
MARXISM AS METAPHOR

A Marxist analysis of law claims that a reasonably systematic relation exists between the law and the relations of production, with the latter more or less determining the former. Such an analysis faces three linked difficulties, which I will call the problem of mechanism, the problem of law as constitutive, and the problem of reification.

The problem of mechanism is the one that most non-Marxists latch onto most easily. They say that a Marxist analysis must claim that in a capitalist society law serves the interests of the ruling class. Yet we all know that judges are formally independent of class pressures, that they only occasionally say that they are acting to promote class interests, and that their social ties to the ruling class are loose enough to make it implausible that the judges are instruments of the ruling class. If all this is so, the non-Marxist asks, how then does the coincidence between law and ruling class interests come about?

The problem of law as constitutive mainly arises within the Marxist camp. In its simplest version, the problem arises because class relations are defined in terms of which class owns the means of production, and, yet, ownership is a legal category that takes on its meaning only because of its relation to all other available legal categories. Law thus seems to define or constitute class relations, in which case it is circular to say that the relations of production somewhat determine the law. How then is a Marxist analysis of law possible?

The problem of reification is the peculiar American contribution to the discussion, because of the strong influence of legal realism on American thought about law. One might say, using the scientific terminology to which some Marxists are attracted, that we must specify carefully the dependent variable— "law"— in the analysis. Most Marxists seem to want to say that a rule of law—the fellow-servant rule is a classic example—serves class interests. Yet the legal realists taught us that there never was a "fellow-servant rule" that could be a dependent variable to be explained in terms of its links to the economic base. There were and always are rules and counterrules, rules with exceptions of such scope as to threaten the rule itself, rules whose force can be eliminated by drawing creatively on analogies to apparently unrelated areas of law, and so on. Statutes too have to be interpreted and fit into a whole legal uni-

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1 Similar effects on general discussions have been caused by American political science. For a summary of contemporary Marxist theories of the state that demonstrates that influence, see B. Jessop, The Capitalist State (1982).
verse, and cannot be understood as a series of words whose meaning is fixed at the time of enactment. What then can a Marxist analysis try to analyze?

Hugh Collins's superb book, Marxism and Law, is a sympathetic explication of what a sensible Marxist analysis might be. It confronts directly the problems of mechanism and of law as constitutive, and gives answers that seem satisfactory on Collins's level of discussion although the answers weaken the claim that Marxists have a special way of analyzing the law. Collins repeatedly notices the problem of reification but does not offer an answer. Indeed, he seems to view reification as inherent in the Marxist program and criticizes efforts to avoid reification as inconsistent with Marxism. He may be correct, in the sense that avoiding reification may, but only may, deprive the analysis of any specifically Marxist content.

I

THE PROBLEM OF MECHANISM

After an introductory chapter explaining why Marxists reject "legal fetishism"—the view that the law is "an essential component of social order"—and seek an image of reality undistorted by that view, Collins discusses the fundamental Marxist argument that law is "essentially superstructural, dependent for [its] form and content upon determining forces emanating from the economic basis of society." He rejects the theory, which he calls class instrumentalism, that law directly reflects the interests of the ruling class. While such a theory may have something to say about the laws regulating the relations of production, it is totally implausible as an explanation of such things as the details of family law. According to Collins, class instrumentalism fails on three grounds: it is "often . . . impossible" to link a legal rule to "any aspect of the relations of production"; some laws are "deliberate attempt[s] to change . . . minor aspect[s] of the relations of production" and therefore cannot reflect them; and, most important, there is no "account of how conscious action is determined by the material basis."

This last ground is the problem of mechanism. One mechanism is conscious awareness of class interests. The law would reflect the interests of the ruling class if lawmakers knew their class interests and enacted them into law. Collins agrees that, just as class instrumentalism may account for some aspects of the law, conscious choice may be the

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2 See, e.g., H. Collins, Marxism and Law 75-76, 84 (1982).
3 See, e.g., id. at 99-100, 109.
4 Id. at 10.
5 Id. at 22.
6 Id. at 23-25.
7 Id. at 25.
mechanism linking law and class interests in some cases. He argues, however, that lawmakers may not always, perhaps never, know what constitutes the long-term interests of the ruling class. An alternative theory, which allows subjective perceptions to diverge from objective class interests, leaves law as "a loose collection of rules produced by the fluctuating forces of diverse political groups" within the ruling class, whose diversity rests not on differences in interests but only on differences in perception. Collins concludes that conscious awareness is a logically unsatisfactory answer to the problem of mechanism: "[E]ither there has to be an account of how motivations inevitably coincide with a person's objective class position, or it has to be explained how the social class . . . comes to share a common perception of interests."10

This gap of logic is filled by a theory of ideology, which not only strengthens the "conscious awareness" answer, but provides an alternative answer to the problem of mechanism. For Collins, ideology is formed by a process of socialization in which people acquire a "set of signs and categories" with which they "interpret the world."11 Ideology is the way that people make sense of their experiences, and the means by which experiences that are painful and unsettling become natural. The pain of alienation is transmitted into the resigned or joyous acceptance of "the naturalness of an individualistic market economy."12 Law plays an important ideological role because it is "encountered frequently in daily life" and "provides a comprehensive interpretation and evaluation of social relationships and events which is in tune with the main themes in the dominant ideology."13

Collins is of course aware that "in tune with" is a long way from "is determined by." The difficulty is that the dominant ideology is so open that almost anything can be "in tune with" it. Collins argues that Marxists can respond to the openness of ideology in one of two ways. They can "limit the[ir] claims . . . to manageable proportions" and argue that they will explain only "the broad outlines of social evolution."14 This solution, Collins correctly states, is "unpalatable" to many Marxists because it means that their theory will have nothing to say about the class struggles that they see "all around them."15

The alternative is to emphasize the "plasticity and omnipresence of the dominant ideology."16 Through this emphasis Marxists are able to

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8 See id. at 31.
9 Id. at 31-32.
10 Id. at 32.
11 Id. at 38-39.
12 Id. at 42.
13 Id. at 50.
14 Id. at 56.
15 Id. at 57.
16 Id.
make some sense of the experience of analysts of law—that things happen, decisions are made, laws are enacted which seem to be the product of guild interests on the part of lawyers or which seem to have little connection to the relations of production. The vehicle in Marxist theory for this sense is the concept of relative autonomy.\textsuperscript{17} Collins struggles hard to make sense of this concept as a tool of Marxist analysis, concluding that in its best form, “relative autonomy” means that “the dominant ideology produces . . . the underlying categories and values of the legal system, but through a logical process judges articulate the precise implications of these forms.”\textsuperscript{18} Yet, Collins points out, this formulation threatens “any illuminating materialist explanation of the content of law.”\textsuperscript{19} If judges have an autonomous power to manipulate underlying categories, what prevents them from doing so in ways that “[alter] the basic principles through legal reasoning”?\textsuperscript{20} Collins summarizes:

If [Marxists] stick to a purely instrumental explanation of legal reasoning, . . . then the whole enterprise of ensuring coherence and consistency in legal reasoning has to be dismissed as false consciousness, perpetuated by lawyers who are concerned to mystify their desire to support the interests of the ruling class. On the other hand, an acceptance of the autonomy thesis poses a threat to the whole theory of historical materialism.\textsuperscript{21} Marxists, it would seem, have a choice between presenting a false picture of reality or being un-Marxist.

Collins suggests that, once again, ideology offers the way out. The apparent autonomy of legal reasoning is an ideology that makes sense of the experience of openness and flexibility within the legal system: “Lawyers are concerned with coherence and consistency because they are attempting to resolve conflicting interpretations of the dominant ideology,”\textsuperscript{22} which is itself open and flexible. But now Collins closes the trap. Because of the plasticity of the dominant ideology, “it is possible to eliminate any counter-examples without difficulty.”\textsuperscript{23} On a Popperian view of science, which I take it many Marxists hold, this makes the Marxist analysis of law unscientific. Collins concludes that instrumentalism must be rejected because it is “unfaithful to the Marxist explanation of ideologies,”\textsuperscript{24} but that an ideological explanation that emphasizes “the plasticity of the dominant ideology”\textsuperscript{25} must also fail

\textsuperscript{17} \textit{Id.} at 61-74.
\textsuperscript{18} \textit{Id.} at 68.
\textsuperscript{19} \textit{Id.} at 69.
\textsuperscript{20} \textit{Id.} at 68.
\textsuperscript{21} \textit{Id.} at 70.
\textsuperscript{22} \textit{Id.} at 73.
\textsuperscript{23} \textit{Id.} at 75.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 76.
because it cannot connect the relations of production to the content of law.

Notice, however, that Collins appears to require that a Marxist analysis of law provide an explanation of the content of the law. As I have suggested, Collins discusses plastic ideologies because he wants to avoid the "unpalatable" limitation of Marxist analysis to broad historical developments. Similarly, he concludes his discussion of ideology by acknowledging that this criticism loses force if we are willing to limit the scope of the theory and thereby leave "large gaps in the account of laws." I will argue below that such a limitation is necessary, not to preserve the distinctively Marxist elements of the analysis, but to make it minimally coherent. The problem of reification is another version of the question of scope to which Collins attends. Solving it may rescue the Marxist project, although perhaps at a cost unacceptable to many Marxists.

II

The Problem of Law as Constitutivē

How can one simultaneously believe all of the following propositions to be true: (1) The base determines (in some strong or weak sense) the superstructure; (2) law is an element of the superstructure; (3) the base consists of the relations of production; and (4) relations of production are defined in terms of ownership of the means of production? Legal terms seem to constitute the base, but that is what supposedly determines them.

Collins's chapter on this issue focuses as it must on G. A. Cohen's masterly contribution. Cohen argues that we must define "relations of production" in terms of physical power over the means of production. This may not work, Cohen concedes, when a mode of production has matured and physical power has acquired normative value by its recognition in law. But "in a period of transformation," we can see how physical power and legally recognized ownership do not coincide. Collins objects, cogently I believe, that somehow during such periods power and ownership have to be brought into harmony. Drawing on his earlier analysis, Collins argues that ideology provides the mechanism by which this harmonization occurs. But if that is so, Cohen can no longer hinge his solution to the problem of law as constitutive to "periods of transformation." Ideologies are groups of ideas that take a long

26 Id.
27 See generally id. 77-93.
29 H. COLLINS, supra note 2, at 82.
30 See id. at 84.
31 See id. at 84-85.
time to develop and acquire normative and persuasive content through sustained struggle between those favored by existing ideologies and those seeking to institute new ones:

A dominant ideology with the potential to shape a social formation could only arise from settled social practices where norms of behaviour had established a degree of regularity of behaviour within which persistent conceptions of the world could emerge. This ideology could not arise from the kind of transitory power relations by which Cohen characterizes the material base.32

This analysis of Cohen's thesis seems correct to me. Collins proceeds to offer a different solution to the problem, a solution that resembles the legal anthropologists' notion of law as a double institutionalization of regularities in behavior into social norms and then into enforceable rules.33 Collins argues that as a mode of production develops (in the womb of an earlier one, Marx might have said), segments of the community (nascent class fragments, Poulantzas might have said)34 interact in patterned ways that rest on their relations to the means of production. Because people need ways of thinking that make sense of their lives, they begin to treat these patterns as norms. When the new mode of production replaces the old, these norms are converted into legal rules.35 Thus the legal rules come to constitute the base by a process of social development and class struggle, through the struggle for ideological domination in the preceding period.

The argument works neatly up to this point. When it is combined with Collins's earlier arguments about the plasticity of a dominant ideology, however, it devastates his effort to make sense of a Marxist analysis of law that does not have "large gaps in the account of laws." To demonstrate this, I must depart from the close tracking that I have given of Collins's arguments and jump to his final chapter.

In that chapter, Collins "turn[s] . . . from theory to practice"36 and asks how a Marxist might use law in the class struggle. "The radical's predicament"37 is that the tactical use of law for short-term ends may validate the ideal with law within bourgeois society, enhance the ideological underpinnings of class rule, and thus impede rather than promote revolutionary change in the long run.38 This occurs because the capitalist mode of production supports, and requires, only a neutral

32 Id. at 85.
34 See N. POULTANZAS, POLITICAL POWER AND SOCIAL CLASSES 77-84 (1973).
35 H. COLLINS, supra note 2, at 88-89.
36 Id. at 124.
37 Id.
38 Id. at 126-27.
state to protect property and enforce contracts.\textsuperscript{39} According to Collins, "[w]hat is needed is a programme for the demystification of the neutrality of the liberal political order, and its replacement by an appreciation of the class structure of government."\textsuperscript{40} Such a program must be pragmatic, sometimes using law to "heighten . . . class-consciousness" by securing laws that "increase the opportunities for a working-class movement to gain cohesion,"\textsuperscript{41} sometimes foregoing apparent reforms as insufficiently demystifying.

I have my doubts about the efficacy of a tactical use of law, which the ruling class may readily describe as a cynical manipulation of the uncohesive working class, thereby preventing an increase in cohesion. But suppose that we treat Collins’s statements not as a political program for Marxists, but as the basis for analyzing the specific content of law in capitalist society. Given that class struggle for Marxists is endemic although not always self-conscious, and given a relatively open ideology of the sort that Collins describes, the laws as they are at any moment must be seen as the product of the class struggle at that moment. Reforms are extracted from unwilling segments of the ruling class by pressure from the working class, enhanced by those leading segments of the bourgeoisie that understand how reform may preserve capitalism. Conversely, repressive laws are imposed by the ruling class on a working class too weak to resist.\textsuperscript{42} Now consider Collins’s solution to the problem of law as constitutive: Regularities of behavior are also negotiated through the class struggle, the particular social norms that embody those regularities ratify the outcome of the class struggle, and the laws that come to constitute the base institutionalize the success of the ruling class. In sum, Collins says that Marxists may escape the circularity of law as constitutive only by developing an empty analytic theory that states no more than that particular laws are explained by the state of the class struggle. Marxists, therefore, must relinquish the project of developing a reasonably comprehensive Marxist analysis of law.

III

THE PROBLEM OF REIFICATION

I have argued that in dealing with the first two problems of mechanism and law as constitutive, Collins leaves Marxism with a serious problem concerning the proper scope of its analysis of law. He argues that a reasonably comprehensive theory will be empty insofar as it emphasizes the plasticity of ideology and, I have suggested, thus argues in

\textsuperscript{39} Id. at 131.
\textsuperscript{40} Id. at 141.
\textsuperscript{41} Id. at 142.
\textsuperscript{42} Presumably almost all of this occurs through the operations of the ideological mechanism that Collins has identified.
effect that Marxism has an empty theory of how the base is constituted by law. It may be possible, however, to have a Marxist analysis of law that makes less comprehensive claims than Collins requires of the analysis that he elucidates.

In a chapter entitled "The Prognosis for Law,"43 Collins touches on this possibility of a more limited Marxist analysis. His discussion is shaped by the utopian vision of a communist society in which the state, and presumably the law as well, will have withered away. I must confess that when the issue is phrased in that way, it strikes me that the ensuing discussion is likely to be highly idealist and unilluminating, although it must be noted that the "wrong" answer cost Evgeny Pashukanis, the leading Soviet philosopher of the law in the 1920s, his life during the terror of the 1930s. Pashukanis developed the "commodity-exchange theory" of law.44 According to this theory, Marx discovered how the fetishism of commodities worked by presenting to everyone in bourgeois society the image of commodities stripped of the labor (power) that produces them. Commodity fetishism lets us treat as fungible all the diverse products of diverse human labor by reducing them to a common unit of labor power. But commodities cannot be exchanged in the market without some human participation, making it necessary to supplement the economic relationship among commodities with a legal relationship among people. This legal relationship corresponds to, and in some versions is derived from, the reduction of diverse human labor to a uniform unit of labor power. For in the legal sphere, law reduces all the diverse relations of social life to relations among legally indistinguishable individuals. Thus, what links law to the material base is the parallel between the way commodities present themselves to us and the way that we conceive of our relations to each other.45 In the currently fashionable terminology, the commodity-exchange theory of law would have Marxism explain the form of law but not its content.

The commodity-exchange theory avoids one version of the problem of reification. In my discussion so far, I have been careful to talk of law in a relatively undifferentiated way. The problem of reification arises when one tries to analyze specific rules or doctrines and link them to the material base, which is the comprehensive project that Collins attributes to Marxism. The difficulty is that, as the realists taught us, there are no specific rules or doctrines. There are results in particular cases, which the judges rationalize by invoking or creating a rule. But there are always alternative rules that could have been invoked to yield a different result, and alternative rationalizations of the same result that invoke still

43 H. Collins, supra note 2, at 94-123.
44 Id. at 108-11.
45 For a presentation of the commodity-exchange theory as applied to the state as a whole, see B. Jessop, supra note 1, at 78-141.
other rules. One does not have to believe as I do that this indeterminacy is total to understand that indeterminacy of any significant degree will doom the comprehensive project. Not only will it be clear that the result could have been different, so that the link between the rule invoked and the material base will be entirely adventitious, but the rule itself could have been different, so that the link that is supposed to explain things would have to be reconstructed entirely ad hoc.

Collins criticizes Pashukanis for trying "to explain all legal rules as reflections of commodity exchange."46 The realist argument shows that such an effort cannot succeed. The commodity-exchange theory, however, need not involve that effort.47 Instead, it could try to explain only the general form of legal relationships in bourgeois society. Another version of the problem of reification, however, then arises. As Collins states the matter: "Bourgeois legal systems are described as sets of general, abstract rules of universal application. . . . I doubt whether . . . this is a fair description of many parts of modern legal systems . . . ."48 He notes that in many fields, especially those involving the regulatory-state characteristic of contemporary capitalism, "the overwhelming characteristic of the regulations seems to be their attention to minute detail rather than abstract principle."49

One could discount this observation, as Claus Offe does, by treating the detail of regulatory laws as a contradiction within later-developed capitalist laws, which has been generated in turn by the contradictions of capitalism.50 A realist would say, however, that generality and abstraction are themselves always masks for minutely particularized decisions. The stated rules, when seen as the realist insists that they must be seen in the precise contexts in which they are applied, are what philosophers might call definite descriptions. This, however, makes the commodity-exchange theory all the more interesting, because it attempts to explain why the appeal to generality and abstraction is so potent that legal decisionmakers always try to use it, are embarrassed when they are forced to particularize, see minutely detailed regulations as a threat to the rule of law, and reject the realist argument fairly violently. Collins criticizes the theory, but only insofar as it tries to be comprehensive.

Collins has shown that the only candidate for a viable Marxist the-

46 See H. Collins, supra note 2, at 109.
47 I know too little about Pashukanis to say whether Collins is right about him. His work, Law and Marxism, suggests to me that Collins has overstated the extent to which Pashukanis was committed to a comprehensive theory. See E. Pashukanis, Law and Marxism (P. Beirne & R. Sharlet eds. 1981).
48 H. Collins, supra note 2, at 99-100.
49 Id. at 100.
50 See, e.g., Offe & Ronge, Theses on the Theory of the State, 6 New German Critique 137 (1975); Offe, Structural Problems of the Capitalist State, 1 German Political Studies 31 (K. Von Beyme ed. 1974).
ory is one that deals with the form and not the content of the law. The commodity-exchange theory is the leading, perhaps the only, contender of that sort. Collins, however, has not shown that, like the other theories, it will not work.

CONCLUSION

A Marxist theory of the legal form may be impossible. One might construct a theoretical entity labeled “the legal form,” but that entity never appears in any real bourgeois society. Instead, as Collins’s example of regulatory law indicates, all real societies are not pure versions of a mode of production and what it may entail, but social formations in which elements of various modes of production coexist. To analyze societies using abstract categories may be possible, but only because one makes some obviously problematic epistemological assumptions. Contemporary Marxists are in general committed to those assumptions. Every instinct I have tells me that they are wrong, but I am not qualified to reject those assumptions out of hand.

Yet even if the epistemological assumptions are wrong, and even if a Marxist analysis of law of the sort that I have discussed is impossible, something still remains to be said. In one sense Marxism is the only remaining secular view that is committed to fighting domination wherever it occurs. Considered in that light, the debate over the withering away of law takes on a new aspect. Law may be taken as a metaphor for all those facets of our social relationships that seem to us necessary for us to get along in the world and that also seem somehow imposed on us. Marxism is then a metaphor for a world of radical contingency, in which we know that social regularities are constructed by our own actions, have no life of their own, and may be challenged and reconstructed whenever and however we want. In that world, however, what do we do about the Charles Mansons and David Rockefellers?

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51 B. Jessop, supra note 1, makes this commitment clear, and Jessop himself is committed to these assumptions.

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