Marxism and the Rule of Law: Reflections After the Collapse of Communism

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This article concerns the relationship between the thought of Karl Marx and the fate of law, and the rule of law, in the communist states of the Soviet Union and east and central Europe. It takes the rule of law to be primarily an attempt to institutionalize restraint on power through law, and it takes it to be realized to a far greater extent in Western liberal democracies than in once-communist states. It argues that Marx's thought offered no support for such institutionalization of restraint, but, on the contrary, considerable support to the repressive, ideological and purely instrumental uses of law and the rejection and destruction of the rule of law, which were characteristic of communism.

> And what about Marx's words? Did they serve to illuminate an entire hidden plane of social mechanisms, or were they just the inconspicuous germ of all the subsequent appalling gulags? I don't know: most likely they are both at once.
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> —Vaclav Havel, "Words on Words"

> A statute-book is a people's bible of freedom.
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> —Karl Marx, "Debates on Freedom of the Press . . ."

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My subject is the relationship between Marxism, communism, and the rule of law. My point of departure is the fate of European communism. My contention is that these subjects are deeply related and, in particular, that the fate of law under communism is related to Marx's thought about law and about freedom.

Of course, the relationships between the thought of a long-dead thinker and the practices of a subsequent regime are matters of great complexity. When that thinker is Marx, they are also subjects of perennial and often bitter controversy, subjects often clouded by debate over pointless questions. Among such questions are whether Marx would have approved of what was done in his name. The question is unanswerable[1] and in any event is irrelevant to the influence of his writings. Another is whether Marxism is either necessary or sufficient for barbarism. It is not necessary for barbarism *tout court*—although it might be for some forms—for the world is full of barbarians, as Hitler and many lesser tyrants have shown. Nor is it sufficient. In the Soviet Union, for example, other forces were at play, among them the Russian state tradition, the weakness of civil society there,[2] and Soviet-directed imposition elsewhere. And Lenin had a lot to do with Leninism,[3] as did Stalin with Stalinism.[4] Many forces contributed to the final product, and there is no way of keeping score.

Still it is not frivolous to ask whether there is any connection between the thought of Karl Marx and the destruction and disparagement of legal entitlements, legal protection, and legal restraint which has been the common experience of all the countries of "really existing socialism." Indeed after the tragic experiments conducted over 70 years in the name of Marx, it would be irresponsibly frivolous not to ask that question. Is the absence of the rule of law in communist states perhaps merely an Eastern legacy or imposition? Is it just the work of thugs (sometimes even maniacs) in power? Or is there something else also at work?

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1. Cf. Leszek Kolakowski, 1 *Main Currents of Marxism* 2 (Oxford, 1978):

> It is impossible to answer the questions "How can the various problems of the modern world be solved in accordance with Marxism?" or "What would Marx say if he could see what his followers have done?" Both these are sterile questions and there is no rational way of seeking an answer to them. Marxism does not provide any specific method of solving questions that Marx did not put to himself or that did not exist in his time. If his life had been prolonged for ninety years he would have had to alter his views in ways that we have no means of conjecturing.

2. See Adam Czarnota & Martin Krygier, "Revolutions and the Continuity of European Law," in Zenon Bankowski, ed., *Revolutions and Law in Legal Thought* (Aberdeen, 1991 (forthcoming)).

3. See Piers Beirne & Alan Hunt, "Law and the Constitution of Soviet Society: The Case of Comrade Lenin," 22 *Law & Soc'y Rev.* 575 (1988); Martin Krygier, "Weber, Lenin and the Reality of Socialism," in Eugene Kamenka & Martin Krygier, eds., *Bureaucracy: The Career of a Concept* 61–87 (New York, 1979) ("Kamenka & Krygier, *Bureaucracy*"); A. J. Polan, *Lenin and the End of Politics* (London, 1984).

4. See Martin Krygier, " 'Bureaucracy' in Trotsky's Analysis of Stalinism," in Marian Sawer, ed., *Socialism and the New Class* 46–66 (Adelaide, 1978).

My answer is that there is and that it is Marxism. Not Marxism exclusively, but Marxism as well. Within the logic of Marx's thought there were ample resources which could be and were drawn upon to encourage, and equally important an absence of resources to discourage, the interpretations they came to be given.[5] These interpretations made it possible to justify a great deal that should never have been tried.

Put another way, there are "elective affinities" between Marxism and communist contempt for law of a sort Weber alleged between Protestantism and early capitalism and Marxists and critical theorists claim between liberalism and contemporary capitalism. Indeed this is more plausible of Marxism than of either Protestantism or liberalism. After all, Marxist regimes had *one* originally inspiring source though many tributaries; liberalism had many, and the genealogy is not simple. And at least the original Marxist revolutionaries took that source very seriously indeed. They were not pretending to be Marxists. They belonged to a tradition and to a movement which regarded Marx's thought as quite unparalleled in insight and authority and was profoundly influenced by it. And they did not just let their system happen. They fought to create and defend it and they *imposed* it. There is no parallel to this systematic purposefulness in liberal democracies. Yet contemporary critics of the American legal order seem to have no difficulty in attributing its central characteristics to "liberal legalism," to Hobbes, Locke, and the satanic Mills.[6] So perhaps the communist legal order might have something to do with Marx.

I. THE COLLAPSE OF EUROPEAN COMMUNISM

The revolutions in east central Europe over the past year are likely to prove as profound as any transformations which have borne that name. They may fail in any number of ways but one: What follows them will differ profoundly from what went before. That was not the case in East Germany after 1953, Hungary after 1956, Czechoslovakia after 1968; Poland after 1956, 1968, 1970, and 1976; nor was it clear that it would be in Poland after 1980–81. It is now.

The Communist Party has crumbled or is tottering in one party-state after another. It has been renamed and must compete for office, its "leading role" has been deleted from one constitution after another, its erstwhile members have scurried in every direction, and staff members of the

5. For broader reflections on the relationship between Marxism and communism of a sort I find congenial, see Leszek Kolakowski, "Marxist Roots of Stalinism," in Robert C. Tucker, ed., *Stalinism* 283–98 (New York, 1977) ("Tucker, *Stalinism*"), and Kolakowski's *Main Currents of Marxism*, especially the introduction and recapitulation and philosophical commentary (vol. 1) and epilogue (vol. 3).

6. I have discussed some of these critics in "Critical Legal Studies and Social Theory—A Response to Alan Hunt," *7(1) Oxford J. Legal Stud.* 26 (1987).

Institute of Marxist-Leninist Thought at Charles University in Prague are looking for jobs.[7]

In most of these states the Party is totally discredited, profoundly demoralized, no longer a good career option—in Rumania an uncertain life option—and no longer able to rely on the Russians. Even the Russians may not be able to rely on the Russians. Communist rule might have been able to survive any one of these obstacles except the last; but not all of them together.

This does not mean that communist states will suddenly wither away, although a few communists have, some literally, some as born again social democrats. Nor does it guarantee a radiant future, not even a happy one. Nevertheless, enough is likely to change for these events to prove of epochal significance, comparable to those of the French and the Russian revolutions.

However, the present revolutions differ in one important respect from those totemic upheavals. They proclaim no world-historical innovations. The truths they seek to vindicate are distinctly old-fashioned, as are their aspirations. There are, of course, huge differences on matters of economic and political policy among the subjects of any one former communist state, let alone between those of different states. And these differences will multiply as deep-seated problems come to be faced and decisions need to be taken. Nevertheless, there is an important underlying level of common ground. Poles, Czechs, Hungarians, East Germans, Bulgarians, and Rumanians share what might seem to some Westerners a remarkably prosaic, if not misguided, ambition. They want to live in what Poles characterize as "normal"[8] societies. In this imprecise but revealing usage, people do not distinguish between, say, the United States and Sweden; France and Austria; Belgium and Great Britain. Nor do they neces-

7. As the *New York Times* reported, Professor Zdenek Safar, instructor in Marxism-Leninism at the Charles University, has been fired along with his 180 colleagues: " 'I think I'll start my own business,' he said matter-of-factly. 'Now it will be possible to make even more money in Czechoslovakia than in Austria.' " *N.Y. Times*, 28 Feb. 1990, at A5. See also "Czechoslovakia's Universities Realign Their Faculties," *Chronicle Higher Educ.*, 7 March 1990.

8. One of the most illuminating contrasts between political cultures, accessible only through experience or thick description, is that between the taken-for-granted freight—or "local knowledge," to use Geertz's phrase—which similar and ordinary words come to carry in one place but not in another. "Normal" is such a word. In Poland, contrasts with "normal" societies are inescapable in ordinary conversation. The word has layers of local experience and knowledge built into it. So, in the understanding of ordinary life, do such experiences as *na lewo* (literally "on the left," roughly and more exactly "under the table" or "on the sly") or *załatwianie spraw* (the universal socialist talent for "fixing [or arranging] things" which in "normal" countries are handled in more formalized and less Byzantine ways). Elsewhere I have tried to flesh out some of the texture of everyday life that this sort of language presupposes. Here I can do no more than refer to that discussion. See "Poland: Life in an Abnormal Country," *Nat'l Interest*, Winter 1989/90, at 55–64; "In Occupied Poland," *Commentary*, March 1986, at 15–23. See also Janine Wedel, *The Private Poland* (New York: 1986).

sarily idealize these societies uncritically. There are many well-informed residents of socialist societies who know full well that life is not easy in the West, and that it will not be in the center and the East even if "normality" is ever attained. They do not see it as sufficient for a good society, merely necessary. For they know too, that, notwithstanding significant differences among "normal" societies, and notwithstanding such societies' many injustices, flaws, and pathologies, compared with "really existing socialism" they share and take for granted much that is unavailable in the East.

With a generality simply unknown—let alone presumed—east of the Elbe, the stores in "normal" societies have goods to sell, their people money to buy; mail gets to its destination unopened; phones work; state agencies are not suffocatingly omnipresent; citizens elect governments; economies are not deformed by the surreal consequences of monopolistic political domination and administrative "steering"; and the exercise of political power is mediated and restrained by, among other things, law.

"Normality" is of course not an analytic category. It is a vague idea of deep local resonance, particularly in popular—often despairing—invocations of it. But it is not empty. And while post-communist dreams of normality might not come to be realized, they are not utopian. For any eastern European who travels west—as so many now can and do—finds them taken for granted. Normality has been absent from east central Europe for a very long time. One of its elements is the role played by law.

II. LAW

In the first months of the Soviet regime Lenin candidly explained that "dictatorship is rule based directly upon force and unrestricted by any laws. The revolutionary dictatorship of the proletariat is rule won and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws."[9] This did not mean that law was to be disregarded forever. When circumstances became appropriate, the Soviet government would come to find law useful: "As the fundamental task of the government becomes, not military suppression, but administration, the typical manifestation of suppression and compulsion will be not shooting on the spot, but trial by court . . . the court is an *organ of power* of the proletariat and of the poorest peasants . . . the court is an instrument *for inculcating discipline*."[10] Of course, one could have *both* shooting on the

9. Lenin, "The Proletarian Revolution and the Renegade Kautsky," 2 (pt. 2) *Selected Works* 41 (Moscow, 1951). Cf. Lenin, "The Immediate Tasks of the Soviet Government," 2 (pt. 1) *Selected Works* 478 ("Lenin, 'Immediate Tasks' "): "But dictatorship is a big word, and big words should not be thrown about carelessly. Dictatorship is iron rule, government that is revolutionarily bold, swift and ruthless in suppressing the exploiters as well as hooligans. But our government is excessively mild, very often it resembles jelly more than iron."

10. Lenin, "Immediate Tasks" at 478–79.

spot and trials by courts, and Stalin did. Once Stalin decreed that the "withering away" of state and law was not imminent, his prosecutor Vyshinsky adjusted Lenin's dicta to incorporate but subordinate law at the same time. He explained, for example: "The formal law is subordinate to the law of the revolution. There might be conflict and discrepancies between the formal commands of law and those of the proletarian revolution. . . . This conflict must be solved only by the subordination of the formal commands of law to those of Party policy."[11] Thereafter countless legal minions, first in the Soviet Union and later throughout the bloc, invoked "socialist legality." They argued, as the recently removed president of the Polish Supreme Court put it: "The rule of law, like every important phenomenon of social life, has a distinctly class character. That is why it is necessary to distinguish sharply between socialist rule of law—our rule of law—and bourgeois law. Socialist rule of law represents a higher, more perfect level of the development of the rule of law."[12]

In recent years, and more quickly months, this language is disappearing. The models looked to for legal reform are unabashedly "bourgeois" or simply Western.[13] There is no traffic east on these matters. Theses of the CPSU Central Committee speak of a "law-governed state," and a symposium on its preconditions is transcribed in Moscow's *Literary Gazette*.[14] Too, the long-serving foreign minister and short-serving president of Bulgaria, Petar Mladenow, sent a telegram to Gorbachev assuring him (*assuring* him!) that "Bulgaria will be changed into a modern law-governed state," and Kalman Kulcsar (the Hungarian minister of justice) explained: "We are now trying to move to the idea of the 'rule of law.' Perhaps it would be more precise to use the term '*Rechtsstaat*,' rather than the 'rule of law' because we have a continental rather than an Anglo-Saxon tradition."[15]

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11. A. Vyshinski, *Sudoustroistva v SSR* (Judiciary of the USSR) 32 (2d ed. Moscow, 1935), quoted in H. J. Berman, *Justice in the USSR* 42–43 (1963). Berman continues (at 391 n.20); "Krylenko, People's Commissar of Justice until 1937, was even more outspoken in his statements that law must be subordinated to 'expediency.' " Cf Sam Krislov's recent observation: "The new freedom of *perestroika* has unveiled gross violation of independent judgment by judges and prosecutors. The president of the Supreme Court climaxed these revelations by calling for legislation making it illegal for government or party officials to direct a verdict in a case—a confession in avoidance of a devastatingly revealing nature." "Socialist Legalism in Poland and the Triumph of Law" (presented at meeting of Research Committee on Comparative Judicial Studies, 26–27 May 1990).

12. Adam Łopatka "Pojęcie praworządności" (Conceptions of the Rule of Law), in Łopatka, ed., *Podstawowe Prawa i Obowiązki Obywateli PRL* (Fundamental Rights and Duties of Citizens of the Polish People's Republic) 16 (Warsaw, 1969).

13. See Inga Markovits, "Law and *Glastnost'*: Some Thoughts About the Future of Judicial Review Under Socialism," 23 *Law & Soc'y Rev.* 400 (1989).

14. See "Kakim dolzhno byt pravovoe gosudarstvo?" *Literaturnaia Gazeta*, 8 June 1988, published in English as "What Should a Law-governed State Be?" 28 *Soviet L. & Gov't*, Summer 1989, No. 1, at 51–65.

15. *Religion in Communist Lands* 141 (1989), quoted in Markovits, 23 *Law & Soc'y Rev.* at 404.

Referring to these developments, the Polish legal theorist Adam Czarnota has recently noted that one of the primary features of the revolutionary changes which have swept the bloc is "the revival of the idea of law."[16] One might add, not bourgeois law or socialist law, just law; law without adjectives. As Czarnota explains:

> Problems of legality, of the proper function of law and of the administration of justice, a collection of ideas which using western ideological language we could grasp together in the category of the Rule of Law, were amongst the leading claims in the focus of activity of the opposition groups, within the communist states. But in addition to the claims of opposition groups, one of the features of changes in Central Europe, especially in Hungary and Poland, is the adoption of a new kind of language, a language which may be called rights-language.[17]

There have been many reasons for communist states to try to take law more seriously, and several of them—aimed at economic efficiency and social order—had nothing to do with the recent upheavals. Even the Chinese government, after all, sought to increase legal stability in the economy before it reasserted old methods to reimpose control. But new ways of talking, even official ways, are not without consequence.[18] Moreover, however instrumental and limited official gestures toward rule of law might have been, they have broader resonance, stemming from quite different sources, in erstwhile communist societies. As Timothy Garton Ash points out, there is a striking consensus among the many different views represented among former dissidents, and sometimes now presidents, in the East: "In politics they are all saying: There is no 'socialist democracy,' there is only democracy. And by democracy they mean multi-party, parliamentary democracy as practiced in contemporary Western, Northern, and Southern Europe. They are all saying: There is no 'socialist legality,' there is only legality. And by that they mean the rule of law, guaranteed by the constitutionally anchored independence of the judiciary."[19] In the context of the remarkable shifts of power that are now taking place in east central Europe, it will be much harder there than in China to turn matters around.

There is no reason to endorse this new enthusiasm for law without

16. "After Death Before Birth: Recent Changes in the Polish Constitution" (presented at the Law and Society Conference, 12–14 Dec. 1989, La Trobe University, Melbourne, Australia).

17. *Id.*

18. As Czarnota (*id.*) comments on the pro-law official affirmations: "Of course this is propaganda but the change in the form of language reflects not only cosmetic change but the possibility of a radical, paradigmatic change in people's understanding of law. For probably the first time in the history of the communist states law is being taken seriously as an instrument for the regulation and organisation of civil society and of the state."

19. "Eastern Europe: The Year of Truth," *N.Y. Rev. Books*, 15 Feb. 1990, at 21.

adjectives just because it has occurred. But there seems to me to be some Hobbesian wisdom, as well as an appropriate humility, in taking it seriously. Hobbes taught us that to know the worth of a scheme of governance it is not enough to compare it with some ideal polity. It is also important to compare it to life without it. Hobbes did so via introspection and imagination, an imagination enriched by experience of the English Civil War. He insisted that any effective government was preferable to none. The people of east central Europe have a different comparison to reflect on. They have not lacked government, and most of them have not lacked laws. They have, however experienced—"on their skins" in the Polish phrase—the lack of the *rule of law*. Humility, as well as intelligence, suggests that we would do well to respect and take account of that experience.

III. THE RULE OF LAW[20]

What can one learn about the rule of law from its absence? The rule of law is a notoriously contested concept, and any account of it must to some extent be stipulative, geared to the particular interests and purposes of the stipulator. My stipulations are intended to apply broadly, but they will not be adequate for every purpose or every use of the phrase. For they have been composed with one particular contrast in mind: that between societies where law can plausibly be said to *count* as a restraint on power and those where it cannot. Among the former are all the liberal democracies, whether governed by conservatives, liberals, or social democrats. Distinctions among them—important for other purposes—are not my concern here. Among the latter, although not alone among them, have been all the communist states that are now crumbling.

1. When people in the West think of law, it is usually in the context of power: police power or political power. Law is seen as a means of exercising power. And so it is. But there are many ways of exercising power. Doing it by *law* is only one such way and as one author has observed, law "has the great virtue of limiting what it grants."[21] One can shoot one's opponents, simply jail them without trial, beat them up in the dark, terrorize them so that they are frightened of every knock on the door, or just send them to rot in remote or uninhabitable parts of the country until they die. Each of these methods has had its supporters, and in many

20. This section is derived from my "Rządy Prawa: Kulturowe Osiągnięcie o Charakterze Uniwersalnym" (The Rule of Law: A Cultural Achievement of Universal Significance), Proceedings of the Third International Congress of Scholars of Polish Origin, Warsaw (forthcoming).

21. James Boyd White, "Law as Law," in *Heracles' Bow* 239 (Madison: University of Wisconsin Press, 1985).

states, including every communist state, power was exercised in just those ways for some time. In some societies, however, power is not exercised in these ways, and that is an extraordinary thing. In these societies, the exercise of power is customarily restrained by law. It is this that people have in mind when, often confusedly, they talk of the rule of law.

2. Yet it is not enough that government make laws. Many dictatorships have done that, and even terrorist dictatorships have, once the terrorist phase has passed. Law can be a great aid to repression, as both authoritarian and totalitarian regimes have known. There was, after all, a Nazi jurisprudence, and it was a horrible sight.[22] Its aim was to make law maximally permeable to political direction and serviceable to government purposes, part of what Reich Minister Hans Frank described as "[a] smoothly functioning and technically superior administration [which is] to a chaotic despotism what precision machinery is to an unreliable makeshift instrument producing only chance results."[23] After all, insistence on obedience to laws whose content, meaning, operation, and interpretation a government controls communicates the government's requirements and saves bullets. Repressive law is perhaps less terrible than lawless repression, but it can be terrible all the same.

Moreover, even apart from repression many governments—communist and fascist governments preeminently—have had a purely *instrumental* and voluntarist attitude to law. Law is one among an array of instruments for translating the government's—or party's—wishes into action and maintaining social order. Its nature will be a reflection of the leadership's purposes. It will last as long and change as fast and often as the rulers wish, be as vague as is useful, be enforced as capriciously as the central authorities or their servants consider appropriate.

It is an open and controversial question in the West how much the welfare state, with its massive governmental growth, and the use of bureaucratic regulation for particular, frequently changing governmental purposes, is compatible with the maintenance of the rule of law.[24] Some writers suggest and hope that they are compatible,[25] some—usually on the right—believe and fear that they are not,[26] and still others—usually on the

22. For a brief but illuminating discussion of recent German works on Nazi jurisprudence, see Massimo La Torre, " 'Degenerate Law,' Jurists and Nazism," 3(1) *Ratio Juris* 95 (1990).

23. "Technik des Staates," *Zeitschrift der Akademie für deutsches Recht* 2 f. (1941), quoted in Otto Kirchheimer, "The Legal Order of National Socialism," in *Politics, Law and Social Change* 99 (New York, 1969) ("Kirchheimer, *Politics*").

24. See Guenther Teubner, ed., *Dilemmas of the Welfare State* (Berlin, 1986).

25. See Kirchheimer, "The *Rechtsstaat* as Magic Wall," in Kirchheimer, *Politics* 428–52; Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law* 210–29 (Oxford, 1979) ("Raz, 'Rule of Law' ").

26. See F. A. Hayek, *Law, Legislation and Liberty* (Chicago, 1973 (vol. 1); 1974 (vol. 2); 1979 (vol. 3); Eugene Kamenka & Alice Erh-Soon Tay, "Beyond Bourgeois Individualism—The Contemporary Crisis in Law and Legal Ideology," in Eugene Kamenka & R. S. Neale,

left—believe and hope that they are not.[27] On the "crisis" of the rule of law, it appears, the disaffected right and the disaffected left overlap in diagnosis if not prescription.

I cannot enter that overheated[28] controversy here except to make two points. The first is that there is the world of difference between, on the one hand, the unconstrained political voluntarism and instrumental use of law found in despotisms, and on the other, welfare states that mix bureaucratic interventions with political democracy and strong and long legal traditions. Notwithstanding the bureaucratization of the modern Western state, legal traditions are still powerful and pervasive there. Perhaps it is just a matter of time, but I am not convinced. Moreover there is no contemporary evidence of a "slippery slope" from welfare states to despotism. Certainly communist despotism was nowhere the result of a slide down such a slope: not in Russia or the states conquered by it, nor in China, North Korea, Vietnam, Cambodia, or Albania. On the other hand, where instrumental attitudes to law are harnessed to a monopoly of political power and not tempered by traditions of restraint by law—as in many contemporary dictatorships—the rule of law cannot survive.

3. The rule of law has three important aspects, which I will label government *by* law, government *under* law, and rights. Each of these aspects points to a crucial and historically rare mode of restraint on power by law.

a) Government by law:[29] 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. When they punish, it should be for offenses known to be offenses ahead of time, etc. This does not always happen, and it probably never happens never. Differences between legal orders are ones of degree, but critical. To the ex-

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eds., *Feudalism, Capitalism and Beyond* 127–44 (Canberra and London, 1975); Theodore J. Lowi, "The Welfare State, the New Regulation, and the Rule of Law," in Allan C. Hutchinson & Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* 17–58 (Toronto, 1987) ("Hutchinson & Monahan, *Rule of Law*"); Geoffrey de Q. Walker, *The Rule of Law* (Melbourne, 1988).

27. See Roberto Managabeira Unger, *Law in Modern Society* (New York, 1976).

28. I have said something about crisis talk in 7(1) *Oxford J. Legal Stud.* (cited in note 6). See the very sensible remarks of David Nelken, "Is There a Crisis in Law and Legal Ideology?" 9 *J.L. & Soc'y* 177 (1982).

29. The sort of issues I have in mind here have been elaborated in many places. Among these accounts, see Norberto Bobbio, "The Rule of Men or the Rule of Law?" in *The Future of Democracy* 138–56 (Minneapolis, 1987); Lon L. Fuller, *The Morality of Law* (2d ed. New Haven, Conn., 1969); F. A. Hayek, *The Constitution of Liberty* (London, 1960); Michael Oakeshott, "The Rule of Law," in *On History and Other Essays* 119–64 (Oxford, 1983); Raz, "Rule of Law" (cited in note 25). See also the symposium on the rule of law, edited by Noel B. Reynolds, in 2(1) *Ratio Juris* (1989).

tent that government is exercised by law in this sense, people can predict what governments will and can do, and can predict what others can and will do. And they know they can. This increases citizens' abilities to coordinate their activities with each other and with governments, and it decreases the possibility or apprehension—both are important—of political arbitrariness. And it makes sense to speak of legal rights.

Of course, this is not the only way of arranging things. And in many societies ghastly things have happened to people—at times millions of people—all the more ghastly because there is *no* way that they could have avoided their fate, appealed against it, or tested its propriety. At best, in place of rights they might have the right to ask for favors. But that is not the same. Less terribly, but still significantly, it was 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.

b) Government[30] under law involves a legal/political culture in which it is understood that even very high political officials are confined and confinable by legal rules and legal challenge. A system, such as that in the United States, in which a president can be dismissed for illegal acts, or in which presidential advisers, mayors, police, magistrates, and others can be investigated and dismissed for illegality is not, unfortunately, one in which no official acts illegally. But it is quite different, and so are public discussion and public expectations of what is appropriate in public life, from a system where the very idea of subjecting the powerful to the law does not exist—either in principle or as a realistic possibility. Again, differences are of degree. Again, they are critical. In societies where government is under law, this is commonly so deeply embedded an achievement that no one notices it *as* an achievement. It simply is taken as the normal way to behave. Observers from harder countries, on the other hand, often find it difficult to understand what ties the hands of the major players. Because of the embeddedness of such assumptions and expectations, the point is best illustrated by comparison. I choose two examples from many.

In 1975 the Australian prime minister, Gough Whitlam, was dismissed from office by the queen's then legal representative in Australia, Governor General Sir John Kerr. On all reports Mr. Whitlam was not happy. I think it safe to suggest that he would have taken all steps he could *imagine* as appropriate to stay in power. But when he was informed by the governor general that he was dismissed, this very disappointed and

30. By government here I refer in a broad sense to political authorities, so as to include the Party in socialist states. In a narrow sense of the word, the executive *government* might be under law, while the Communist Party remains above it. The Party might indeed insist on that. That does not satisfy this element of the rule of law.

angry man could only think to call the queen. When he discovered it was too late and that no other legal alternatives were open, he complied with a decision he hated, and contested an election which he lost. Moreover, the discussion of this momentous *political* event—both by supporters and bitter opponents of the governor general's action—revolved to an extraordinary, even tedious, extent around whether it was legal or not. When I explained the issues of public debate (which had to do with a senate's constitutional power to block supply and a governor general's to dismiss a government) to a distinguished Hungarian Marxist, he found it impossible to understand ("ununderstandable" was his word) that *law* had figured so prominently in what was taken to be a political crisis.

My other example could easily come from contemporary China, or numerous other terrible polities in the world. However, I choose a less well remembered episode close in time to the events I have just discussed. In 1979, the Soviet government asked then president of Afghanistan Mohammed Taraki to replace his deputy prime minister, Hafizullah Amin, with their choice, Babrak Karmal. Amin was invited to a cabinet meeting at which the Soviet ambassador was present. At the meeting Amin shot dead his leader, Taraki, and declared himself head of the government. He then proceeded to wipe out anyone he suspected of opposing him (including some 12,000 intellectuals and activists). In the end, even that did not help him. Soviet troops invaded Afghanistan, claiming that they were invited by Amin. The first leading figure they killed was Amin himself.

Here we have a contrast between a society where law *counts* in public life and one (and of course there are many such societies) where, to say the least, it does not. Living in a society where law counts, it is easy to imagine that that is a natural state of affairs. In fact, it is not natural and it is rare.

c) Rights: Accounts of the rule of law often stop here, on the grounds that substantive desiderata for a good legal and political order go beyond the rule of law—equally important but something else. Certainly, detailed specification of the rights one should have is not my present subject. Still, it is conceivable that a government operating by and under law could allow itself almost anything and forbid its subjects almost everything (except complaints against illegal governmental acts, of which *ex hypothesi* the government would have little need). That sort of legal order, perhaps a major general's dream, is extremely unlikely. Despotisms shun the light, and they shun restraint. They also have no *reason* to expose themselves to either.[31] Government by and under law delivers both. Nevertheless, the bare possibility reminds us that the rule of law is not sufficient for a good society, even though in large complex societies it is necessary for one. It also suggests that we must keep in mind one of the major *points* of the rule

31. Cf. John Finnis, *Natural Law and Natural Rights* 273–74 (Oxford, 1980), and Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory 2(1) *Ratio Juris* 93–94 (1989).

of law, for which government by and under law are also necessary but not sufficient: that is, protection of individuals from arbitrary intrusion. In other words, the legal order must provide for, and protect zones of, individual freedom from interference, negative liberty. Typically such protection takes the form of legal rights, immunities, or protected entitlements. A good society may well do more, but at least it should do that.

The rule of law is not a panacea. There are countless problems it does not and cannot solve. There are values with which it conflicts, and there are problems it generates itself.[32] Moreover, its elements are nowhere fully or uniformly realized but are approximated to greater or lesser degree in different societies, among different classes, races, and sectors of social life[33] and at different times. In societies where it makes sense to speak of the rule of law, there is plenty of room for immanent criticism that points to inadequate, partial, biased, corrupt, or compromised attainment of it. There is also room for argument that the rule of law is not all we should want and for recognition that, in case of conflict of values, we need not assume that only maintenance of the rule of law matters,[34] or that any chink in what are fancied to be its formalistic preconditions spells its doom. And finally, there is space—well filled at present—for showing not merely that the rule of law is less than it is sometimes assumed to be but that it gives potent and often misleading ideological cover for exploitative and oppressive realities.

It might even be that Western critics of the rule of law know its dark sides better than do those in the East, and that the latter have yet to learn something about these sides from us. But the reverse is also true. What they do know is often invisible to us, and it is important. They know that with us law counts in ways and to an extent that it never has for them. The more realistic of them know that the rule of law is not the solution to all their problems, for they know that such solutions are unavailable. And when law starts to mediate between power and people in their societies, they will still have plenty to worry about and much to do. In the meantime they are likelier to find liberal praise of law and rights far less risible than do some of their Western colleagues; they might empathize with some of the criticisms of rights-trashing voiced by minority CLSers;[35] and even E. P. Thompson's earnestness about the rule of law might seem

32. On both sorts of problems, see Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York, 1978). See also Hutchinson & Monahan, *Rule of Law*.

33. Cf. Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (London, 1981).

34. See Raz, "Rule of Law."

35. See "Symposium: Minority Critiques of the Critical Legal Studies Movement," 22 *Harv. C.R.-C.L. Rev.* 297 (1987), particularly Richard Delgado, "The Ethereal Scholar: Does CLS Have What Minorities Want?" at 301–22, and Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" at 401–33.

more palatable than the light-minded sophistication of some of his critics.[36]

Thus, law that counts in the ways I have suggested is capable of being a shield against government, not merely its sword. It can serve as an important source of signals and nodes of coordination, a rich and valuable contributor to the texture of everyday life, and an important source of security and stability to many people who never give it a thought. Where it does not count in such ways, law is likelier to be either a sham or simply a device for letting people know what their rulers require them to do and getting them to do it.

4. When writers seek to explain the preconditions for the rule of law, they often point to features of the written laws themselves: they should be prospective, clear, open and accessible, noncontradictory, and so on. They also point to institutional arrangements: an independent and impartial judiciary, an independent legal profession, honest and apolitical law enforcement. These are all important achievements, satisfied to greater or lesser degree in different societies. In a country that lacks all or some of them, it is an important practical task of institutional design or redesign to provide for them. But they do not tell us why Mr. Whitlam bowed to a decision he hated. For that one must look to something far vaguer but fundamentally more important: a widespread assumption within the society that law *matters* and should matter.[37] This assumption is extraordinary: it cannot be decreed, though it can be destroyed. It has grown in certain societies, particularly those of western Europe and its offshoots, and the growth has taken centuries. It is not clear that it can be implanted by political power. What is clear, for it has happened in central Europe and elsewhere, is that it can be destroyed—at least for some time—by sufficiently flagrant governmental violation and neglect.

My subject, then, is the restraint of power through law. It might sound quite unreasonable to ask revolutionaries for restraint. But one of the lessons of Poland since 1980, or of Czechoslovakia's "velvet revolution," has been that it is possible for revolutions to be "self-limiting." The reasons for such limitation were obvious to all those who engaged in it,

36. See Thompson's eloquent and—among Marxists, controversial—conclusion to *Whigs and Hunters* at 258–69 (Harmondsworth, 1977) ("Thompson, *Whigs and Hunters*"). It is symptomatic of differences between Eastern and Western life experience, and of the Western left's difficulties with the rule of law, that these 11 pages should have caused such a stir. See, e.g., Bob Fine, *Democracy and the Rule of Law* 169–89 (London, 1984); Adrian Merritt, "The Nature and Function of Law: A Critique of E. P. Thompson's *Whigs and Hunters*," 7 *Brit. J.L. & Soc'y* 194 (1980); Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" 86 *Yale L.J.* 561 (1977). A liberal's only complaint might be that it took Thompson so long to get there. He might have read Madison.

37. Thompson, *Whigs and Hunters*, has some illuminating things to say about this aspect of the rule of law.

indeed were part of their life histories: the tragic consequences of the alternative.

A central characteristic of the exercise of power under "really existing socialism" was its arbitrariness. An important ingredient in that was absence of the rule of law in the sense outlined here. At different times, extralegal "administrative measures," special invisible sentencing boards, secret tribunals, police, informers, torturers commonly took the place of law; "partiinost," "socialist legal consciousness," "analogy," "campaigns," and "telephone law" ensured that law itself was politically pliable. And quite apart from these special effects, such law as there was was ignored when expedient and was otherwise long treated purely instrumentally by the Party. Rules of the game were changed unpredictably, subject to no formal procedures of consequence, while the game was still being played. The extent of the state's resulting lawlessness and arbitrariness varied within communist polities according to floating distinctions between "political" offenses and others, between such polities and over time. But compared with "normal" polities, arbitrariness was enormous, was widely felt and rightly resented. It also came to be expected. It is one of the many objectionable features of "really existing socialism" which one hopes that reformers in the now decommunizing countries of east central Europe will seek to overcome. That will not happen swiftly or easily, because it involves alteration not merely of rules but also of expectations and attitudes. And in the absence of experience of the rule of law, it is easy to imagine that it is enough to replace vice with virtue, rather than with restraint on the pursuit of both. Still, as we have seen, there are signs that political elites on several sides—at least in some post-communist states—have reasons to favor an increase in legality. At the very least, it 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. And in the long term, political liberty is dependent on stable law as well. All have an interest in overcoming chaos, and the vital forces in these societies are pledged to liberty. Most of these forces have turned away from Marxism as though it had nothing to offer them in this regard. Are they right to do so?

IV. MARXISM, COMMUNISM, AND THE RULE OF LAW

Marxism has been the most influential, certainly the most invoked, combination of social theory and secular prophecy of the modern world. To those seeking to make sense of the societies in which they lived, it purported to offer the key. To those seeking deliverance from loathed forms of social organization, it explained that such deliverance was not

merely possible but inevitable. In neither context, however, was much said about the rule of law.

The reasons for this are not far to seek. Marx did not believe that law was as important or as valuable in *any* societies as I have claimed it to be in our own, and he saw no place for it in communist ones. In particular, his social theory did not suggest that before the revolution it was, and his moral philosophy did not suggest that after the revolution it should be, a significant *restraint* on power.

The writings of Marx and Engels do not contain any systematic theorizing about law. Contemporary elaborations of a Marxist theory of law are, and must be, constructions of what Marx or Marxism would or should say about the subject. If one compares the depth of Marx's analysis of economic matters in his mature writings with the perfunctory character of his analyses of law, the contrast is striking.

There is no mystery about this. This thinness of Marx's analysis of law is a corollary of the centrality in his analysis, of economics and "material life." For as Eugene Kamenka has emphasized, Marx spent most of his life

> under the self-imposed duty of wading through "economic filth," seeking to prove that the "secret" of law, of politics, ideology and the State lay, in each case, in something else—in productive forces, in the class struggle, in the "material" life of society. . . .
>
> Marx and Engels refused to take law seriously as a specific social institution, having some character and history of its own. It reflected, for them, the mode of production, the economic organization of society, the class struggle, the will of the State, and through it the will of the ruling class. It sanctified and protected social arrangements. It did not create them and it was not a fundamental social arrangement itself.[38]

Law was not the only social institution that Marx put in the shadow of economic forces and economically based social classes. Elsewhere I have argued that he did the same with bureaucracy.[39] In neither case was the lack of emphasis simple oversight. It was theoretically driven. In particular, it was driven by the social theory Marx developed by and after 1845. According to that theory, the most important activity in every society is economic production. The most important social actors, consequently, are those involved in production, and the most powerful actors overall are those most powerful there. These actors come to form social *classes*, distin-

38. "A Marxist Theory of Law," 1 *Law in Context* 49 (1983).

39. See Martin Krygier, "Saint-Simon, Marx and the Non-governed Society," in Kamenka & Krygier, *Bureaucracy* (cited in note 3) ("Krygier, 'Saint-Simon' "), and *id.*, "Marxism and Bureaucracy: A Paradox Resolved," *20(2) Politics* 58 (1985).

guished in terms of their relationship to the means of production. The class which owns the means of production is the *ruling* class in a full sense, for it dominates not just the economy, but—because of that dominance—very much more. Those excluded from ownership are excluded from much else.

These points can be made in more or less subtle and complex ways, and Marx, like later Marxists, made them in both ways: sometimes acknowledging more resilience, integrity, and "stickiness" *vis-à-vis* the economy for law and other social practices, sometimes less; sometimes treating law in simple instrumental terms, sometimes not. But it remains true that when it came to law, for the most part Marx was looking elsewhere and arguing that we should all do so. In the grander scheme of things, law, like bureaucracy, was just not *centrally* important,[40] and in any case it had to be understood primarily in terms of its contributions to and relationships with the social forces that were.

This ordering of priorities had two important consequences. On the one hand, it explains the long dearth of serious Marxist writings about law. With very few exceptions, sustained Marxist legal theory only began to emerge in the past 20 years. On the other hand, when law *was* discussed, Marxists focused on its connections with the deeper economic structures and forces which Marxists took law—however "relatively autonomously"—to serve. Nor was this a travesty of Marx's writings.

Since Marx's writings on law are unsystematic, the nature of law's contributions to "economic relations" and ruling class interests are not much detailed or theorized. In particular passages he attributes a variety of jobs to law. Three, in particular, stand out. At different points in his works, he attributed one or a combination of three roles to law: repression, ideology, and constitution of capitalist relations of production and exchange. I begin with repression and ideology.

In Marx's earliest philosophical writings and journalism, he often attacked the repressiveness of Prussian laws. At this stage he wrote as a philosophical critic, not yet a socialist, a revolutionary, or a social theorist. He believed that repressive laws in general, and class-based laws in particular, were in principle curable perversions of what, in conventional Hegelian terms, he took to be the "essence" of law—the realization of freedom.[41]

40. "Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations." Karl Marx, "The Poverty of Philosophy," in Karl Marx & Frederick Engels, 6 *Collected Works* 147 (London, 1976) (volumes are cited as "Marx & Engels, *Collected Works*").

41. See particularly "Comments on the Latest Prussian Censorship Instruction," "Debates on Freedom of the Press and Publication of the Proceedings of the Assembly of the Estates," "Debates on the Law of Thefts of Wood," "The Divorce Bill," "Justification of the Correspondent from the Mosel," in Marx and Engels, 1 *Collected Works* (London, 1975).

On these related issues of diagnosis and cure, as the world knows, he later changed his mind. Law came for him to be chronically, not accidentally, partial[42] and it had no liberatory essence. He took it, for example, to be "a great and dangerous illusion" for English workingmen to imagine that "their lives [were] protected by the formality of the Riot Act, and the subordination of the military to the civil authorities. They know now . . . that . . . any country magistrate, some fox-hunter or parson, has the right to order the troops to fire on what he may please to consider a riotous mob; and, secondly, that the soldier may give fire on his own book, on the plea of self-defence."[43]

In the article from which this passage comes, Marx celebrates the painful liberation of the workmen from their "great and dangerous illusion," but again and again he insists that all of us are in thrall to such illusions. And law, with its rhetoric of equality, rights, formality, procedures, and justice, is a purveyor of just such illusions—in capitalist societies, liberal illusions.[44] What must be understood about such rhetoric, and what is often equally misunderstood by those who benefit as by those who suffer from it, is that "[t]he ideas of the ruling class are in every epoch the ruling ideas. . . . The ruling ideas are nothing more than the ideal expression of the dominant material relations . . . of the relations which make the one class the ruling one, therefore, the ideas of its dominance."[45] And so:

> Don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.[46]

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42. "The material life of individuals . . . is the real basis of the state and remains so at all the stages at which division of labour and private property are still necessary. . . . These actual relations are in no way created by the state power; on the contrary they are the power creating it. The individuals who rule in these conditions . . . have to give their will, which is determined by these definite conditions, a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way." Karl Marx & Frederick Engels, *The German Ideology* 348 (Moscow, 1976) ("Marx & Engels, *German Ideology*").

43. "Report to the Basle Congress," in David Fernbach, ed., *The First International and After* (New York, 1974) ("Fernbach, *First International*"). Cf. Engels, "The Condition of the Working Class in England," in Marx & Engels, 4 *Collected Works* 514–17.

44. "If, like the Berlin ideologists, one judges liberalism and the state within the framework of local German impressions, or limits oneself merely to criticism of German-bourgeois illusions about liberalism, instead of seeing the correlation of liberalism with the real interests from which it originated and without which it cannot really exist—then of course, one arrives at the most banal conclusions." Marx & Engels, *German Ideology* 211.

45. *Id.* at 67.

46. Karl Marx & Frederick Engels, *The Manifesto of the Communist Party*, in Karl Marx,

I do not want to insist on the "nothing but" aspect of these formulations. I have no wish to maintain that Marx was vulgar. Rather, I want merely to emphasize the *tendency* of his thought on these matters. Many of Marx's comments on law seek to *unmask* it and its pretensions. As a limit to the power of the powerful it is either illusory and systematically partial—for law is involved in class exploitation and repression—or useful to ruling classes as an ideological emollient and mask for their real social power, a power which, however well disguised, is fundamental—at least, Engels came to add after Marx's death, "ultimately," "in the last analysis."[47] It was necessary not that law fulfill any mythical essence, as the young Marx had believed, but that it disappear[48] along with the state[49] and with the class society that supported them and that they supported.

With varying degrees of subtlety and refinement, Marx and Engels repeatedly unmasked law, either as a repressive instrument of ruling classes or as an ideological mystification of exploitative class relations or as both. Much law is repressive, Marx, Engels, and Lenin insisted; much is ideological, Marx, Engels, Gramsci, and more recently Hay insisted. That it might also be *liberating* was only conceded by Marx in comparison with the feudal past or with worse versions of the capitalist present, certainly not in comparison with the socialist and communist future. So to ask Marxist revolutionaries to make space for restraint by the rule of law would be to voice a quaint liberal demand for which they were not *theoretically*—let alone temperamentally—programmed.

This "unmasking" stance to the rule of law is often the source of powerful critique. It can point to discrepancies between ideals and practice, between legal equality and material inequality, between unanchored legal individuals and economically situated social classes, between legal freedom and economic necessity. Such critiques have appealed to many, and the conviction that the ideals of the rule of law should be seen through rather than simply seen runs very deep in Marxism. Thus Hugh Collins, in a work on Marxism and law, explains that "[t]he principal aim of Marxist jurisprudence is to criticize the centre-piece of liberal political philosophy, the ideal called the Rule of Law."[50] Collins chides Edward Thompson for insisting upon what Thompson had called "the obvious

Political Writings, vol. 1: *The Revolutions of 1848* 83 (Harmondsworth, 1973) ("Marx & Engels, *Manifesto*").

47. See the series of letters Engels wrote after Marx's death, which seek to allow some room for what has come to be called the "relative autonomy" of law: Karl Marx & Frederick Engels, *Selected Correspondence* 417–19, 421–25, 459–60, 467–68 (2d ed. Moscow, 1965) ("Marx & Engels, *Correspondence*").

48. "As far as law is concerned, we with many others have stressed the opposition of communism to law, both political and private, as also in its most general form as the rights of man." *Id.* at 225.

49. Cf. Frederick Engels, *The Origins of the Family, Private Property and the State* (Moscow, 1968).

50. Hugh Collins, *Marxism and Law* 240 (Oxford, 1982) ("Collins, *Marxism*").

point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law . . . the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction."[51] Collins understands that Thompson "goes so far as to ascribe an intrinsic value to the goal of ensuring the legality of government action. This last position threatens, of course, to slide into a wholesale acceptance of the Rule of Law."[52] Indeed, in a rather disarmingly authoritarian passage, Collins explains the *correct* position, lest other Marxists might be moved by Thompson's apparently confused eloquence:

> Support for fundamental political liberties through legal mechanisms *may be permitted because of the possible instrumental gains to the working-class movement*. But any wider belief in the intrinsic merit of preserving the legality of government action and defending individual rights *makes the mistake* of taking the ideology of the Rule of Law at face value. The ideological function of the modern legal system in obscuring class domination renders an undiscriminating pursuit of the principle of legality inconsistent with Marxism.[53]

It is not an outrageous step from such a conception of law, one which emphasizes its repressive and/or ideological potential and denies or talks down its connection with liberty, to use it for repression and ideology once one is in power, overseeing the dictatorship of the proletariat and the *transition* to communism. Law is law, that is, a means of repression and ideology. Marx never suggested that it would disappear overnight. Indeed he suggested the opposite.[54] What matters, in the transition from an evil and doomed past to a glorious and inevitable future, is whose interests repression and ideology are intended to serve.[55] Admittedly, when fully attained communism will have no truck with law. However, for the meantime Marx had emphasized that there was no quick jump from capitalism to communism. Rather, there would be a "period of the revolutionary transformation from one to the other. There is a corresponding period of transition in the political sphere and in this period the state can only take the form of a *revolutionary dictatorship of the proletariat*."[56] One of the first tasks

51. Thompson, *Whigs and Hunters* 266 (cited in note 36).

52. Collins, *Marxism* 144.

53. *Id.* at 146 (emphasis added).

54. See "Critique of the Gotha Programme," in Fernbach, *First International* 339–59 (cited in note 43).

55. Leon Trotsky makes the point in *Their Morals and Ours* (New York, 1939).

56. "Critique of the Gotha Programme," in Fernbach, *First International* 355.

of the dictatorship, Marx came to reiterate after 1851, would be to "smash" the state.[57] What or who would need to be smashed, Marx did not specify, or how it should be done. These blanks had to be filled in later, and they were, not in the only way possible but in one possible way. There was certainly reason to believe, as Michael Evans notes, that in this period the dictatorship would need to be aggressive.[58] There would be the specific tasks involved in clearing the way for socialism; for if the state had to be smashed what of those it served? And, in any event, as Marx had explained of other revolutions, "every provisional political set-up after a revolution requires a dictatorship, and an energetic dictatorship at that."[59] Communist rulers have found these arguments very persuasive as, given their assumptions, they are.[60]

What of dissidents within communist states? What use could they make of Marx's attacks on the repressiveness of law, his early and passionate denunciations of censorship, his unmasking of the latent and silent functions of official pronouncements? All these dissidents, of course, were familiar with repression, all with ideology—indeed, with repression and ideology in the name of Marx, and equally with repressive and ideological uses of law, though not only of law. Moreover, Marxism was often the idiom of early attempts by east and central European dissidents to criticize their regimes.[61] This was partly because there once were Marxists in Marxist states, partly because of the ease with which Marxist criticism could be rewritten to fit the highly repressive and ideological polities by which they were governed, and partly because criticism from within has been at times the only sort available (and the most damaging). Nevertheless, most dissidents in communist states who began to criticize from within Marxism did not stay there, and many did not begin there at all. Commonly this was for three reasons. First, Marx's emphasis on economic power as the funda-

57. See Karl Marx, *The Civil War in France* 164, 227 (Peking, 1966) (this edition contains the important first and second drafts); Marx & Engels, *Correspondence* 262. See also the 1872 preface to the German edition of the *Communist Manifesto*.

58. See Michael Evans, *Karl Marx* 149 (London, 1975).

59. Karl Marx, "The Crisis and the Counter-Revolution," in Marx & Engels, 7 *Collected Works* 431 (cited in note 40).

60. As Kołakowski points out, to the extent that one believes state and law to be the servant of ruling classes:

> There is nothing wrong in concluding that the same situation prevails, at least so long as communism in the absolute form has not entirely dominated the earth. In other words, the law is an instrument of the political power of the "proletariat," and since law is just a technique to wield power, and, more often than not, its main task is to cover violence and to deceive the people, it makes no difference whether the victorious class rules with the help of the law or without it; what matters is the class content of power and not its "form."

"Marxist Roots of Stalinism," in *Stalinism* 295 (cited in note 5).

61. I have discussed Jugoslav and Polish once-Marxist dissidents—including Djilas and Kuroń and Modzelewski in "The Revolution Betrayed? From Trotsky to the New Class," in Kamenka & Krygier, *Bureaucracy* 88–111; and Krygier, 20(2) *Politics* (cited in note 39).

mental ground of repression seemed inadequate to explain the politically dominated and driven societies in which they lived. Second, and more specifically, the belief that repression and ideology could always and only be traced to classes owning the means of production was more and more strained in societies of unprecedented repressiveness, without private property but with more than enough social division and exploitation. Third, the idea that the abolition of private property and its replacement with state ownership was the path to a radiant future came increasingly to seem a surreal and tragic mistake. All the more has this seemed so, in the light of the distance in repression and ideology (though not of geography) between, say, Rumania and Austria, Poland and Sweden, East and West Germany, which forms one part of the contrast with which this article is concerned. In any event, to those who set any store at all by the importance of *instituting* restraint on power by law, the writings of Marx and Engels (unconcerned with that problem of institutional design) have nothing to say.

Apart from repression and ideology, there was a third theme in Marx's writings that formed the basis of the theory of Evgenii Pashukanis, who had a marked influence on Soviet law and jurisprudence in the 1920s (and English Marxist writings on law in the 1970s). Marx often wrote of the contribution of law to the formation, organization, and maintenance of the capitalist mode of production and of capitalist relations of production. He drew attention, for example, to the role of statutes which contributed to the clearing away of feudal remnants, and later statutes which regulated hours and conditions of work in factories. And he once emphasized a deeper, more constitutive role for *contract* law in making capitalist commodity exchange possible, for

> [i]t is plain that commodities cannot go to market and make exchange of their own account. We must, therefore, have recourse to their guardians, who are also their owners. . . . In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognize in each other the rights of private proprietors. This juridical relation, which thus expresses itself in a contract . . . is a relation between two wills, and is but the reflex of the real economic relation between the two.[62]

Pashukanis built a theory from this passage and from the social theory which underlay it. Law, he insisted was an integral and indispensable in-

62. See 1 *Capital* 88–89.

gredient of capitalism, for it was required for commodity exchange between millions of independent actors. Not just a means of repression, not merely ideology, law defined the subjects and nature of rights necessary in a capitalist market economy. And it did so in a particular way, for it took a particular *form*. The fundamentally important branch of law was not public but private law, specifically the law of contract. Contract law presupposed independent right-and-duty-bearing legal subjects exchanging in the market on the basis of legal equality. That was no accident, nor was it an epiphenomenal product of capitalism. Like Durkheim, Pashukanis saw the legal framework providing "noncontractual elements of contract,"[63] on which individual exchanges relied. Like Weber he linked the *form* of modern contract law to the economy of market exchange.

But if Pashukanis brought law down to earth, it was not for long. Precisely because law of a particular form was part of the fundament of *capitalism*, Pashukanis argued, it was only fundamental *in* capitalism. Marx had, after all, insisted that "[t]he life process of society" under socialism would be "treated as production by freely associated men, and . . . consciously regulated by them in accordance with a settled plan."[64] Unruly individual exchange would give way to rational and conscious plans.[65] Indeed, it was the rational and planned character of communism that would prove central to human emancipation from blind dependence on nature and social forces.

Pashukanis quoted Marx's account of "truly human emancipation," from "On the Jewish Question" (see below beginning at note 81), to get his bearings on "the perspectives of the unbounded future."[66] However, he focused on the fate and transformation of law in the transition period. In doing so, he for the first time gave some concrete meaning to the predicted "withering away" of law in socialism. In place of the independent commodity-producing-and-exchanging atoms of a capitalist economy—"individualized and antagonistic subjects, each of whom is the bearer of his own private interest"[67]—socialism would be directed by central planners with "unity of purpose."[68] In place of the clear general rules necessary for these atoms to coordinate their activities, and hold each other to bargains or sue, "technical regulation"[69] would be a matter of flexible policy directives, obedient to, not a restraint upon, the directives of the central unified mind. Increasingly, the legal form would give way to

63. See Emile Durkheim, *The Division of Labor in Society* 211–17 (New York, 1964).

64. 1 *Capital* 84.

65. See Krygier, "Saint-Simon" at 54 (cited in note 39).

66. *The General Theory of Law and Marxism*, in Piers Beirne & Robert Sharlet, eds., *Pashukanis: Selected Writings on Marxism and Law* 89 (New York, 1980).

67. *Id.* at 60.

68. *Id.*

69. *Id.*

"economic life flowing into natural categories, and the social bonds between production units represented in its rational, unmasked (non-commodity) form—to this corresponds the method of direct, i.e. technical-content instructions in the form of programmes, production and distribution plans etc., specific instructions constantly changing depending upon the change in conditions."[70]

Not only was this change to take place in economic law, with contract law giving way to planning directives. It would also infuse the rest of law, which under capitalism derives from and mimics the form of contract. In particular, criminal law would be replaced by "measures of social defence," whose "consistent execution"

> would not require the fixing of individual *sets of elements of crime* (with which *measures of punishment* are largely linked and defined by statute or by the courts). It would require, however, a clear description of *symptoms* characterizing a socially dangerous condition and the development of those *methods* which must necessarily be applied in each given case for social defence. . . .
>
> . . . [P]unishment presupposes an exactly fixed set of elements in a crime. A measure of social defence has no need for this. Payment by coercion is legal coercion directed towards a subject placed in the formal framework of a trial, a sentence and its execution. Coercion, as a measure of defence, is an act of pure expediency and as such may be regulated by technical rules. These rules may be more or less complex depending upon whether the purpose is the mechanical elimination of a dangerous member of society, or his correction; but in any event these rules reflect clearly and simply the objective which society has set itself.[71]

There was no place here for legal rights. Rights against what? In the 1920s Pashukanis, whose commodity-exchange school dominated Soviet law and set the agenda for Soviet law schools, argued for "direct action" rather than "action by means of a general statute" in criminal law. He advocated that a reformed Criminal Code of the RSFSR should have only one section, laying down general principles, and should dispense with sections defining specific crimes and prescribing penalties. Their aim was to free the judge of restrictions and allow him to "apply whatever penalty he thought necessary to assure the protection of society."[72] This "legal nihilism" was an important ingredient in early Stalinist lawlessness. Pashukanis attacked, and his school sought to root out, "the bourgeois

70. *Id.* at 88.

71. *Id.* at 124.

72. Quoted in Robert Sharlet, "Pashukanis and the Withering Away of Law in the USSR," in Sheila Fitzpatrick, ed., *Cultural Revolution in Russia 1928–31* (Bloomington, Ind., 1978).

juridical world view."[73] In doing so, they contributed directly to what has been called the "jurisprudence of terror." In the campaign against kulaks, for example, which Robert Conquest estimates to have cost some 6.5 million lives,[74] terror operated directly without legal restraint, as well as through legal provisions empowering local authorities "to take all necessary measures . . . to fight kulaks."[75] As Sharlet points out, the jurisprudence of terror, as distinct from terror pure and simple, was pursued through increasingly vague and capacious legal provisions and "abrupt, undiscussed, or unannounced changes in legal rules (or in their application) which went in the direction of maximizing the power of the state at the expense of the individual, especially in terms of his personal security."[76]

The jurisprudence of terror served Stalin well, and it had a new lease on life in postwar communist states. But in the 1930s Stalin decided that one could have too much of good thing, and he brought law back in. The new slogan was "stability of laws" of a strengthened state. This had nothing to do with legal restraint on power, and it coincided with the period of greatest repression in Soviet, indeed Russian, history. It was a classic, perhaps *the* classic, example of "political justice" of the sort I have sketched in section II.2 above: what Kirchheimer has called, "the twin but respectable brother of terror, to whom a more specific task is assigned: ensuring the regularity and predictability of behavior."[77] Still it was incompatible with a theory of legal nihilism. Accordingly that theory was denounced, "socialist legality" was born, and Pashukanis was killed. He was not alone.

Marx was not Stalin. Nevertheless Marxist interpretations of law as repressive, or ideological, or even as constitutive as per Pashukanis, offer little succor to anyone concerned with promoting a defensive, protective, even merely a restraining, role for law. None of these conceptions took the moral claims of the rule of law seriously, nor is it clear on the basis of *what* Marxist conception of law one could argue for it.

And if this was the case for Marxist interpretations of existing law, there was even less to say about its future. For these three Marxist conceptions converged on one significant point in understanding the future. Society and law were to be *transformed* by the proletarian revolution. In their place would ultimately develop a society without a division of labor or

73. Quoted in Robert Sharlet, "Stalinism and Soviet Legal Culture," in Tucker, *Stalinism* 160 (cited in note 5) ("Sharlet, 'Stalinism' ").

74. *Harvest of Sorrow: Soviet Collectivization and the Terror Famine* 299–307 (London, 1986).

75. Decree of the Central Executive Committee and the Council of People's Commissars of the USSR, 1 Feb. 1930, "On the Measures to Strengthen Socialist Reorganization of Agriculture in Areas of All-Out Collectivization and to Fight Kulaks," in Zigurds L. Zile, ed., *Ideas and Forces in Soviet Legal History* 168 (2d ed. Madison, Wis., 1970).

76. Sharlet, "Stalinism" at 165 (cited in note 73).

77. *Political Justice* 287, cited in Sharlet, "Stalinism" at 168.

private property, therefore without social classes, therefore without class exploitation, therefore without significant conflict and therefore without the need for protective barriers between man and man or man and state. In any case there would be no state. If this all sounds a bit swift, that is appropriate. It *is* all a bit swift. Marx's prophecies of human liberation, of a society of total community and harmony, with no state, bureaucracy, or law, have been at the same time the most inspiring and frustrating of his legacies: Inspiring because people have been moved to extraordinary endeavors, including the communist revolutions of the 20th century, on the basis of them; frustrating because compared with his voluminous analyses of past and present, when it comes to Marx's discussions of the future, "all that is solid melts into air."[78]

Marx had some epistemological ground for this reticence—ground no longer available to many Marxists—that one could not know the details of what would follow capitalism, and could certainly not prescribe for it. But what warrant was there, then, for faith—*his* faith, after all—that the future would be in every respect superior to the present, that in it competition would disappear and that unthreatening and fulfilling cooperation would triumph, that the future would be purged of all the distasteful elements, even hitherto necessary elements, of the "prehistory" of mankind such as law, and that restraining limiting institutions were not even worth thinking about? Such a future might be worth dying, perhaps even killing, for. In the light of such goals, Stalin's and Trotsky's insistence that the Party cannot be a mere discussion club[79] is readily understood. But what of the means? And what reason to be certain about ends? Marx's writings were astonishingly thin on this range of concerns, and I know of no evidence that he considered that a problem. Nor did the Bolsheviks and their successors, until a very short time ago.

There have, of course, been noncommunist tyrants inspired by plainly evil ideologies such as Nazism or simply by thirst for power. That they proceeded to do evil is no puzzle. There have, too, been ordinary thugs and murderers in ruling communist parties throughout the world, and until recently they have had a significant role to play. But they do not interest me, for my field is not criminology. Far more interesting are larger-than-life figures such as Lenin or Trotsky, who lived for the revolution, achieved it unexpectedly rather late in life, and who imposed a much-

78. Marx & Engels, *Manifesto* 70 (cited in note 46).

79. Nor was it. Although Stalin and Trotsky disagreed on a good deal, on this conceptual distinction they were at one. Attacking Trotsky in 1923, Stalin explained, "It is necessary to put limits to discussion, to preserve the party, which is the fighting unit of the proletariat, from degeneration into a discussion club." "On the Tasks of the Party," *Pravda*, 2 Dec. 1923, quoted in Robert Vincent Daniels, *The Conscience of the Revolution* 221 (New York, 1960). Cf. Trotsky: "we stand not for democracy in general but for *centralist* democracy. . . . The revolutionary party has nothing in common with a discussion club where everybody comes as to a cafe." *Writings of Leon Trotsky* 94 (New York, 1975 [1930]).

copied political system where legal restraint on power did not exist and, more important, was not considered appropriate. Since I know of no evidence that, unlike Yezhov or Beria, say, they enjoyed murder, since there were many people who did similar things in many places, since the toll was horrendous (and worse in the early periods, before careerists and time servers took over from true believers) and since, for much of the period of this carnage (particularly the worst periods), they contrived to hold the support of many distinguished Western intellectuals, what inspired them? A world-historical fantasy in which restraint on righteous power played no role.

Marx had nothing to say in favor of the barbarism carried out in his name. There might be social theorists and philosophers of servitude, but Marx was not one. His was a philosophy of freedom, in a profound and pervasive sense. His social theory was harnessed to a diagnosis of present exploitation and a prophecy of future deliverance which underlay all that he wrote. But the conception of freedom which animated him was a particular one; it was certainly not a liberal one, and it had little to do with restraint through law. I will conclude with some reflections upon it.

Andrzej Walicki comments that the "conception of freedom has a rather peculiar status in Marx's thought. It is its central question and simultaneously a marginal question—a central question on the philosophical plane, a marginal question on the legal and political plane."[80] Every element of this quotation is exemplified in Marx's early text, "On the Jewish Question."[81] Marx begins and ends his essay discussing the position of Jews in the modern state, in response to "The Jewish Question" by Bruno Bauer. It is quickly evident, however, that Marx's concern for Jews is limited. His theme is broader. It is the nature of "truly human emancipation," the inadequacy of anything less and the inappropriateness of any incompatible conception of freedom. Bauer had advocated as the key to the emancipation of the Jews, not recognition of Judaism as a legitimate faith but nonrecognition of *any* religion by the state. Marx, on the other hand, considers this solution quite inadequate. At the core of Marx's critique is the complaint that Bauer has merely considered "who should emancipate and who be emancipated."[82] He has failed to consider the question Marx regards as fundamental: "*What kind of emancipation* is involved? What are the essential conditions of the emancipation which is required? Only the critique of *political emancipation* itself would constitute

80. "The Marxian Conception of Freedom," in Zbigniew Pelczynski & John Gray, eds., *Conceptions of Freedom in Political Philosophy* 217 (London, 1984). I have been much influenced by Walicki's writings on this aspect of Marx's thought. See also his "Marx and Freedom," *N.Y. Rev. Books*, 24 Nov. 1983, at 50–55 (1983); and "Karl Marx as Philosopher of Freedom," *Critical Rev.*, Fall 1988, at 10–58.

81. Karl Marx, *Early Writings* 211–41 (New York, 1975).

82. *Id.* at 215.

a definitive critique of the Jewish question itself and its true resolution into the 'general question of the age.' "[83]

The question for Marx is what is the relationship between political emancipation and "universal human emancipation." The answer is that political emancipation is a partial and self-contradictory, even if salutary, step on the way to human emancipation. On the one hand, it is "certainly a big step forward. It may not be the last form of general human emancipation, but it is the last form of human emancipation *within* the prevailing scheme of things."[84] On the other hand, the last step "*within* the prevailing scheme of things" is not the truly last step.

It is partial, for what it renders irrelevant politically it allows to remain relevant privately. Thus an irreligious state is compatible with private religiosity: "a state can be a *free state* without man himself being *a free man* . . . the *state* can have emancipated itself from religion even if the *overwhelming majority* is still religious. And the overwhelming majority does not cease to be religious by being religious *in private*."[85] So long as men profess religion they have not been freed *from* religion, and they are therefore unfree: "the fact that you can be politically emancipated without completely and absolutely renouncing Judaism shows that political emancipation by itself is not human emancipation. If you Jews want to be politically emancipated without emancipating yourselves as humans, the incompleteness and the contradiction lies not only in you but in the nature and the category of political emancipation. If you are ensnared within this category, then your experience is a universal one."[86]

It is not self-evident that to be free to believe is to be unfree, but it is evident to Marx. One cannot be devout and free at the same time. Indeed to him freedom *of* religion, as opposed to his oxymoronic freedom from religion, represents a contradiction, what might be called a moral contradiction. It contradicts what the young Marx took to be man's essence, and the older Marx believed to be his fate, in several respects.

First, man was to be fully self-determined, in charge of all that matters to him, not the plaything of external forces or imaginary projections, among them religious ones. So long as he was religious he was not truly human, not the Promethean master of his fate who recognized himself to be so. And until he realized this, shed himself of mistakes, he would remain unfree.

Political emancipation was partial in another sense as well. Politics as the sphere of public life, concerned with the common, universal affairs of citizens is projected upon the state—alienated from men and able to domi-

83. *Id.*
84. *Id.* at 221.
85. *Id.* at 218.
86. *Id.* at 226–27.

nate them. They, meanwhile, treat public, cooperative participation with others at best as a role, not the whole of life. Marx's conception of freedom, realized in a "truly human" (later "communist") society posits a communal life, where individuals would live in cooperative harmony with others, recognizing them as fellow *species-beings*, seeking association with them, not protection from them. But this is not what political emancipation delivers. Indeed, it in effect subordinates the pallid, distanced form of men's species-activity found in the "free" state to their separate, antagonistic material life in civil society. It does not merely allow, but presupposes what Marx loathes: civil society, full of separateness, distinctions, money, markets, exchanges, law, (and Jews).

Emblematic of the inadequacy and "contradiction" of political emancipation is the French Declaration of the Rights of Man and of Citizens of 1789. The rights of *citizens* are political rights, "rights which are only exercised in community with others. What constitutes their content is *participation* in the *community*, in the *political* community or *state*. They come under the category of *political freedom*, of *civil rights*."[87] Political freedom is not nothing, but it is radically less than everything:

> The perfected political state is by its nature the *species-life* of man in *opposition* to his material life. All the presuppositions of this egoistic life continue to exist outside the sphere of the state in civil society, but as qualities of civil society. Where the political state has attained its full degree of development man leads a double life, a life in heaven and a life on earth, not only in his mind, in his consciousness, but in reality. He lives in the political community, where he regards himself as a communal being, and in civil society, where he is active as a private individual, regards other men as means, debases himself to a means and becomes a plaything of alien powers.[88]

The rights of the *citizen* tend at least partially in the right direction. However, Marx has nothing good to say of the rights of man. The man they presuppose is a greedy, calculating egotist—the Jew as Marx characterizes him—who sees others only as customers, competitors, or threats, who can only think to erect walls against the world rather than bridges to other members of the species living within it. Thus Marx writes:

> the so-called *rights of man*, as distinct from the *rights of the citizen*, are quite simply the rights of the *member of civil society*, i.e., of egoistic man, of man separated from other men and from the community. . . .
>
> Liberty is therefore the right to do and perform everything which does not harm others. The limits within which each individual can move *without* harming others are determined by law, just as the

87. *Id.* at 227.
88. *Id.* at 220.

> boundary between two fields is determined by a stake. The liberty we are here dealing with is that of man as an isolated monad who is withdrawn into himself. . . .
>
> . . . [T]he right of man to freedom is not based on the association of man with man but rather on the separation of man from man. It is the right of this separation, the right of the restricted individual, restricted to himself.[89]

Unlike the rights of citizens, Marx does not consider the rights of man to have anything to do with emancipation. They are not a partial realization of man's destiny. They are alien to it. They are not to be enriched by truly human emancipation but extinguished. Society will no longer be civil society, which in its rapacious egoistic greed, as Marx charmingly puts it, "ceaselessly begets the Jew from its own entrails."[90] Jews will no longer be Jews, "the conflict between man's individual sensuous existence and his species-existence will have been superseded. The social emancipation of the Jew is the emancipation of society from Judaism."[91]

It is unpleasant to read such passages after the Holocaust. But Marx had no "final solution" of the modern sort in mind. His major objections to the survival of Judaism were two: first and more specific, that his caricature Jew expressed the spirit of civil society and second and more general, that the survival of Judaism, like the survival of any religion, preserved difference where there should be community. That is what is inadequate about the disestablishment of religion:

> Man emancipates himself politically from religion by banishing it from the province of public law to that of private law. It is no longer the spirit of the state where man behaves—although in a limited way, in a particular form and a particular sphere—as a species being, in community with other men. It has become the spirit of civil society, the sphere of egoism and of the bellum omnium contra omnes. It is no longer the essence of community but the essence of difference. It has become the expression of the separation of man from his community, from himself and from other men, which is what it was originally.[92]

In an emancipated society these differences will disappear. What need, then for "[t]he ungrounded and unfounded law of the Jew [which] is only the religious caricature of ungrounded and unfounded morality and law in

89. *Id.* at 229.
90. *Id.* at 238.
91. *Id.* at 241.
92. *Id.* at 221.

general, of the purely *formal* rites with which the world of self-interest surrounds itself."[93]

The fantastic qualities of such a dream of emancipation have been observed often enough,[94] as have, too, its practical implications for ambitious and ruthless zealots, freed of qualms by the world-historical importance, inevitability, and unparalleled virtue of what they believed themselves to be about. Both these qualities are clearer now than then, but they were not invisible to writers at the time and some of the best arguments against them had already been made before and when Marx wrote.[95] Moreover, there is even in principle a frightening moral authoritarianism in all this. In Marx's distaste for separateness, boundaries, distinctness, freedom *of* religion, there is a passion for unmediated social wholeness which, to say the least, has not worn well. In Marx's conception, as Walicki has stressed, what was to be liberated in truly human society was the *species*—from alienation, from self-deception, from dependence on nature and on others, from antagonism, from difference. There is no evidence that Marx considered any need to protect *individuals* against their species or whoever might come to speak on their behalf. Indeed, notions of mediating institutions, zones of protected autonomy and plurality, tolerance and protection of individual life plans, simple restraint in the pursuit of huge ambitions, are simply absent from Marx's utopia and would cut deeply against its grain. It is not absolutely clear that he wanted them all to disappear, but certainly he did nothing to advocate them and nothing to safeguard them. Even if this were an innocent oversight, it would not be an unimportant one. There are reasons to believe, however, that it was no accident.

93. *Id.* at 239.

94. See Leszek Kolakowski, 3 *Main Currents of Marxism* 523 (Oxford, 1978).

95. Cf. Benjamin Constant, *Political Writings*, trans. & ed. Biancamaria Fontana (Cambridge, 1988); Aleksandr Herzen, *From the Other Shore*, with introduction by Isaiah Berlin (Oxford, 1979).