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EMPIRICISM AND THE CRITIQUE OF MARXISM ON LAW AND CRIME*

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In this paper I take issue with the critical reaction that has recently sought to test the empirical adequacy of Marxist accounts of law and crime. I argue that this reaction has seriously misrepresented its own conceptual object by confusing it with concepts generated in theoretical structures less alien than Marxism, such as labeling theory and conflict theory. Because it uses "naive falsificationism" as its criterion of empirical adequacy, this reaction also inadvertently lends plausibility to some of the empirical objects specified by current Marxist concepts.

The decade since the intellectual and political unrest of the 1960's has witnessed the emergence of a burgeoning Marxist literature concerned to elaborate a theory of law and crime under capitalist (and occasionally, collectivist) modes of production. Most such work has been accompanied by sectarian, and at times overtly hostile, accounts of the conceptual significance of these objects within Marx's own critique of the categories of bourgeois political economy, and also of the contemporary articulation of the legal system with the various levels and practices constitutive of capitalist social formations. These developments derived a certain urgency from the intuitive notion that the economic, political and ideological operation of the legal system, and of much of the content of legal doctrine, might somehow explain the surprising longevity of such formations despite their endemic and pervasive contradictions. But intuition hardly satisfies the canons of scientific procedure. In 1975, in his Presidential Address to the Society for the Study of Social Problems, Stanton Wheeler reflected on the import of this literature and pointed out that:

> . . . the emergence of conflict theory and the rediscovery of Marx may perhaps move us in a new direction. . . . It is too early now to judge the fruits of these new conceptions, but it is my strong impression that the achievements have been more rhetorical than anything else, that whatever their value in changing our conception of crime, they have not led to new and fresh empirical inquiry. . . . (Wheeler, 1976:527)

It is undeniably true, in the limited sense in which Wheeler intended, that these "new conceptions" have indeed not led to fresh empirical inquiry. However, one of the unintended consequences of Wheeler's advocacy is that the Marxist literature on law and crime has itself been increasingly subjected to empirical scrutiny by non-Marxist sociologists. In the past several years, these latter have mobilized a critical reaction whose goal is the empirical assessment of the conceptual objects specified, loosely, by the "New Criminology," conflict theories and Marxist perspectives on law and crime. But the pursuit of this goal has largely been undertaken in terms of an empiricist logic consonant with formal and mechanical causality. This logic carries with it the unfortunate and ethnocentric maxim that the dialectical method of Marxist analysis is *ab initio* to be ignored by those critics whose task it is to assess Marxist accounts of law and crime.

The initial findings of this critical reaction have, not surprisingly, been far from unanimous in their implications. In their article "Rediscovering Delinquency" Hagan and Leon (1977:589) have recently argued that the Marxist perspective on law and crime is "(1) prone to logical errors, (2) largely unconfirmed, (3) often unconfirmable and (4) possibly quite frequently false." But it is clear from the outset that the deep structure of Hagan and Leon's argument had little substantively to do with delinquency. Far from it, the delinquency legislation associated with a particular society (Canada), during a specific period of time (1857–1952), was used by the authors as a foil

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to rebut (a) Marxist accounts (e.g., Platt, 1969, 1974) of the "same" empirico-temporal data, and (b) the conceptual and objective relationship which Marxists (e.g., Quinney, 1975a,; Taylor *et al.*, 1973, 1975) are commonly said to hold between class interests and the value-component of legal imperatives. The correct interpretation of the relevant data, Hagan and Leon extrapolated, would enable them to evaluate "the emergence of the Marxian perspective and the logic of its premises" (1977:587). The reader was at once awed by the complexity of this ambitious task, and subsequently dismayed by the woeful disregard for epistemological protocol with which it was completed. Nowhere did the authors precisely identify the nature of their object. This was vaguely and variously described as "a Marxian social historical approach to the study of social evolution" (1977:587), "this new Marxist perspective on law creation" (1977:588) and "a Marxian class conflict approach" (1977:597).

Some commentators (Chiricos and Waldo, 1975; Tittle *et al.*, 1978), using very different data and quantitative techniques, seem in general agreement with Hagan and Leon. Others (Cashmore, 1978; Jacobs, 1978; Jankovic, 1978; Lizotte, 1978) have concluded that Marxist and conflict perspectives are plausible or have at least been verified by the available evidence. Still further findings range from the skeptical assertion (Brown, 1978; Hawkins, 1978) that the empirical evidence may have little bearing on these perspectives to the implicit suggestion (Cernkovich, 1978) that the very concept of social class ought to be rejected as an explanatory framework for understanding law and crime.

The intention of this paper is neither to vindicate nor to supplement the inadequacies of Marxist perspectives on law and crime. Nor is it to assert that Marxism is impervious to non-Marxist criticism. Rather, it is to argue that the critical reaction to Marxism is intemperate and unwarranted because it has unwittingly conflated its own objects with those generated by concepts in other theoretical structures. More specifically, its instigators have had a tendency both to confuse certain Marxist concepts with concepts internal to conflict and labeling theories, and to ignore the important differences in the theoretical finesse of competing versions of Marxism. This quite probably means that *all* of the above findings are equally meaningless. Even more seriously, their critique appears incognizant of the epistemological universe from which it derives its own methodology and discourse. Such methodology, I will argue, is akin to what Lakatos (1970) has characterized as dogmatic or naive falsificationism.

IDENTIFICATION OF THE OBJECT

The refutation or verification of the conceptual objects emanating from any theoretical structure requires, first, that these objects be adequately identified. Proper identification requires a comprehension of their mutual articulation within their theoretical structure, and that they be distinguished from objects which appear similar yet which are contained within other theoretical structures. What of the Marxist analysis of law and crime which emerged in the 1960's—and which is now flourishing, for example, in the Conference on Critical Legal Theory (in Madison), the Birmingham (England) Center for Cultural Studies, and in *Contemporary Crises, Crime and Social Justice* and *Marxist Perspectives*? Superficially it appears to have been a politically-motivated amalgam of certain concepts *already* conceived within the structures of criminology, labeling theory and conflict theory. In outlining what is plausibly the conventional history of this development, Galliher has noted that:

> . . . the popularity of the labeling perspective with its emphasis on societal reaction and created deviance seems to have provided the conditions in the discipline for the swift re-emergence of the conflict orientation once it was triggered by the political milieu. . . . The conflict perspective stressing powerful interest groups' control of the law, police, and courts, in turn created the intellectual basis for the emergence of Marxism in criminology in the 1970's (Galliher, 1978:253-54).

By this account, then, the Marxist perspective on law and crime was a political response which

emerged "in the discipline," "in criminology." Indeed, how could this development have proceeded otherwise? There was no substantive precedent, at least in the USA, for a Marxist analysis of law and crime. Some Marxist writings did exist elsewhere—such as the contributions made by Bonger, Renner and Gramsci, and numerous works on commodity exchange and criminal law by Pashukanis, Berman and Krylenko in the USSR in the 1920's.[1] But these remained, and remain, mostly untranslated and therefore effectively unavailable to an English language audience. Moreover, there was an undercurrent of suspicion that many of these pioneering efforts were closer to European social democracy than to Marxism. And no precedent existed in Marx's own fragmented and unsatisfactory discourse on bourgeois law, even though his illuminating confrontation with Hegel's *Rechtsphilosophie* has periodically afforded some measure of inspiration.

There is, therefore, obvious merit in the observation that the Marxist analysis of law and crime which emerged in the late 1960's had its origins in mainstream sociology and criminology. Strong candidates for the immediate intellectual ancestry of this analysis, as Galliher suggests, are labeling and conflict theories. Nor is this history inconvenienced by the fact that the latter theories gained disciplinary prominence and intellectual respectability in the early 1960's. In that labeling and conflict theories were antiestablishment, cynical, and bent on demystifying the legal order, it is clear that their surface structures were vehicles for carrying a political message not entirely dissimilar to that embraced by Marxism. But if this picture is accurate we are faced with the interesting paradox of a Marxism nurtured in the womb of theoretical structures to which it was, ostensibly, largely opposed. And unless we uncover the genesis of this paradox we could mistakenly be tempted to extract appropriate Marxist concepts from the theoretical structure of which they are only a part, identify them in terms of concepts which are generated in less alien theoretical structures (such as labeling and conflict theories), and attempt to measure the empirical objects specified by the former in terms of the concepts yielded by the latter. It is one thing to argue that the newly acquired institutional position of labeling and conflict theories created a certain elective affinity with Marxism, but it is quite another to argue that they provided sufficient antecedent intellectual conditions for the application of Marxism to law and crime. Unless we recognize that labeling and conflict theories constituted some of the polemical climate but contained few of the intellectual premises for the emergence of Marxism in the USA, then we will be lulled into the complacent notion that Marxism differs from other perspectives not in its theoretical structure but only in that its political purpose is more radical.

Labeling theory—which came in many guises—was seen by its main protagonists as a palliative to a traditional criminology excessively imbued with positivism, correctionalism and conservatism. For Marxism, the essence of positivism—a term most often used in a derisive rather than any precise epistemological sense[2]—was that it allowed the methods of natural science unproblematically to be transported to the realms of social matter. In effect, this implied that the Kantian dualism of mind and body, of culture and science, could be resolved through the utilitarian guidelines of social engineering. Indeed positivism had first infiltrated American criminology in Chicago, during a period[3] when urban administrators, somewhat unwisely, were restructuring the spatial patterns of the physical environment through the medium of the City Beautiful concept borrowed from the experience of British town planners in the first quarter of the twentieth century. The resultant spirit of pragmatic optimism was soberly transformed by the Depression into one of social realism. However, an abiding legacy of the Depression was the notion that

1. The most detailed treatment of the commodity exchange school of law is found in Sharlet, 1968. See also the editors' introduction in Beirne and Sharlet, forthcoming.
2. For excellent analyses of positivism in criminology see Matza, 1964: chap. 1, and Cohen, 1974.
3. Similar developments, it should be noted, were taking place in the sociology of law, or the "science of law" as Roscoe Pound (1921, 1942) often termed it.

cyclical economic crises, and the social disorganization thereby engendered, could best be counteracted through active intervention by state apparatuses using various pump-priming mechanisms.

Yet positivist criminology was hopelessly unable to account for the new forms of social dissent which mushroomed in the 1960's. For twenty years it had virtually ignored the implications of Sutherland's (1940, 1941, 1949) work on white-collar crime. Sutherland's work neither fostered nor permitted examination of the relationship between legal institutions and social classes, but it did undeniably reveal that crime was more evenly distributed throughout the social structure than criminology admitted. Positivist criminology was not only unable to explain the crimes routinely committed by government and large corporations, it also had no competent explanation of the violence coextensive with civil rights, minority and antiwar movements. Horowitz and Liebowitz (1968), in an influential article, pointed out that the traditional distinction between social problems and the political system was becoming obsolete. Behavior which had previously been perceived and defined as social deviance was now assuming well-defined ideological and organizational contours. Labeling theory, beginning with Becker's noted insight in *Outsiders* that "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender' " (1963:9), promised to indicate the manner in which social dissent and traditional forms of deviance were becoming increasingly blurred. What institutional processes enabled certain forms of deviance, and not others, to be designated as deviant?

It is usually the case in the intellectual history of social theory that the dominant paradigms in a discipline are not replaced by other paradigms erected on novel or oppositional sets of epistemological principles. Fundamental epistemological revolutions in social science have been extremely rare. What is more common is that the content of the dominant paradigms is shifted from one focus to another. Works by Becker (1963, 1964), Matza (1964, 1969) and Lemert (1970) roughly defined the limits within which labeling theory would develop largely as a reaction to positivist criminology. The focus of concern shifted from the characteristics of offenders to the social processes whereby an actor was labeled as deviant, stigmatized and compelled into further deviant behavior. Where positivist criminology saw its pre-given conceptual object as crime defined by statute or common law, labeling theory began by making the very notion of crime subjectively problematic.

Criminologists—or "sociologists of deviance" as the labeling theorists and interactionist called themselves—were now compelled to question the assumptions by which certain interactive meanings became routinized and enshrined with the institutional sanctity of legal authority. What was the social construction of the reality in which society created deviance? How was this reality negotiated? Positivist criminology had emphasized different versions of control theory whose common and basic unit (anthropological man) was subject to social and ecological constraint. Labeling theory, although never successfuly challenging the philosophical assumptions of constraint, and conscious of the dangers involved in the classical concept of free will, instead stressed the integrity and rationality of the subjective values of the outsider and the underdog. This entailed the simple methodological injunction that "offender" and "victim" were to be reversed. Where earlier research had tended to concentrate on property crimes and crimes of violence, the new concern was for victimless and often esoteric "crimes." This required that sociologists suspend their personal values in order (empathetically) to understand the value systems under investigation. Where positivist criminology had dissolved the "causes" of crime into a plethora of multicausation and statistical correlations, labeling theory appeared to dissolve all mechanistic notions of causation. But this dissolution was deceptive. What was the form of explanation posited by labeling theory of "secondary deviation" if it was not based on the very mechanistic causation that the labeling theorists detected and despised in positivist criminology? Was not the concept of societal

reaction assigned a causative status within labeling theory similar to that assigned, for example, to parental occupation and education in traditional criminology?

Labeling theory left itself open to attack on two fronts. Ethnomethodologists complained that it did not sufficiently explore the processes and meanings of social interaction at the micro level. Marxists complained that labeling theory's focus on the interactive process between rule definers, rule breakers and social audience was not carried through to its implicit conclusion—the mutual interpenetration of polity and economy. What was the nature of the social totality in which these interactive processes occurred? Gouldner concluded that "Becker's school":

> . . . thus views the underdog as someone who is being mismanaged, not as someone who suffers and fights back. Here the deviant is sly but not defiant; he is tricky but not courageous; he sneers but does not accuse; he 'makes out' without making a scene. Insofar as this school of theory has a critical edge to it, this is directed at the caretaking institutions who do the mopping-up job, rather than at the master institutions that produce the deviant's suffering (Gouldner, 1970:107).

Labeling theory graciously gave the deviant a voice, but this voice was unable to articulate the lengthy social distance between "caretaking" institutions and "master" institutions. Nor could it indicate that the social-engineering policies of these institutions did not always occur *in vacuo toto*, that sometimes they were explicable only in the context of the structural relations between social classes. The great bulk of that tradition in American criminology epitomized, in different ways, by Merton's "Social Structure and Anomie" and Cohen's *Delinquent Boys* did, it was true, employ the concept of social class. But it used that concept very differently from the way it is employed by Marxism, as a set of structural relationships mainly constitutive of the social and technical relationships of production and exchange. Instead it tended to assign to "social class" the very imprecise and different meanings also attributed to it during the post-1945 debates—within non-Marxist discourse—on functionalism, social stratification and convergence theory.

It was conflict theory, drawing on the spirit of Weber, Simmel, Mills and Dahrendorf, that was to supply some of the theoretical vocabulary to fill this lacuna. An impressive body of research (Chambliss, 1964; Hall, 1952; Roby, 1969; Turk, 1966, 1969) soon accumulated which indicated that particular pieces of legislation were the result of conflicts of interest. Such conflicts, so the argument continued, were normally resolved according to the wishes of those with power. The conflict theorists were rarely precise in delineating quite in what "power" and "conflict" consisted, how power manifested itself, how conflict was resolved, and why it was resolved at all; but they nevertheless agreed that power and conflict were at the root of social organization. Quinney's seminal *The Social Reality of Crime* is representative of this tendency:

> In any society conflicts between persons, social units, or cultural elements are inevitable, the normal consequences of social life. . . . *power* is the basic characteristic of social organization (Quinney, 1970:8, 11).

This is of course a thematic and crude characterization of the conceptual basis of conflict theory, one that ignores its external relationship with other perspectives such as phenomenology and ethnomethodology, and omits all of its internal subtleties. But it has the modest virtue of demonstrating that a conceptually imprecise conflict theory might unconsciously be identified with an "instrumental" form of Marxism. Conflict theory was generally so vague in its basic assumptions, and so wide-ranging in its scope, that it might easily incorporate (or co-opt) a variety of different perspectives, including Marxism, within the compass of its structure. Jacobs, for example, has asserted that "instead of seeing the law as an impartially administered codification of shared norms, conflict theorists hold that the criminal statutes are created and enforced according to the wishes of those with power" (1978:515). The rigidity of the causal

structure of this argument—whose logical relations are formally almost identical to those held by labeling theory and positivist criminology—is not diminished by the correlative and more complex assertion that "*the more there are differences in economic resources and economic power, the more one can expect that the criminal codes will be administered in a way that pleases monied elites*" (Jacobs, 1978:516). The corollary of this assertion, in turn, often extends the causal chain to the argument that "when sanctions are imposed, the most severe sanctions will be imposed on persons in the lowest social class" (Chambliss and Seidman, 1971: 475).

Taken together, these assertions provoke several unanswered questions: Why should such administration please monied elites? What is the relation between the process whereby "elites" become "monied" and the administration of law? How and why are "economic resources" and "economic power" translated into legislative and judicial influence? Why do persons in the "lowest social class" typically receive the most severe sanctions? These questions can perhaps be answered, but they cannot consistently be answered empirically by the insensitive form of historicism which these assertions utilize. Let us assume that conflict theory generally holds both (a) that criminal laws are created and administered in the interests of a ruling class, and (b) that the severity of (legal) sanctions is inversely correlated with the hierarchy of social classes. The problem with these assertions, when taken together, is that the truth of the former might have implications incompatible with the truth of the latter. Indeed a convincing argument can be made that ruling classes have a general interest in promulgating and reproducing the stability of the social order *as a whole*, and that an important way of achieving this is by somehow ensuring that the severity of sanctions *ought* not significantly to be correlated with social class.

The second half of this paper seeks radically to demarcate the causal structure of Marxist propositions on law and crime from the causal structure of labeling and conflict theories, from which Marxism is commonly said to have emerged. The Marxist analyses of law which emerged in the late 1960's did not, it must be stressed, develop from any sector of mainstream sociology. Largely, they arose from earlier concerns within Marxist philosophy and Marxist theories of the capitalist state. The brief discussion which follows argues that the logical structure of Marxism is not causal but relational. As such, much of the empirical evidence directed towards the assessment of Marxist propositions is either grossly misdirected or else inadvertently supports them.

THE OBJECT

Instrumental Marxist Accounts of Law and Crime

The contemporary empirical assessment of Marxist accounts of law and crime has tended to be based on the false assumption that, as Hagan and Leon (1977:588, quoting Chambliss 1974:37) write, law is seen by *all* Marxists as "first and foremost a reflection of the interests of the governing class." This is not to deny that this position—which may be termed "instrumental Marxism"—has occupied a significant status in the intellectual history of Marxism. But to portray it as representative of even a majority of Marxist theorists today is, however, a flagrant *reductio ad absurdum* of Marxist theory. Instrumental Marxist accounts of law and crime bear less resemblance to current Marxist theory as a whole than to some of the "conspiratorial" premises of conflict theory and some of the apparent structural implications of labeling theory. But the natural affinity between instrumental Marxism and these latter two theories does not allow a critique of Marxism that is based exclusively on instrumentalism.

Instrumental Marxists have tended to derive their *weltanschauung* from an incomplete reading of the *Communist Manifesto's* dictum that "the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels, 1973:

110). The state and legal system are seen as instruments which can be manipulated, almost at will, by the capitalist class as a whole or, in certain moments, by particular fractions of capital. In this manner several empirical studies (Kolko, 1962; Domhoff, 1970; Miliband, 1969) have sought to prove that the economic power which inheres in the ownership or control of the means of production (industrial, financial, commercial and land capitals) can typically be transformed into personal political influence on the legislative process. It is argued that this transformation is materialized in such factors as lobbying, campaign financing, intermarriage within the capitalist class, and by straightforward corruption by business of the judiciary and of state and federal legislatures.

In a limited sense instrumental Marxism has performed the useful iconoclastic function of revealing the social fictions promoted by doctrines such as "the rule of law," "equality before the law" and "the separation of powers." But the danger involved in such "demystification," as Fraser (1976) has ably shown, is that it may achieve little more than a moralistic inversion of the categories already found in legal doctrine. What is good becomes bad, what is right becomes wrong.

> This disguised victory of bourgeois legal theory has already become manifest among radical lawyers in North America whose theoretical radicalism is contained and exhausted in a perception of the law as an elaborate confidence trick . . . The law, in other words . . . is dismissed contemptuously as an elaborate structure of myths, the function of which is to obscure the underlying reality of bitter struggle between social classes (Fraser, 1976:128).

Instrumental Marxism, in this respect, therefore occupies one end of a continuum with voluntaristic pluralism as its polar opposite, and it is vulnerable to simple empirical refutation. No doubt all of the transformative factors mentioned above do actually occur, but it is most unlikely that they occur with sufficient frequency to enable them to be regarded as the normal path by which economic interests are intercalated with formal political institutions. The capitalist class *as a whole* cannot be well served by frequent and visible abuses of due process. Instrumental Marxism views the capitalist class a group devoid of internal dissensions and antagonisms, and it ignores the partial autonomy of the legal system and legal doctrine, once developed, relative to other state institutions and relative to the exigencies of particular social classes.

Structuralist Marxist Accounts of Law and Crime

Structural Marxists have argued that state apparatuses exercise a "relative" autonomy in their relationship with the capitalist class. This means that in its basic struggle with the working class, the capitalist class cannot manipulate state institutions at will. The specific factors which determine the degree of this autonomy have as yet been inadequately theorized, but it is clear in outline that all state apparatuses are subject to the functional constraints of the structural ensemble of social relationships under capitalism. Schematically, the historical sphere within which state apparatuses operate is limited economically (O'Connor, 1973), politically (Poulantzas, 1971, 1975) and ideologically (Althusser, 1971; Genovese, 1976). These constraints may, simultaneously, be internal to a state apparatus—in the force of its belief systems, recruitment patterns and organizational stability confronted by the fluid contours of the class struggle(s)—and external. The effect of external constraint is best illustrated by O'Connor's insight that the state incurs two competing social expenses in its quest to guarantee the reproduction of the social formation: costs designed to reproduce the economic mode of production and stimulate the rate of profit, and costs which legitimate the sanctity and harmony of the social order.

The state must, therefore, *routinely* pursue policies which are at variance with the interests or wishes of certain fractions of capital. There are many cases which support this contention: welfare legislation (Anderson, 1974) which supports unemployed and nonproductive laborers, rent restriction (Beirne, 1977) which inhibits landlords' ability to receive open market rental

incomes, antitrust legislation, zoning ordinances, corporation taxes and so forth, none of which could be shown to be in the immediate interests of capital. This implies that various state policies, implemented through the medium of the legal form, will necessarily produce empirical cases which conflict with the capitalist class's search for rent, interest and industrial profit. It may ultimately be partly true that the benevolence of rich men to poor, as Hay (1975:63) has vividly suggested, is upheld by the sanction of the gallows and the rhetoric of the death sentence. But it is even more true that the capitalist class does not, and cannot typically neutralize opposition or pursue its own interests through the instrumental use of legal sanctions. Balbus (1973), for example, has pointed to the complex factors which mediated such manipulation in black ghetto revolts in Chicago, Detroit and Los Angeles. Any given court response to collective violence in these cities was likely to be a function of a delicate balance which court authorities are forced to achieve among their compelling and competing interests in order, formal rationality and organizational maintenance.

At least two relevant conclusions can be drawn from the structuralists' contributions. First, the enactment of legislation and the administration of justice are by no means always in the objective interests of the capitalist class, or indeed any class. Marx's own work never posited an *a priori* causal structure between elements in the "base," e.g., a particular class, and elements in the "superstructure," e.g., law.[4] Overwhelmingly, this structure involved a relational form of analysis whereby particular social relationships between classes are to be understood within the contexts of empirical and historical exigencies. There is, for example, no *a priori* reason to suspect that dominant *economic* classes in a given social formation will always be dominant *political* classes. But the structural variation in the relations between classes is bounded by the limits to which contradictions between classes can survive inherent transformative tendencies. Second, within the boundaries specified by the structural relations, levels and practices of a given social formation, empirical and historical analysis may reveal that some legislation is actually beneficial to one class rather than others. But each case must be examined empirically and on its own merits.[5] What matters, from the structuralist position, is the long-run stability of the social formation, and there is much historical evidence to demonstrate that social formations cannot survive for very long if particular classes within it are able visibly, or even surreptitiously, to manipulate state apparatuses at will.

Commodity Exchange and the Limits of the Legal Form

Structuralist Marxists have therefore provided us—and in so doing have soundly defeated instrumental Marxism—with a reasonable explanation of why the content of legislation may not always be in the immediate interests of the capitalist class. But the specific *content* of legal imperatives does not explain why the overall and long-run interests of the capitalist class are nevertheless embodied in law, why they are embodied in the *form* of law. Why are these interests not embodied in the form on which they episodically depend, namely, naked coercion? Is the legal system's "relative" autonomy from the class struggle merely another legal fiction, promoted by the capitalist class, which functions to obscure the ultimate causal dependence of law on dominant social classes? If this question is answered affirmatively, then this paper has traveled a circuitous and tortuous route only to discover that the empiricist critique of Marxist theories of law and crime is, paradoxically, correct. The answer, however, appears to be that the legal form itself has an innate quality which represents and perpetuates the dominant mode of production within any social formation.

4. I am well aware of the strict limitations inherent in the base/superstructure metaphor, and it is used here primarily for expository purposes.

5. Compare, for example, the abstract and relational logic which underlies Marx's *Capital,* with the illuminating empirical (historical) analyses which Marx provides in his three articles on French politics.

The importance of this latter point was singularly underlined in the work of the Soviet legal theorist Evgeny Pashukanis (1924).[6] The originality of Pashukanis' theory of law—which was largely contained in his *General Theory of Law and Marxism*—lies in the contraposition of three notions with what Pashukanis took to be the *modus operandi* of Marx's *Capital.* From Hegel, Pashukanis borrowed the familiar distinction between essence and appearance, and also the notion that the Roman *lex persona* was an insufficient basis for the universality of rights attached to individual agents under capitalist modes of production. And from Pokrovsky, an Old Bolshevik and the leading Russian historian between 1910 and 1932, Pashukanis borrowed the assertion that the development of capitalism must be understood in the context of the historical primacy of mercantile capital.

Pashukanis was first concerned to rebut the view that law is capable of voluntaristic manipulation by dominant social classes. If law is seen simply as a system of relationships which answers to the interests of the dominant class, then how can it be distinguished from all other social relationships which involve regulative norms? If law is seen as a social relationship, and if one asserts that law regulates social relationships, then one must engage the tautology that social relationships regulate themselves.

Clearly, not all rules are legal rules: some rules are customary and traditional, and may be based in moral, aesthetic or utilitarian considerations. The crucial question with which Marxist theory must be concerned is the elucidation of the conditions in which the regulation of social relationships assumes a legal character. Following certain sections of Marx's Hegelian-inspired analysis in Volume I of *Capital,* Pashukanis argues that the search for the unique social relationship, whose inevitable reflection is the form of law, is to be located in the interaction between commodity owners. The logic of legal concepts corresponds with the logic of the social relationships of commodity exchange, and it is in these relationships—and not in the instrumental demands of domination, submission or naked power—that the origin of law is to be sought.

Capitalist societies are principally societies of commodity owners. Commodities have a dual and a contradictory character. On the one hand, a commodity is and represents a use-value. But commodities necessarily embody different use-values because the qualitatively distinct social needs that they fulfill, and the quality and quantity of labor expended in their production, are necessarily different and unequal. On the other hand, a commodity is and represents an exchange value. One commodity may be exchanged for another in a definite ratio. The values encountered in this exchange are expressed by and facilitated through the mediation of another commodity—money—as the form of universal economic equivalent.

The potential for commodity exchange thus assumes that qualitatively distinct commodities enter a formal relationship of equivalence, so that eventually they appear as equal. Commodity exchange obscures a double abstraction in which concrete labor and concrete commodities are equalized *inter se* and are reduced to abstract labor and abstract commodities. This abstraction in turn perpetuates the fetish that commodities themselves, including money, contain living powers: commodities therefore dominate their very producers, human subjects. But the logic of commodity exchange—the basic logic of capitalism—defines and complements the logic of legal fetishism. At the same time that the product of labor is assuming the quality of a commodity, and becoming the bearer of value, the human subject acquires the quality of a juridic subject and becomes the bearer of a right. The constant transfer of rights in the market creates the appearance of an immobile bearer of rights. The concrete rights and obliga-

6. The importance of Pashukanis' contribution to a materialist theory of law has only very recently been recovered by Marxists. See Fraser, 1976; Arthur 1976, 1978; Balbus, 1977; Holloway and Picciotto, 1977; Redhead, 1978; Beirne and Sharlet, forthcoming.

tions established between economic subjects are eventually dissolved into the abstract attributes of the juridic subjects. Concrete political subjects are relegated to abstract political citizens who incorporated egoism, freedom and the supreme value of personality. The capacity to be a subject of rights is finally disassociated from the specific living personality and becomes a purely social attribute. Law is thus the political form for establishing abstract equivalence between isolated economic subjects.[7]

Pashukanis' argument has at least two important implications for the present discussion. First, the range of variation in the context of particular legal norms is circumscribed by the *form* of law, and the form of law is contingent on the dominant modes of production in any social formation. The *content* of legal norms may only vary within these determinate limits. Under the capitalist mode of production, for example, there can be no law which abolishes rent, interest or industrial profit, for that would be to abolish capital itself. But the *level* of surplus value—or already-produced surplus value in the case of rent—extracted by capital will vary according to state policies which are themselves partly conditioned by the relative strengths and weaknesses in the class struggle. Second, law is not an external object whose meaning can be ascertained in isolation from the social relationships of production and exchange. Law both mediates and is mediated by these relationships, and is the political equivalent which lends cohesion to the relationships among atomized economic agents. Thus, to raise questions concerning the equity, or otherwise, of a given law presupposes questions concerning the nature of production and exchange; the former cannot be asked, or measured, without the latter.

CONCLUSION

One final point is now in order. Currently, many sociologists seem eager to measure the empirical status of law within social structures, but few have bothered to conceptualize the features distinguishing law from other categories of rules. How does law differ from mores, customs and tradition? Can legal rules sensibly be distinguished from the more mundane rules which social actors routinely use to negotiate everyday life? Is law simply a set of rules whose violation will incur organized sanctions? Or is it a less visible set of ideological injunctions most commensurate with the forms of domination under capitalism, so insidious that our notions of legitimacy and equality are permeated by its intrusiveness? These are important questions, but they can be neither adequately posed nor properly answered within the framework of empiricism.

The major contention of the argument here has been that the critical reaction to Marxist accounts of law and crime is at present seriously in error. I have suggested that this reaction has misrepresented its object (the concepts specified by the theoretical structure of Marxism) by confusing it with objects contained within intellectual traditions more familiar than Marxism.

In that it tends to rely on naive falsificationism as its criterion of empirical truth, the critical reaction I have outlined here shares a feature with other varieties of sociological empiricism. The existence of legal controls and legal sanctions "inimicable" to the immediate interests of the capitalist class does not refute or falsify the Marxist perspective. The argument "*this* law is inimicable to the interests of the capitalist class, *therefore* law *in general* does not reflect those interests" is syllogistic unless it is based on the premise that one ought, and one ought to be able, to identify such interests and to distinguish between the immediate and the overall interests of the capitalist class. In order to acquire a modicum of legitimacy for its economic position in production, the capitalist class is best served by a legal system which is constrained to present itself as the embodiment of the universal interest of the social formation rather than of

7. Since law is based on commodity exchange—or, more precisely, the *generalized* commodity exchange which is peculiar to *capitalist* production—the existence of law is therefore both superfluous and practically impossible under communism.

particular interests within it. If these premises themselves are not subjected to empirical scrutiny than no amount of counterfactual examples can falsify or displace the proposition that inimicable legislation does not contradict the overall interests of the capitalist class and that such legislation may actually support that class's interest in long-run stability. Even an overtly empiricist set of propositions must be based on some unspoken theoretical structure, yet unless this structure is explicitly articulated no empirical tests—or vague assertions that Marxism encourages tautologous theorizing—can displace the proposition that legislation usually but not always reflects the interests of the capitalist class.

Theoretical structures are never rejected on empirical grounds alone. They are either supplemented and modified by new empirical findings, or discarded in favor of theoretical structures which explain more empirical space. But when the goal of the sociological method slides from puzzle-solving to testing, when data are put into an artificial nexus with concepts concerning class interests and concepts concerning needs for legitimacy, then the sociological enterprise assumes an insoluble relativism which, as Robert Merton reminded us, is devoid of any central referent beyond an obsession with measurement itself.

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