MARXIST PERSPECTIVES
IN THE SOCIOLOGY OF LAW

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Abstract
This review considers the problems and prospects associated with the development of Marxist perspectives in the sociology of law. Taking as its starting point the efforts to construct a Marxist understanding of law through the traditional approach of legal economism, a number of directions and themes in the development of a new Marxist vision of law are explored. Alternatives to "legal nihilism" are examined in conjunction with a survey of the movement of Marxist theory toward a "looser" and "flatter" conception of the relationship between law and society. The role of politics, ideology, and history in the reconstruction of Marxist legal theory are then considered with special attention to the virtues and limits of "imbricationist" and "constitutive" accounts. The analysis ends with a reexamination of the points of convergence and divergence among Marxism, sociology, law, and socialism.

INTRODUCTION: THE CRISES OF LAW AND MARXISM

The last decade has witnessed an explosion of interest in Marxist perspectives on law. Just over ten years ago, Elliot Currie (1971: 137) could observe with confidence that there were "very few Marxian analyses in the academic sociology of law." Today, although Marxist insights have by no means revolutionized our understanding of law, the sociological questions that they have raised are no longer, as Currie charged, "unasked." To the contrary, Marxist theory in general and Marxist interpretations of law in particular have become more central to the sociological enterprise. A number of explanations may be advanced for this noteworthy and surprisingly rapid shift. Most generally, there was what Hunt (1981: 49) has
called a "deeply felt 'crisis' that enveloped law and legal institutions from the end of the 1960s" in Western Europe and the United States. This crisis was associated with a number of developments that breathed life into Marxist approaches to the law: (a) the exhaustion, if not total collapse, of the "normative integration" paradigm in sociology (Abel 1980; Hunt 1981) and the decay of "liberal legalism" within legal thought and jurisprudence (Unger 1975, 1976; Klare 1979); (b) the "opening out" (Sumner 1981) of theoretical perspectives on law and other "superstructural" elements within European Marxism (see Althusser 1971; Williams 1973; Thompson 1975; Cohen 1978; Hall et al 1978; Poulantzas 1978); (c) the growing interest in political and economic dimensions of law generated by the emergence of "radical criminology" (Taylor et al 1973; Quinney 1974; Greenberg 1980a; see Sparks 1980 for a critical review) and "radical legal practice" (Black 1971; Lefcourt 1971); (d) the broadening of interest in the relationship between law and social change through the study of punishment and its historical transformation (Hay 1975; Spitzer 1975, 1979; Foucault 1977; Ignatieff 1978, 1981; Lea 1979); and finally (e) the rediscovery in the English-speaking world of two "classical" Marxist interpretations of law: the work of the Austrian Marxist Karl Renner (1949) (for commentary see Kahn-Freund 1949; McManus 1978; Hirst 1979; Kinsey 1979) and the work of Evgeny Pashukanis (1978, 1980) (for commentary see Balbus 1977:fn. 5; Kinsey 1978; Sumner 1979: Ch. 8; Hirst 1979: App. I; Binns 1980; Mullin 1980; Greenberg & Anderson 1981; Beirne & Quinney 1982).

Taken together, these developments help us to identify the major stress points in the Marxist theory of law and to interpret the directions its development has followed. Some of the factors outlined above are the product of political struggles, others are tied to cultural and intellectual debates, and still others are the result of the pervasive discontent with modern forms of law in all its guises. To assess the shape and substance of this ferment accurately it will be helpful to look more carefully at both the deconstruction and reconstruction of Marxist perspectives on law that have taken place over the last decade.

The Problem

Although recent collections (Cain & Hunt 1979; Phillips 1980) have done much to dispel the myth that Marx and Engels were oblivious to legal issues, it is still fair to observe that they never identified law as a major theoretical problem (Campbell & Wiles 1980:x). In the absence of an adequate treatment of law in their original writings, the Marxist conception of law that first emerged in the 20th century reflected the weltanschauung of "orthodox" Marxism (Gouldner 1980; Jacoby 1981). Embracing what Hirst (1979) has called "essentialism," these accounts were wedded to the
“view that all social phenomena can be reduced or derived from the economic” (Sugarman 1981:81). It is this tendency to trace all legal phenomena back to economic forces and structures that has created the greatest obstacle to the development of a Marxist sociology of law.

The purest form of legal economism is embodied in the identification of Law as a social form with Capitalism as an economic system. The earliest proponent of this position was Pashukanis (1978:61) who reasoned that “the withering away of the categories of bourgeois law will ... mean the withering away of law altogether.” Basing his theory of law on Marx’s analysis of commodity exchange, Pashukanis consistently argued that there was an homology between the logic of the commodity form and the logic of the legal form (Beirne & Quinney 1982:21).

While this insight has proven valuable in demystifying the law as an ideological form in capitalist societies, it has also created a cul-de-sac for Marxist attempts to come to grips with law. To the extent that law can only be understood as a negative force and form peculiar to bourgeois society, its explanation begins with the critique of capitalism and ends with its eclipse. If this view is taken seriously, then as Marxism achieves its objectives the theory of law self-destructs: “Laws as a specific object of analysis disappear” (Hirst 1979:163). When it is tied to this logic Marxism does not so much offer a theory of law as a “theory against law” (Santos 1979; Cotterrell 1981a). Insofar as Marxism is forced to throw the legal “baby” out with the capitalist “bathwater,” any systematic consideration of the law is stymied before it starts.

The mechanical equation of Law and Capitalism by “legal nihilism” (Sharlet 1978; Hunt 1981:35) has proven an embarrassment and a frustration for those who have sought to advance Marxist theories of law: an embarrassment because of the unmistakable and persistent presence of the legal form, legal ideologies, and repressive law in “socialist” and other noncapitalist societies; a frustration because as Law is disentangled from Capitalism, the entire edifice of Marxist theory threatens to collapse.

A number of strategies have been pursued by Marxists since Pashukanis in an effort to overcome the shortcomings of economism without sacrificing the basic structure of Marxian theory. The problem these strategies face is exactly how to disentangle Law from Capitalism and fashion a more sophisticated, flexible, and empirically defensible understanding of the nexus between the two. Before examining these strategies in greater detail it will be useful to outline the context within which they have emerged.

**Functional Analysis and the “Loosening Project”**

As early as 1906 an alternative to the emphasis on legal form in Marxist legal theory became apparent in the work of Karl Renner (1949). Renner
located the roots of capitalist law in bourgeois property relations, but unlike Pashukanis he was "principally concerned with the ends to which law is put, rather than with the form of law itself" (Kinsey 1979: 52). For Renner law is a "neutral framework of legality or the rule of law, upon which would evolve the social functions of a 'Socialist Commonwealth'" (Kinsey 1979: 53). And since law can serve different ends under different economic regimes, it is possible not only to envision a socialist law but also to see how law can become a political as well as an economic tool. The connection between law and economy is thus preserved but the functional relationship between the two is "loosened" in an important respect.

The most obvious problem with this "solution," however, is that it fails to specify the connection between legal form and content. As a number of commentators have noted (Klare 1979: 135; Kinsey 1979: 52; Beirne & Quinney 1982: 6), law cannot be treated as an "empty frame" into which new content is poured without forcing us to introduce other factors (e.g. power, mystification, etc) to explain how the law accomplishes its ends. In this sense, Renner's loosening and the elasticity (McManus 1978) it provides presage "instrumentalism" (see Miliband 1977), one of the other types of reductionism identified in revisionist debates.

When approached from the standpoint of the "needs" of an economic system, the essence of the loosening project (Greenberg 1976) is the denial of the functional necessity of law for that system. The question thus becomes: Is it possible to provide an explanation of law that ties it to economic organization without reproducing the circularity and teleology of functionalism? (See A. Horwitz 1977; Spitzer 1977.)

One of the most straightforward ways of distinguishing Marxist theory from traditional functionalism is to emphasize the fact that for the former elements of a class system are always dysfunctional as well as functional. More specifically, the central mechanism of social change in class society is, according to Marxist theory, a dialectical process through which the relations of production inevitably come into conflict with (are dysfunctional for) the developing forces of production. Thus, for example, as capitalism develops we should expect that legal arrangements functional under feudalism (e.g. the Elizabethan Poor Laws) would become dysfunctional for and have to be replaced by laws compatible with the emerging capitalist order [e.g. the Poor Law Reform of 1834 (see Polanyi 1957: Ch. 6; Piven & Cloward 1971)]. Taking this a step further, we should also expect that "forms and principles of socialist legality [are] developing within capitalist societies" (Sumner 1981: 88).

When systematically applied to the analysis of law these insights encourage us to view law as always at least somewhat at odds with the mode of production in which it is found. But while an inventory of the functions and
dysfunctions of various laws for any mode of production establishes the contradictory character of law (Chambliss 1979; Grau 1982), the question of why these contradictions exist or how and when they are likely to be "resolved" remains unanswered. Moreover, since law can always be said to be ahead of, behind, or parallel with a given economic order, we have no way of establishing the precise functional significance of any given law.

_Deconstructing Marxism: Structuralism, Culturalism, and the "Flattening Project"

Of the many "isms" identified in the debate over the revision of Marxist theory, "structuralism" and "culturalism" are two of the most important. Centering around the work of Louis Althusser in France and E. P. Thompson in Britain, respectively, these two tendencies have in many respects defined the terms and limits of the recent investigation into the role of law in Marxist theory. Beginning as efforts to refine traditional conceptions of the base-superstructure metaphor, they have in very different ways tried to respond to the challenge of economism in the Marxist perspective on law. The recurring issue facing both of these tendencies or "schools" (Laclau 1977: Ch. 2; Redhead 1982: 330) is, as I argue below, how to redefine the relationship between external structures, human subjects, and the law (Hirst 1980).

A major point of departure in the "structuralist" approach is the concept of the "relative autonomy" of the law. As a touchstone for many revisionist accounts (Balbus 1977; Edelman 1979), it offers an approach to rethinking the law/economy nexus in structuralist terms. Louis Althusser (1970: 99–100) suggests that the law, along with philosophy, aesthetic production, scientific formations, and other "superstructural" elements, have their "own history" and exist as "relatively autonomous and hence relatively independent" features of the "whole." Law is thus conceived as independent of the economic system but also dependent in some sense. This "some sense" is the rub since the movement and structure of all superstructural elements (including law) are ultimately traced back to the economic system.

Balibar (1970: 306), Althusser's collaborator, illustrates this logic in his argument that the interventions of the State, law, and political power, such as those that occurred in the transition from feudalism to capitalism (e.g. factory legislation and the enclosure acts in England), "transform and fix the limits of the mode of production." What he means by this is that at least in transitional periods "the forms of law and of State policy are not, as hitherto, adapted to the economic structure . . . but dislocated with respect to it" (Balibar 1970: 306–7). Thus law is somehow "broken loose" to do its dirty work. But this dislocation does not block the path between economy and law, it only serves to make that path more tangled and circuitous. In
the final analysis, the path leads back to a version of the very economism that the theory is ostensibly designed to overcome. The knee-jerk relationship between law and the economy is abandoned (Beirne & Quinney 1982: 13), but law is still accounted for in the “last instance” by pulls on the visible or hidden economic strings.

Why then has structuralism been taken so seriously as a way out of the theoretical impasse facing the Marxist analysis of law? One answer may be found in extensions and refinements of the structuralist position by Nicos Poulantzas (1973, 1978). Poulantzas breaks with the Althusserian portrayal of law in an important respect. Specifically, he observes (1982:190) that “Law does not only deceive and conceal . . . nor does it merely repress people by compelling or forbidding them to act.” Thus law is not simply, as Althusser (1971) would have it, an “ideological state apparatus.” “It also organizes and sanctions certain real rights of the dominated classes (even though, of course, these rights are invested in the dominant ideology and are far from corresponding in practice to their juridical form)” (Poulantzas 1982:190). Even though Poulantzas is quick to add that the rights granted are in an important sense illusory, he has at least opened the door to a broader view of law as a partly positive (i.e. active and creative) as well as partly negative factor in the “political-social field” (cf. Edelman 1979).

The emphasis on law’s active, shaping, embedded, and “lived” character in the work of Poulantzas and to some extent in that of Antonio Gramsci (see Hall et al 1978; Sugarman 1981) has helped structuralism move beyond a unidimensional conception of law. Recent commentators have drawn attention to these “functions” and tied them to the emergence of what has been called the “constitutive theory of law.” According to Klare (1979:128, 132), this theory of law shifts the emphasis from law as an abstract and objectified structure to the notion of law-making as praxis: the view that law represents “a form of expressive social practice in which the community participates in shaping the moral, allocative, and adjudicatory text of social life.” The constitutive theory thus demands “recognition of the role played by all social actors, including even oppressed individuals and groups, in the constitution of the legal order” (Fraser 1978:148). In opposition to the lockstep of legal nihilism and the system imperatives of classical structuralism, this approach seeks to “bring men (and women) back in” (cf. Homans 1964) to the explanatory system and to redefine history as a process driven by human subjects (Thompson 1978:79).

This perspective is echoed, albeit from the vantage point of “culturalism,” by E. P. Thompson. Thompson, whose position is described by several observers as “imbricationist” (Sugarman 1981; Beirne & Quinney 1982), assumes that law is “deeply imbricated within the very basis of productive relations” (Thompson 1975:261). Law is, moreover, both within and with-
out; there are "invisible" as well as "visible" structures of law (Thompson 1975:261). From the point of view of some structuralists, Thompson's position is one of "cultural reductionism" (Merritt 1980:210). But Thompson is not simply suggesting that the economic infrastructure is "absorbed" by the superstructure of legal, political, ideological, or cultural practice; he is arguing that the very distinction between infrastructure and superstructure is flawed. For Thompson law does not simply influence the material basis of society, it becomes part of that basis. The impulse to treat law in this way is part of what may be described as the "flattening project": the denial of the topographic metaphor of base and superstructure in Marxist theory.

Conventional Marxism has proceeded on the assumption that the architectural metaphor can and should be rehabilitated—as, for example, in Cohen's (1978:231) suggestion that the "roof" (superstructure) is not only supported by the "struts" (infrastructure) but also renders them more stable. But the flattening project involves a movement away from this sort of theorizing for both structuralism and culturalism. Whatever their continuing differences, both schools seem to be moving toward an obliteration of the distinction between the "upper" reaches of consciousness, culture, religion, art, politics, and law and the "lower" economic processes and structures.

Once it is redefined and flattened in this way, the theory of law can begin to take the interpenetration of the legal and extra-legal worlds seriously. It becomes possible, for instance, to ask questions about the law-making process in socialist as well as capitalist societies (Fraser 1978; Kinsey 1978). What remains crucial to this task, however, is the ability to distinguish expressive from repressive law and to demonstrate how particular social arrangements prove consistent or inconsistent with each. If law is social practice, then how do we decide whether that practice is expressive, repressive, or both? Moreover, since the theoretical center of gravity is shifted from the reified economic system to the flesh and blood people who create and live it, a new problem arises: How can we understand the nature and significance of law as a social institution as well as a social practice?

Law is never simply praxis. No matter how fluid, spontaneous, and revolutionary a society is, it must create institutions that at some point guide and define the limits of social practice. As a series of crystallized social practices within history, law becomes a condition as well as a form of social practice, a framework within which law-making itself takes place. Law is thus always structure as well as practice, if only because laws inevitably outlive their makers.

By downgrading the structural, constraining side of law the "imbrication-ists" have created another problem: They have dissipated the structural
tension at the very heart of Marxist conceptions of social change. For Marxism the movement of class societies through history is premised on the tension between the forces and relations of production. If law is "reconstituted" (Fraser 1978:150), does its status change from a static relation of production to a dynamic productive force? To say that law is expressive under socialism and repressive under capitalism hardly solves the problem. An agenda is not a theory.

Thus the flattening project not only demands that Marxism reconceptualize the system at rest, it also entails a rethinking of the system in motion. If law is embedded in the very foundations of class societies the question becomes: How can law both support and inhibit the transformation of such societies? Are we to understand law as both a force and a relation of production, its precise status being determined in each empirical instance; or is it better to distinguish different kinds or levels of law? In either case, the reconstruction of Marxist legal theories requires that we take a closer look at the relationship between legal and other "noneconomic" social forms.

RECONSTRUCTING MARXIST LEGAL THEORY: THE ROLE OF POLITICS, IDEOLOGY, AND HISTORY

The deconstruction of Marxist legal theory has opened up an important breathing space for those who are pursuing emancipatory conceptions of law and society. For those interested in its reconstruction the greatest amount of attention has been focused on the significance of politics, ideology, and history.

Law and Politics

Once legal theory has been freed from the stranglehold of crude economism, it is hardly surprising that the links between law and politics become far more salient. Modern law is always in some sense a creation of the state just as the state is in some sense a creation of modern law (P. Beirne, personal communication). The connections between the institutionalization of power and the practice and structures of law are thus far too important to ignore. Nevertheless, the relationship between law and the state raises serious questions for any Marxist vision of law (Miliband 1977).

The major difficulty associated with the introduction of politics into the Marxist consideration of law grows out of the fact that Marxism is ill-equipped to treat it as an independent and relevant variable. Politics has typically been submerged in classical Marxist discussions of law because of the tendency to focus on the "private" (economic) functions of law and to
treat "public" law as a "second-order" problem (Steinert 1977:438–39). But in those cases where public law is addressed, it is usually treated as an extension of the state and the will of the ruling class. In consequence, there is little incentive to distinguish public law and state policy, much less approach law as a factor in opposition to the state (Grau 1982). Neither politics nor law can be taken seriously when they are either dissolved into the economy (economism) or equated with the will of the dominant class (instrumentalism).

Marxism's analysis of the state as an historical form also weakens its explanatory force. The reason is that Marxist theory has traditionally comprehended capitalism "as the first mode of production in history in which the means whereby the surplus is pumped out of the direct producer is 'purely' economic in form—the wage contract" (Anderson 1974:403). In contrast to capitalism, "all other previous modes of exploitation operate through extra-economic sanctions—kin, customary, religious, legal or political" (Anderson 1974:403). Since Marx (1970a:689) emphasized the ways in which capitalist control was based on the "dull compulsion of economic relations," it may be argued that while the superstructural elements of kinship, religion, law, and the state become part of the "constitutive structure" of precapitalist modes of production, they remain "marginal" to the organization and regulation of capitalist life. Thus, at least traditionally, the same reasoning that leads Marxists to treat law as epiphenomenal under capitalism removes politics and the state from serious theoretical consideration. And insofar as Marxism limits itself to a critique of capitalism, the "political problem" fails to emerge as either a theoretical or practical issue.

At its core Marxist theory prefers to approach capitalism as if politics were an external rather than an internal precondition of its existence. The logic behind this reasoning becomes suspect, however, when we recognize that the "wage contract" of which Anderson speaks, capitalism's "glue," is itself a legal construct. In fact, the classic definition of capitalism—private ownership of the means of production—itself contains two important legal concepts: "private" and "ownership" (Tushnet 1982:10). There are many instances in Marx's analysis, as Cohen (1978:216–30) has revealed, where he defined economic structure in legal (and therefore political) terms. And while some purists, like Cohen (1978:224–5), may feel compelled to separate the economic "wheat" (e.g. production relations) from the legal "chaff" (e.g. property relations), the consistent interpenetration of the two illustrates the significance of the legal/political dimension in the reconstruction effort.

Two directions in the recasting of politics within Marxist legal theory appear promising. They may be roughly characterized as (a) Law against the State, and (b) the State against Capital. Beginning with E. P. Thomp-
son’s contributions and the ensuing “rule of law” debate (Fine et al. 1979; Sumner 1981; Redhead 1982), a number of commentators within Marxism have begun to suggest not only that Law and State are empirically distinguishable, but also that they frequently stand in opposition. This opposition is typically rooted in the contradictions of legal development within class societies. Since the capitalist state must continually legitimate itself in terms of the values of individual rights, equality, freedom, and justice, it must develop a system of rules, procedures, and practices (Law) that actually serves these values, at least some of the time. By juxtaposing “arbitrary power” and “the rule of law” it may be argued that law can operate against the state as well as in its service (see Thompson 1975).

The notion of Law against the State captures the contradictory reality of capitalist arrangements. The nub of the problem for Marxist theory comes in specifying the conditions under which the rule of law and the “rights” it provides are in fact a barrier to power, an extension of power, or both. The theory must not only specify the ways in which “rights” such as habeas corpus, trial by jury, and the right to organize unions (Thompson 1979) are situated within history (Picciotto 1979), but also address the interplay between abstract rights and principles on the one hand and concrete procedures and practices on the other. In this endeavor the lines between the public and private spheres, although frequently blurred (Unger 1975, 1976; Fraser 1978; Klare 1979), must be distinguished as clearly as possible. Thus the freedoms granted against the State that Thompson and other imbricationists explore are not at all the same as those granted through the State [e.g. freedom of contract and property (see Neumann 1957)]. Certain kinds of individual rights help the State to grow while others hold it in check.

Yet to talk of “granting” these freedoms and rights is, of course, to miss part of Thompson’s point. Because he and other imbricationists present law as an “arena for struggle” rather than as either a reflection of economic imperatives or a benefit of the state, there is a strong emphasis on “winning” rather than granting rights. In fact, the rule-of-law analysis is largely defined in terms of the possibility and desirability of reconceiving law as a product of class struggle—the “missing link” in orthodox and structuralist accounts (Sumner 1981; Grau 1982; Redhead 1982). Hall (1980: 10) summarizes the position well: “We are arguing . . . that the civil rights and freedoms which make our society what it is are rights which were defined and won in struggle against the dominant interests in society, not bestowed on society by theory.”

A second consideration of politics within Marxist legal theory focuses on how the state sometimes operates against rather than in the service of Capital. In challenging traditional Marxist concepts of the state, a number of observers have drawn attention to two important but neglected facts:
(a) The "capitalist state" may use law as a means of "disciplining" specific capitals in the interest of capitalism as a whole, and (b) power groups in capitalist societies may use the state and its laws against the interests of both specific capitals and capitalism in general.

In the first case specific laws (i.e. antitrust legislation, certain types of administrative law, environmental law, products-liability law, etc) become a brake on renegade capitalists and a coordinating, organizing, and regulating factor in the interest of capitalism. One variant of this position is developed by the "capital logic school" (Jessop 1980:340). Emphasizing the functions that must be performed to maintain the capitalist system as a whole (e.g. securing social order, providing necessary infrastructure, guaranteeing internal and external markets, reproducing labor power, long-range planning, and investment in human capital), this school argues that "since the state and state intervention developed exactly because these tasks could not be performed profitably by single capitals (otherwise they would have) and since the state has to step out of the competition between capitalists to fulfill those tasks it must (and does) have a certain amount of independence from capital and its factions" (Steinert 1977:439).

This independence explains how and why the law can work against "particular capitals" (e.g. "profiteers," "unethical" manufacturers, union-breaking companies, corporate polluters, etc) yet remain loyal to "capital in general." But because the "logic of capital" forces the state to pay for its independence by serving another and deeper set of "system needs," these theories never really release the state from capitalism's grasp. What they do provide is a more complex analysis of the articulations among the economy, politics, and the law.

The second way of interpreting the role of the state vis-à-vis capitalism is based on the recognition that in some circumstances the power of the state may be harnessed by groups that lie beyond the immediate boundaries of capitalism's "interests" and "needs." Two possibilities are relevant here: the seizure of power from "above" and from "below." On the one hand, it is clear that capitalism has taken a number of "exceptional" forms (e.g. fascism) wherein the power of the state was "captured" and used to diminish if not destroy the ability of the capitalist class to administer the economy and "make" the law (see Neumann 1944; Kirchheimer 1969; Gramsci 1971; Hall et al 1978). On the other hand, there is the obligation to explore the seizure of power as part of the process through which capitalism is transformed into socialism—keeping alive the possibility that history is always made, at least in part, by men and women and that neither Capitalism nor the State is an eternal social form. If Marxism is to be taken seriously as an analysis of capitalism and socialism, it must address both of these questions as part of any investigation into politics and the law.
Law and Ideology

The major obstacle to the investigation of the relationship between ideology and law has been the long-standing Marxist habit of defining the former as "false consciousness" and the latter as "repression." If ideology is, by definition, no more than a veil pulled over the eyes of the working class by its masters, then there is little point in studying its connection to the political/legal apparatus or assessing its role in promoting or inhibiting social change. By beginning and ending its consideration of ideology with the epigram "the ideas of the ruling class are in every epoch the ruling ideas" (Marx 1970b: 64), classical Marxism restricts the role of ideology to that of a "confidence trick" (cf. Kinsey 1978) by which capitalists rule.

But recent work on the theory of ideology in Marxism (Lichtman 1975; Kellner 1978; Hirst 1979; and Sumner 1979) has stimulated a reexamination of ideology's meaning, function, and role within Marxist theory. Several aspects of this process are relevant to the position of ideology in Marxist legal theory. The most general of these is the recognition that ideology must be distinguished from propaganda. As Arnold Hauser (cited in Muraskin 1976: 566) has suggested, "what most sharply distinguishes a propagandistic from an ideological presentation and interpretation of facts is . . . that [the former's] falsification and manipulation of truth is always conscious and intentional. Ideology, on the other hand, is mere deception—in essence self-deception—never simply lies and deceit." Insofar as ideology is embedded in the consciousness of both the deceivers and deceived, it can no longer be confused with direct manipulation. From this perspective, the ruling class never creates legal ideology out of thin air. Rather, it must be collected from a kind of "ideological pool" within the sea of beliefs, half-truths, cliches, and assumptions making up the culture and consciousness of any society. And to the extent that this pool is fed by the everyday experiences, traditions, aspirations, and frustrations of all classes within society, the relationships among ideology, law, and politics become interesting and complex.

Freed from the assumption that ideology is simply reality turned upside down, as in a camera obscura (Lichtman 1975), by a scheming ruling class, investigations of legal ideology become central to the reconstruction of Marxist legal theory. Not only can ideology itself be defined as an imbricated force (see the discussion of "flattening," above), but the ideological sources and implications of law can also be subject to more careful scrutiny. Two dimensions of law have recently been explored in this regard: law as magic and as doctrine.

Part of the significance of law in class societies resides in its ability to mystify social life. To the extent that Law as a way of reasoning, as doctrine, and as practice is couched in "professional secrecy, esoteric language, grand
ceremony, special clothing, carefully structured courtrooms, the rituals of legislation and the occupational status of the judge” (Sumner 1979:275), and to the extent that it is embedded in commonplace rituals such as the pledge of allegiance, it becomes something special and mysterious: a reified social form (Gabel 1980).

As an ingredient in the glue used in the attempt to put the humpty-dumpty of culture back together after capitalism has pushed it off the wall, Law (like Science) performs an important set of ideological functions. The reified character of Law as both practice (reflected in its ritual, ceremonial, and totemic character) and consciousness (reflected most generally in bromides like “all men are equal before the law” and “a government of laws not men”) provides an important ingredient in the foundation of class rule—an ingredient often taken as seriously by the rulers as by the ruled. In this respect Law is the opium of both the masses and the ruling class. The fact that the ruling class has a more strategic position and a greater interest in the manufacture of this opium (Sumner 1979:270) in no way exempts them from all its addictive effects.

The ideological functions of legal doctrine within capitalist societies have been demonstrated in a number of ways. Part of the critique concerns shortcomings in both liberal and conservative accounts of the patterning of legal decisions and discourse. The main targets here have been legal formalism (Kennedy 1973; M. Horwitz 1977: Ch. 8) and liberal legalism (Kennedy 1976; Unger 1976; Klare 1979) as efforts to construct coherent legitimating accounts of the nature of law. Thus, for example, legal formalism can be interpreted as a specific legitimating ideology corresponding to a particular stage in capitalist development. As such it formed “an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making ‘legal reasoning seem like mathematics,’ conveyed ‘an air . . . of . . . inevitability’ about legal decisions” (M. Horwitz 1977:254).

Legal interpretation is the primary process of self-legitimation for the legal profession. When it is “decoded” (Klare 1981) in this way, the ideological functions of doctrine are both revealed and rendered less effective. The assumption here is that legal texts provide an important part of the ideology of law—an ideology that helps legitimate and mediate repression through a “logic of obfuscation” (Kennedy 1979:220). The task of critical inquiry is thus to “uncover the constellation of assumptions, values and sensibilities about law, politics and justice these texts evince, to reveal their latent patterns and structures of thought . . .” (Klare 1981:451).

At another level specific types of law and their interpretation are analyzed as they contribute to the ideological reproduction of capitalism. In this body of work, the ideological features of particular types of laws are delineated and tied directly to the fact that capitalist law, in spite of its claims to
transcendence, must always reflect the underlying contradictions and grim realities of capitalist life. Thus the law, in spite of itself, becomes a prism through which the alienating, divisive, and exploitative features of capitalism are refracted.

Many examples of this type of analysis are beginning to appear in American law journals and other publications. The ideological dimensions of law have been explored in areas as diverse as private (Kennedy 1976) and public (Tushnet 1979) law, the law of contracts (Gabel 1977; Gabel & Feinman 1982), torts (Abel 1981), constitutional law (Tushnet 1981), labor law (Klare 1978, 1981, 1982; Stone 1981), criminal law (Kelman 1982), and law relating to race relations (Freeman 1978, 1982), health care (Rosenblatt 1981), the family (Olsen 1983), and gender roles (Rafter & Stanko 1982; Polan 1982; Taub & Schneider 1982).

In most cases, inquiries of this sort seek to establish a link between the legal principles reflected in the evolution of doctrine and specific imperatives of capitalist society. A few examples may be considered: In discussing the "assumption of risk" doctrine in workmen's injury cases, Morton Horwitz (1977:210) argues that it expressed "the triumph of contractarian ideology more completely than any other nineteenth century legal creation . . . the law had come simply to ratify those forms of inequality that the market system produced." Looking at the ideological significance of the legal contract, Cotterrell (1981b:63) suggests that the idea of "equivalence" and "universality" embodied in this genre of law "promotes the breakdown of all major status differentials unconnected with the needs of an economy based on market exchanges and confirms and defines the particular form of individualism in terms of which capitalist social relations are conceptualized." In a critique of American tort law, Abel (1981:206-7) indicates that tort doctrine is significant in the reproduction of bourgeois ideology because it reinforces individualism, offers symbolic support for inequality, and "responds to intangible injury by extending that fundamental concept of capitalism—the commodity form—from the sphere of production to the sphere of reproduction." Finally, Klare (1981:452) argues that "collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace."

As the legal profession and those who reproduce it (law professors) have become more self-conscious about the ideological sources and implications of their work, the notion that the law is simply a neutral instrument—a notion itself associated with the rise of capitalism (M. Horwitz 1977: Ch. 1)—has become ever more suspect. And this suspicion has grown pari passu with Marxism's increasing attention to the links among law, politics, and ideology.

The interpretation of the law as doctrine is a vital process in the demystification of law. Yet it is also clear that ideology is never fully formed,
articulated, or internalized at the doctrinal level. There may be value in destroying the artificial coherence and legitimacy of legal thought, but it isn’t clear what those beyond the legal establishment can build on the ruins. “Legalism” suffers from “an overemphasis upon judicial institutions and the relative neglect of the formulation and administration of law” (Abel 1980:828). But to the extent that “critical legalism” (see Unger 1983) restricts its critique to the level of doctrine and ideology, it suffers the same fate.

Law always responds in some fashion to the voices and actions of those who are its subjects; in this sense ideology is as much emergent as it is imposed. The concrete struggles, disputes, and agreements that are transformed into law leave their imprint on both the form of legal institutions and the content of legal ideas. Hence, legal ideology not only reinforces, enshrines, and legitimates the victories of the capitalist order, it also registers and presages its defeats. Once again, the contradictory nature of law threatens to destroy the symmetry and closure of any Marxism that refuses to acknowledge its mediative and transitory character.

Perhaps more than anything else, the explanation of legal change forces Marxist theories of law out of their analytical straitjacket. It is this issue, as it invokes the role of history, to which we now turn.

**Law and History**

At the heart of any Marxist inquiry lies the question of social change. Whatever else it may claim to be, Marxist theory must measure itself by its ability to explain major transformations in the organization of economic, political, and social life. But like most of the 19th century attempts to understand the workings of Western societies (Bock 1952), Marxist theory is haunted by the “ghost of evolutionism” (Jacoby 1977:78; Gouldner 1980: Ch. 2). The power of the ghost is evidenced in the willingness to reduce social change to “a developmental schema, registering a progression—difficult, halting, occasionally stopped and reversed—when there may be none” (Jacoby 1977:74). Many of the excesses and distortions of orthodox Marxist legal theory may be traced to the insistence that law must follow society and society must change according to a preordained plan. The “withering away” thesis, based as it was on visions of inexorable progress toward “lawlessness,” is only the most blatant of these themes.

But there is another side to the Marxist vision of history. Marx (cited in Jacoby 1981:22) was careful to note that “human history differs from natural history in that we have made the former, but not the latter.” As a product of human activity rather than nature, the history of law reflects all of the contingencies, uncertainties, human failings, and misunderstandings of social existence. If we study the movement of law within its own history, rather than forcing it to follow the movement of “historical laws,” it
becomes possible and desirable to examine the richness of law in the past as well as the present.

Two major advances are associated with the introduction of historical considerations into Marxist legal theory: (a) the historical specification of the functions of law; and (b) the reexamination of the major time frames within Marxist analysis: the modes of production. On the one hand, it has been recognized that the functions of law are historically contingent; that the same law can accomplish different tasks and serve different masters over time. On the other hand, it has become obvious that legal change does not correspond neatly to the life course of any given mode of production; nor do specific legal arrangements necessarily stay within the boundaries of the mode of production in which they are expected to appear.

Although Marxist legal theory has clearly suffered from an insistence that specific legal forms and contents must be linked with distinctive modes of economic organization, a few studies in the Marxist tradition have recognized that laws may serve different purposes under the same economic conditions and the same purposes under different economic conditions. Several examples may prove instructive on this point: (a) Vagrancy laws served two very different functions over several hundred years in precapitalist England (Chambliss 1964); (b) the writ of trespass under capitalism "derives originally from feudal ideologies of landowners, reflecting feudal relations of production where territoriality and battles for land were crucial features" (Sumner 1970:273); and (c) in general, "legal techniques may be created in the course of development of particular spheres of economic activity while legal systems ... have no place for such techniques within their body of legal doctrine" (Cotterrell 1981b:57–58).

As these examples suggest, Marxist investigations of law may also benefit from a more careful look at the nature of law both between and within different modes of production. Comparing law across modes of production allows us to acknowledge the "slippage" between law and economy without denying the connections between the two. Comparisons of this sort may be made over the actual passage of time or by looking at the ways in which different modes of production (e.g. capitalist and precapitalist) confront each other in the modern era. In the first instance, the focus is on how specific laws operating under one mode of production (e.g. Roman civil law under slavery) are appropriated to fit the instrumental and ideological purposes of another, more modern, way of organizing economic life (e.g. capitalism) (see Cohen 1978:245–48). In the second case, the process of "modernization" is explored (Greenberg 1980b; Fitzpatrick 1980a; Cohen 1982) in order to understand how the varieties of economic, political, and cultural organization prevailing in precapitalist societies acquiesce, resist, or compromise with the legal imperatives of the capitalist world system (Fitzpatrick 1980b; Snyder 1980). Through this type of historical compari-
son it becomes possible to investigate simultaneously both diachronic and synchronic aspects of legal and economic life.

In addition to the value of studying law across modes of production, it is also useful to pay closer attention to historically specific legal variation within these economic forms. An interesting example of how this sort of periodization may advance Marxist understandings of legal relationships is found in the work of Richard Kinsey. In an investigation of despotism and legality, Kinsey (1979:48–49) delineates three periods in the development of capitalist production “within which qualitative changes in the control of organization of the labor process are visible.” Each of these three periods—manufacture, the early period of modern industry, and advanced capitalist production—constitutes, according to Kinsey, a peculiar form of despotism: the despotisms of property, the factory, and legality. Here Kinsey is suggesting that the nature of social control under capitalism adapts to and reflects the historically rooted problems associated with class rule. The despotism of legality is, as Kinsey (1979:62) has observed, epitomized by the fact that “the content of the contract may be disputed but the form is never questioned.” By distinguishing this type of social regulation from earlier varieties based on control over property [cf. Blackstone’s 18th century emphasis on the security of private property (see Kennedy 1979)] and control over machines (as found, for example, in claims to commercial liberty), we can begin to refine our understanding of how phenomena as broad as capitalism and law are intertwined through time.

The recovery of history from the “genetic fallacy,” like the recovery of politics from “instrumentalism” or “statism” and ideology from “false consciousness,” offers the hope of a new life for a theory facing rigor mortis (Jacoby 1981: Ch. 1). But in breaking loose from the chains of orthodoxy, Marxist legal theory also faces centrifugal forces that threaten to “loosen the theory until it vanishes into a cloud of words and intentions” (R. M. Unger, unpublished). This dialectic of danger and hope must inform any attempt to move beyond what we have considered thus far.

SOCIALISM AND LAW: TOWARD A CONCLUSION

While Marxist theory has much to say about law and capitalism, on the subject of law and socialism it has been strangely silent. The historical and contemporary reasons for this silence are not so strange as to be belabored here. What is important, however, is whether in light of the deconstruction and reconstruction I have described a theory of law under socialism is likely to emerge.

Such a theory will have to explore the nature of law in two contexts: “actually existing” socialist states (Bahro 1978) and states (or collectivities within them) that are moving toward socialism. Despite the relative longev-
ity of "actually existing socialism" in the Soviet Union, China, and Eastern Europe, relatively few accounts of law have been able to penetrate cold war ideology in the West and party science in the East. Since socialist law is rarely presented to the West in other than approved form, it has been extremely difficult for Western scholars to assess its deeper dimensions and implications. This may also be true in insurrectionary or revolutionary situations, although their very fluidity and confusion create greater opportunities for study (e.g. Santos 1977, 1982; Issacman & Issacman 1982; Spence 1982).

However, neither "Socialism" nor "Capitalism," at whatever stage of development, can be treated as a monolithic social formation or deformation. The growing gaps between the ideologies, self-conceptions, and realities of legal affairs in both types of systems provide a fertile ground for critical research.

A promising way of looking at these inconsistencies is the examination of what Santos (1979) has called "dual power." Under stable pre- and postrevolutionary situations as well as during periods of revolutionary ferment it is possible to identify embryonic, poorly organized, and more or less transitory and submerged systems of "people's law." These arrangements may exist alongside, within, or in explicit defiance of official law. Everything from neighborhood justice, worker's courts, tribunals, and local mediation systems on the one hand, to vigilantism, the hidden economy, and persistent forms of "crime" (Black 1983) on the other, can embody these structures and episodes of law. The relationship between political constellations of this sort and their more institutionalized counterparts can be studied within all types of economic systems as part of the dialectic between law as alienation and praxis. In this and certainly other ways, questions about law and socialism can be productively redefined.

The fundamental question framing this inquiry may now be restated: Which is likely to wither—law, sociology or Marxism? The answer will depend, of course, on whether Marxism can meet the challenge posed by its theoretical crisis. A blinkered Marxism will remain content to discount both law and sociology in the "revolutionary struggle": law because it will inevitably "wither away"; sociology because "socialism suppresses social science" (Cohen 1980: 302). The unification of theory and practice promises to end the sociology of law: "in the bright light of socialism the torch of the specialized investigator is invisible" (Cohen 1980: 302).

But the bright light of what has traditionally been promoted as socialism may blind as well as reveal; it may be Marxism, therefore, rather than law or sociology, that actually withers away. The decline of conventional Marxism as an explanatory system—only one aspect of which I have examined here—is even more striking when we consider that it has been accompanied
by the unprecedented "success" (see Jacoby 1981) of Marxism as a political rallying point. Whatever we think of Marxism's theoretical strengths and weaknesses, it is important to keep in mind that "about one third of the world's population lives under the governance of states regarding themselves as Marxist, and all this has come about in little more than half a century" (Gouldner 1980:4).

In reflecting on the contradictions between Marxism's political and theoretical status it is clear that the Marxist analysis of law need not stand or fall on the basis of legal "successes" in actually existing socialist societies, or, as some ideologs would have it, on its ability to provide a logically impenetrable, appropriately pedigreed, and totally explanatory system. In those cases where Marxist theory gives up its search for "universal rationalizing principles" (Horwitz 1981) and its claims to being an all-encompassing cosmology—aspirations shared, ironically enough, by its archenemy positivism—it can get down to the business of studying law. At that point, Marxist perspectives on law can become part of the project that Marxism holds so dear—the harnessing of law to the purposes of society rather than the harnessing of society to the purposes of either capitalism or law.

Literature Cited

Cohen, S. 1982. Western crime control models in the third world: benign or malignant? In Research in Law, Deviance and Social Control, Vol. IV, ed. S. Spitzer,


Poulantzas, N. 1982. Law. See Beirne & Quinney 1982, pp. 185–95
Redhead, S. 1982. Marxist theory, the rule of law and socialism. See Beirne & Quinney 1982, pp. 328–42
Steinert, H. 1977. Against a conspiracy theory of criminal law a propos Hepburn’s ‘social control and the legal order.’ *Contemp. Crises* 1:437–40