a-pair.” What about Romania and Salazar’s Portugal (rather than Austria—what about prewar Austria for that matter)? Poland and Franco’s Spain (rather than Sweden)? East Germany and Greece under the generals (rather than West Germany)?

In the end, Krygier’s argument is trite and discredited, merely an effort to keep fighting the Cold War. For him, the only alternatives are capitalism (preferably in its undiluted American form) and communism
(preferably in its undiluted Stalinist form). This is a perfect example of Gramsci's notion of hegemony: myths about oneself and one's enemy that drastically limit the imagination. It is necessary to continue attacking Stalin, and not just Stalin but Lenin, and not just Lenin but Marx, in order to distract attention from the failures of the conservative program of capitalism: the federal deficit left by Reagan's voodoo economics, the collapse of the cities, the deepening gulf between rich and poor, the feminization of poverty, the increasing respectability of racism, the destruction of the environment, the disaster of public education, and the crimes of the rich—the HUD scandal, the $500 billion savings and loan bailout. If Marx did not exist, conservatives would have to create him to justify their (selective) attack on the state, the redistribution of wealth from poor to rich, and the degradation of social welfare into what Reagan derisively called the "safety net."