

Law-Making As Praxis
by Karl Klare
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I. The Promise of Critical Legal Thought

There has been for some time a recognized crisis in classical Marxist political theory that can no longer, if it ever did, adequately account for the role of the state in advanced capitalism. This crisis has called forth a series of creative but incomplete attempts to conceptualize the advanced capitalist state.¹ There is likewise a long-smoldering crisis in liberal legal theory,² which has, in turn, called forth a critical response symbolized by such developments as the creation of the Conference on Critical Legal Studies. One major strand in the emerging attack on liberal legalism is the elaboration of a neo-Marxist legal theory,³ which is laying foundations for the

*With minor revisions, this is the text of remarks presented at the First New England Regional Meeting of the Conference on Critical Legal Studies, held in Boston, Feb. 4, 1978. The Conference on Critical Legal Studies is a national organization of law practitioners, teachers, and students, social scientists, and others committed to the development of a critical theoretical perspective on law, legal practice and legal education. The paper was submitted to the "Notes and Commentary" section with the thought that *Telos* readers would be interested in the recent emergence of a serious interest among students and practitioners of law in radical social theory, particularly as legal practice has hitherto been notable for the absence of a sustained commitment to theoretical work. It is a development of some significance that there is a widespread acknowledgement in the radical legal community, growing stronger still since this conference, that the community needs to acquire a deeper theoretical base and to devote attention to the issues, themes and arguments of the traditions in critical social thought discussed in journals such as *Telos*. By the same token, the empirical and practical focus of critical legal thought has already enriched and, it is hoped, will continue to enrich the discourse of radical social theory. In particular, the growing literature emanating from the critical legal theory movement, some of which is cited in the text, has already made important contributions to the theory of the state. The context of the remarks that follow was an early attempt to bring together several constituencies that have much to gain by sharing their work. The Conference on Critical Legal Studies may be reached through its secretary, Mark Tushnet, Law School, University of Wisconsin, Madison, WI 53706.

1. This literature is by now familiar and need not be surveyed here. See David Gold, Clarence Lo, Erik Wright, "Recent Developments in Marxist Theories of the Capitalist State," *Monthly Review*, October 1975 (Part 1) and November 1975 (Part 2); Alan Wolfe, "New Directions in the Marxist Theory of Politics," *Politics and Society*, Winter 1974. The comments on the theory of the state that follow draw on this literature, particularly the work of Ralph Miliband, James O'Connor, Claus Offe, and Alan Wolfe. I have found most useful Fred Block, "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State," *Socialist Revolution*, No. 33 (May-June 1977).

2. The roots of the current crisis of American legal thought may be traced to the 1930s, when the legal system, like all other aspects of capitalist life, experienced traumatic upheaval. Legalism never fully recovered from the largely successful assaults of legal realism in the 1930s, though serious attempts have been made to repair the edifice of liberal jurisprudence since the Depression. See generally, Lon Fuller, "Reason and Fiat in Case Law," *59 Harvard Law Review* 376 (1946); Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness," *62 Minnesota Law Review* 265 (1978); G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," *59 Virginia Law Review* 279 (1973). (Note: legal citations begin with the volume number, have the source cited second, and end with the page number of the opening or cited page.)

3. There is a growing body of literature about law written in English that may broadly be said to be within the perspective of the "neo-Marxist" theoretical project. See particularly: Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law,"

creation of a Marxist jurisprudential culture in the United States.⁴ My thesis is that because of its concreteness and empirical focus, because of its inherent orientation toward practice,⁵ and because of its abiding concern with the claims of reason and justice, however much those claims are systematically violated by capitalism, critical legal thought has much to contribute to the revivification of Marxist political theory. In particular, critical legal thought forces attention upon the need to conceive and anticipate, however rudimentarily, the institutional forms for political expression, collective decision-making, resource allocation, and dispute resolution which will someday constitute a free and democratic society — matters ordinarily postponed or ignored in the classical Marxist tradition. I will argue that the key to releasing this theoretical potential lies in transcending the traditional view of law (and the state

11 *Law and Society Review* 571 (1977); Andrew Fraser, "The Legal Theory We Need Now," *Socialist Review*, Nos. 40-41 (July-October 1978); Peter Gabel, review of Dworkin's *Taking Rights Seriously*, 91 *Harvard Law Review* 302 (1977); "Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory," 61 *Minnesota Law Review* 601 (1977); Douglas Hay, et al., *Albion's Fatal Tree* (New York, 1975); Karl Klare, *op.cit.*; E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1975); Mark Tushnet, "A Marxist Analysis of American Law," *Marxist Perspectives*, No. 1 (Spring 1978); "Perspectives on the Development of American Law," 1977 *Wisconsin Law Review* 81 (1977).

4. There are many reasons why a Marxist legal culture has been slow to develop. As a group, political lawyers tend to be oriented toward the resolution of immediate, pressing practical issues, rather than toward theoretical work. The many distinguished radical and socialist lawyers who accomplished so much representing and serving the labor, civil rights, anti-war, women's and other popular movements over the generations had and have much to contribute to an understanding of the capitalist state, yet, understandably, their energies have been devoted first and foremost to grappling with immediate litigation problems. As a result, they have had little opportunity to develop alternative theoretical models for understanding the American legal process. Until recently, what existed of radical legal theory was a series of demonstrations that this or that statute or decision served the interests of a particular class or group. Although such demystifying critiques have an important place, the argument of this paper is that they are inadequate as a ground for Marxist jurisprudence. There are other reasons, which I am unable fully to explore here, for the underdevelopment of Marxist legal culture: the tendency of orthodox Marxism to treat law as a mere epiphenomenon and, hence, the lack of much serious writing on law within the Marxist tradition; the pragmatic orientation of lawyers as a group, by training and professional interest; and, perhaps, the more thoroughgoing and hegemonic consolidation of a Cold War perspective within law than in the social sciences, delaying an opening to the left in legal academic circles some five or ten years after radical sociology and economics caucuses began to flourish in the United States. See also Mark Tushnet, "Marxist Analysis," *op.cit.*, p. 96.

5. That is, the embeddedness of action-in-belief and of belief-in-action. See Roberto Unger, *Law in Modern Society* (New York, 1976), pp. 245-246. The term "legal practice" is not, except where the context requires, used in the narrow sense connoted by the phrase "practice of law." Rather, I use "practice" in the broadest sense of any social-world producing activity, as in Marx's concept of *praxis*. See Dick Howard, *The Marxian Legacy* (London, 1977), chapter I. "Legal practice" (or "law-making" or "the legal process") thus comprehends the modes of thought characteristic of legal culture, the styles and patterns of consciousness by which lawyers perceive and resolve problems, the institutions, processes, and behaviors that together constitute the external manifestations of law, such as courts, agencies, police apparatuses, adjudication, legislation, contract, and so on, and, indeed, all human contacts with official and semi-official dispute-resolution processes. For example, in my paper, *op.cit.*, I argue that the great sit-down strikes of 1936-37 were, in effect, a part of the "legal process" that established collective bargaining in this country, as much as the action of Congress in passing the National Labor Relations Act. The rural poor who, through their collective action "enforced" a just price in the sale of grain, were, on E.P. Thompson's evidence, relying upon and participating in the legal culture of their times; i.e., they were in some sense engaged in "legal practice" as that term is used here.

generally) as mere instruments, buttresses or "retaining walls" of class power, and being able to conceive of law and politics more broadly as forms of practice by which the social order of capitalism is defined.

II. *Marxist Political Theory in Late Capitalism*

The social and political transformations of advanced capitalism have eroded the underpinnings of the classical Marxist view of the state, which is embodied in the familiar "base-superstructure" dichotomy, in which the state is seen as an instrument of class power and more or less responsive to the will of dominant economic actors; that is, as a "reflection" of the primary structure or "real foundation" of social life which is said to be located in the relations of production. The classical statement of this view is Marx's well-known dictum: "In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society — the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life."⁶

Without pausing to recapitulate the debates as to whether the theory is, as stated, defensible, and whether in light of his work as a whole it can be said that Marx actually held such a theory, it is coming to be common ground that the base-superstructure paradigm cannot tell us what is important to know about the state in advanced capitalist society — namely, *why* the capitalist state *is* a capitalist state. The model is deficient for several reasons:

(1) *Politicization of the "base"*: The state in advanced capitalism systematically and pervasively intervenes in, and indeed, reshapes the sphere of private economic and social activity. The process of capital accumulation is now dependent upon and contoured by state policy. This has been true in a systematic sense since the 1940s, but the process of political "rationalization"⁷ of private economic activity has been the trend since at least the turn of the century.⁸ The state sets the ground rules of most economic transactions, directly regulates many significant industries, regulates the class struggle through labor laws, through its actions determines the size of the "social wage," provides the infrastructure of capital accumulation, manages the tempo of business activity and economic growth, takes measures directly and indirectly to maintain effective demand, and itself participates in the market as a massive business actor and employer. It is, in short, simply impossible to speak meaningfully of the "relations of production" in advanced capitalism without comprehending under that heading the role of the state, the relationships of state power to private economic

6. Karl Marx, "Preface" to *A Contribution to the Critique of Political Economy* (Chicago, 1904), p. 11.

7. See Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago, 1967), pp. 1-10.

8. Often this rationalization process can be traced to the initiative of leading corporate interests, but often that is an insufficient explanation. The role of popular initiative and class struggle and the independent interests and goals of state managers (often in conflict with those of much of the business community) have, until recently, been underplayed in what is otherwise one of the most fruitful first steps toward a critical theory of the state, the theory of "corporate liberalism." See Block, *op. cit.*, note 2, and Fred Block, "Beyond Corporate Liberalism," *Social Problems*, Vol. 24 (1977).

activity.

(2) *Transformation of the "superstructure"*: At the same time, the concerns and interests of private life are infused into the public domain, they become concerns of public policy. Labor-management disputes, the character of education, the distribution of income, the allocation of social entitlements to the poor, the nature of family life, in short, all important issues of social life, increasingly become the concerns of public policy, including issues of the most intimate kind. To pick just a few examples, and leaving aside such well-known matters as the Bakke case, in recent years the business of the United States Supreme Court has included such concerns as what medical procedures shall be available to poor women; the permissible length of policemen's hair and sideburns; where on an employer's premises employees may engage in private, off-duty conversations about labor unions; whether government may regulate family size by financially penalizing welfare recipients who have more than the prescribed number of children; what relationships or "lifestyles" must obtain between persons who wish to live in the same household; and even whether a rare species of fish known as the "snail darter" should be preserved at the expense of a \$100 million public works project. Most politically involved people would, I suspect, be astonished to learn the scope of "private" activity scrutinized and regulated by public agencies that would be revealed by reading through a year's worth of Supreme Court opinions or federal administrative law decisions and rulings. As the state has increasingly assumed the burdens of maintaining consumer demand, managing employment levels and labor force attitudes, and mitigating the most extreme human consequences of unrestricted capital accumulation, almost all private concerns have become matters of state policy.⁹

(3) *Corporatism and bureaucracy*: The base-superstructure paradigm is of little use in analyzing the central phenomenon of corporatism in advanced capitalism — the ascendancy to (or cooptation into) semi-governmental power of hitherto "private" institutions such as corporations, labor unions, and universities, which plan and execute decisions affecting our individual and collective destinies. The repercussions within law of these developments are enormous. The separation between private and public law is collapsing,¹⁰ and "state action" doctrine — that is, the theory of sovereignty¹¹ — is in a state of ideological chaos. The conception of "rights" in capitalist society, to the extent they exist at all, is increasingly being transformed from one of absolute entitlements possessed by individuals as against state power to one in which the individual has a narrower claim merely to have his or her interests "weighed" by authoritative agencies and-or represented reasonably and in good faith by large, bureaucratic corporatist entities over whose direction one has no real

9. I emphatically do not mean to imply that the expansion of the concerns of state eliminates private control of many or even most important social processes. Quite the contrary, the most serious decisions with social consequences, such as investment decisions and the content of collective bargaining contracts, remain largely under private control. The essential contradiction of advanced capitalism remains that between the social production and private appropriation of wealth. What is asserted is that a mutual interdependency develops between state power and the processes of capital accumulation, and that one cannot fully understand either process without appreciating the other. For more detailed discussion, see Block, *op. cit.*, note 1, and also Claus Offe and Volker Ronge, "Theses on the Theory of the State," *New German Critique*, No. 6 (Fall 1976).

10. See generally Morton Horwitz, *Materials on American Legal History, 1890-Present* (Harvard Law School, 1976); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought, 1865-1940* (Unpublished manuscript).

11. See Laurence Tribe, *American Constitutional Law* (Mineola, N.Y., 1978), chapter 18.

control.¹²

(4) *Culture and legitimation*: The base-superstructure model cannot do justice to the cultural and psychological underpinnings of state power, nor to the cultural function of the state in reproducing the social order of capitalism, nor indeed to the partial, but important, degree to which the forms and institutions of liberal, representative democracy represent the achievements of working class agitation. As Perry Anderson has written: "The existence of the parliamentary State thus constitutes the formal framework of all other ideological mechanisms of the ruling class. It provides the general code in which every specific message elsewhere is transmitted. The code is all the more powerful because the juridical rights of citizenship are not a mere mirage: on the contrary, the civic freedoms and suffrages of bourgeois democracy are a tangible reality, whose completion was historically in part the work of the labor movement itself, and whose loss would be a momentous defeat for the working class."¹³

The Marxist theory of the state has recently recognized a need to focus attention on the cultural mediation of class and state power and, in particular, the legitimation functions of the state. Yet we are just beginning to understand why particular cultural resonances flow from state action in concrete historical cases, and how the popular democratic aspirations which are reflected in the false (but only *partially* false) universality of the liberal state are repressed, deflected, and perverted by the institutional mechanisms of capitalism. Notwithstanding other achievements of 20th-century Marxism, it is disappointing that whereas the state is massively involved through law in the application of cultural, institutional and physical power in everyday life for purposes of the reproduction of the social relations of capitalism, very few concrete examinations of the impact and meaning of the legal process exist within Marxism, largely due to the tendency to see law as merely "epiphenomenal."

In sum, the "superstructure" theory of state power is simply inadequate to describe advanced capitalist politics. Indeed, any lingering desire to refurbish this model is fatally eroded by the recovery of the dialectical theory of praxis underlying Marx's work. The central themes of Marx's politics — the critique of the fracture of social and political life, between "bourgeois" and "citoyen," which is the hallmark of all liberal democratic theory and which inevitably masks the reality of domination in class society; the view that the capitalist state extracts the social and communal essence of people and returns their sociality in the form of atomization and domination;¹⁴ the conception of freedom as the material and institutional arrangements permitting human self-actualization and self-expression and of human "right" as the right to community and communal control of the destiny of the species, to work as a mode of self-expression, indeed, the right to the "emancipation of the senses," to the realization of a fully human sensibility; in short, the notion of "socialism [as] a promulgation of human freedom across the entire existential space of the world"¹⁵ — these themes are simply incompatible with a causal, instrumental conception of the relationship between consciousness and actuality which is the necessary conceptual corollary of the

12. See generally Note, "Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing," 88 *Harvard Law Review* 1510 (1975).

13. Perry Anderson, "The Antinomies of Antonio Gramsci," *New Left Review*, No. 100 (November 1976-January 1977), p. 28.

14. For this point, see Wolfe, *op.cit.*, note 1.

15. Perry Anderson, "Problems of Socialist Strategy," in Perry Anderson and Robin Blackburn, eds., *Towards Socialism* (Ithaca, N.Y., 1966), p. 289.

superstructural or "reflective" theory of the state. Rather, Marx's politics depends on a dialectical theory of consciousness — a theory of human self-activity or objectification as social world-creating (within the pre-existing space of materiality); a conception of people as beings in relation to, and dependent on, others; a conception of the relationship of subject and object in which the subject derives its contents from objects and relationships external to it, but nevertheless one in which the subject shapes, changes, and gives meaning to objects in the process of coming to know them.

The obvious inability of the orthodox paradigm to absorb, much less explain, the politics of advanced capitalism, combined with recent efforts to achieve a critical reconstruction of Marx's ontology, have generated a number of creative responses within Marxist political theory. Notwithstanding very different theoretical starting points, much of this work has come to center on the concept of the "relative autonomy" of the state from the will of dominant economic actors.¹⁶ Although unquestionably an advance, the relative autonomy formulation is incomplete as an explanation of the social and historical mechanisms by which class interest is converted into state policy, or of how the balance implied by "relative" is maintained. We thus far do not have a theory of the *practice* by which the state in capitalist society is reproduced as a capitalist state.

In my view, the central difficulty of Marxist political theory, even in its most sophisticated versions, is its residual insistence on seeing the state primarily as a *buttress* of class power, as the protector of long-run class interest, or, in Poulantzas' formulation, as "the factor of *reproduction* of the conditions of production of a system."¹⁷ What is needed is a theory in which political action can also be conceptualized as *creating* or *articulating* class power. To be sure, politics "creates" class power only on the terrain of a historically pre-given social formation, but the dynamic element in the activity of the state must be seen as a *constitutive* component of the social totality.

III. *The Constitutive Theory of Law*

The initial theoretical operation is to free the Marxist theory of law from its determinist integument — i.e., the notion that law is a mere instrument of class power — and to conceive the legal process¹⁸ as, at least in part, a manner in which class relationships are created and articulated, that is, to view law-making as a form of praxis. In Andrew Fraser's words, "against the view that the law is essentially an instrument of the dominant class... law must be [seen as] a central category in any theory of sociality within advanced capitalist societies."¹⁹

Consider two applications of this approach:

(a) A brilliant example, to the elegance of which I cannot do justice, is Douglas

16. Thus, the "relative autonomy" notion appears to be common ground between the otherwise radically distinct approaches of Ralph Miliband and Nicos Poulantzas in their famous debate. Compare Nicos Poulantzas, "The Problem of the Capitalist State," *New Left Review*, No. 58 (November-December 1969), pp. 73-74, with Ralph Miliband, "Poulantzas and the Capitalist State," *New Left Review*, No. 82 (November-December 1973), pp. 85 and 85n.

17. Poulantzas, *ibid.* Emphasis altered.

18. Again, the "legal process" or "law-making" is defined here in the broadest terms.

19. Andrew Fraser, "The Legal Theory We Need Now," *Socialist Review*, Nos. 40-41 (July-October 1978), p. 148. I have been strongly influenced by Fraser's work, which appeared in an earlier form as "Legal Theory and Legal Practice," *Arena*, Nos. 44-45 (Greensboro, Australia, 1976). I would advance the proposition quoted with respect to all capitalist social formations, not just advanced capitalism.

Hay's description of the criminal law in 18th-century rural England.²⁰ Hay begins with a paradox: the 18th-century witnessed both an enormous expansion in the number of capital offenses, particularly offenses against property, and, at the same time, weak and declining enforcement of the law, frequent acquittal of offenders on highly technical grounds, and frequent pardons or commutations of the death sentence. Contemporary reformers argued, to little avail, that property could be better protected and crime more efficiently "managed" by a more serious commitment to detection of crime, to certainty in prosecution, and to certain, but graded, punishments to insure that juries would convict and that sentences would be executed.

The seemingly irrational resistance of the landed gentry to this sensible advice is explainable only when we adopt the perspective that the social function of criminal law was not the management of crime, but sustaining the moral authority of the gentry and creating a complex and richly articulated system of social relationships of personal dependency that constituted the structure of power. That is, criminal law not only served to reproduce the social order; in part, it also constituted and defined the social order.

Hay persuasively argues that the weaknesses and inconsistencies of the law were well-suited to fulfill this broader mission. Without reproducing his entire text, the most important facets of his description of the 18th century criminal process are:

(i) The extraordinary psychic power of the law, particularly the irrational spectacle and horrible ritual of capital proceedings, was exploited to create a community theater of terror;

(ii) The solicitude customarily extended to the accused, the absurd procedural formalism which allowed frequent escape from the gallows, the occasional conviction of a nobleman, and the occasional practice by the wealthy of financing a lawsuit brought by a poor retainer, were all carefully woven into a powerful cultural underpinning for the hegemonic presentation of class rule as a system of blind and equal justice (while at the same time this ideology, as well as the absence of a standing national police force, protected the gentry from the Crown);

(iii) The rules of criminal procedure (such as the prohibition on employment by accused felons of counsel to address the jury) were structured to make the character witness (a man of property to whom one would become, literally, indebted for life) central to the criminal defense; and,

(iv) The mercy and pardon power, which was *de facto* in private hands because of the system of private prosecution, pervaded the administration of the law, and mercy was dispensed in a personalistic, discretionary manner: "the manner in which a pardon was obtained made it an important element in 18th century social relations in three...ways. In the first place, the claims of class saved far more men who had been left to hang by the assize judge than did the claims of humanity. Again and again in petitions the magic words recur: 'his parents are respectable persons in Denbighshire'; his father is 'a respectable farmer'; his brother is 'a builder of character and eminence in London'. . . . Pardons also favored those with connections for another reason: mercy was part of the currency of patronage. Petitions were most effective from great men, and the common course for a plea to be passed up through increasingly higher levels of the social scale, between men bound together by the links of patronage

20. Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson and Cal Winslow, eds., *Albion's Fatal Tree* (New York, 1975), pp. 17-63. The paragraphs that follow are drawn from Hay's essay.

and obligation.... Beyond class favoritism and games of influence, the pardon had an equally important role to play in the ideology of mercy. The poor did not see the elaborate ramifications of interest and connection.... [N]o gentleman wished to admit too openly that justice itself was but another part of the system. Moreover, pardon-dealing went on at the highest levels only, well concealed from the eyes of the poor. Therefore the royal prerogative of mercy could be presented as something altogether more mysterious, more sacred and more absolute in its determinations. Pardons were presented as acts of grace rather than as favors to interests. At the lowest levels, within the immediate experience of the poor, pardons were indeed part of the tissue of paternalism, expressed in the most personal terms. The great majority of petitions for mercy were written by gentlemen on behalf of laborers. It was an important self-justification of the ruling class that once the poor had been chastised sufficiently to protect property, it was the duty of a gentleman to protect 'his' people."²¹

The genius of the English criminal procedure was to put the instruments of terror directly at the disposal of the dominant socio-economic actors, but under the guise of an impartial, determinate, and humane rule of law. But the ideological mystification is only one aspect of Hay's argument. The other and crucial point I draw from Hay is that the legal process contributed to the articulation of the vast configuration of relationships of personal dependency and the psychic and emotional penumbra that surrounded them which constituted the primary system of authority in rural England. *That is, the legal process was one of the primary forms, if not the primary form, of social practice through which the actual relationships embodying class power were created and articulated:* the ruling class's "political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighborhood as a man of compassion.... [T]he power of gentlemen and peers to punish or forgive worked in the same way to maintain the fabric of obedience, gratitude and deference. The law was important as gross coercion: it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission, the 'mind-forged manacles,' which Blake saw binding the English poor."²²

(b) A second example is provided by my own research on American labor law in the 1930s and 1940s, which attempts to resolve the difficulty for Marxist theory posed by New Deal labor law reform. The National Labor Relations Act of 1935 is portrayed in conventional liberal historiography as proof of the possibility of democratic reform within capitalism. In reaction, some left interpretations have portrayed it as the outcome of a decision by the most sophisticated representatives of the business community to promote collective bargaining so as to preserve the social order and forestall developments toward even more radical social change.²³ The former view fails to do justice to the massive extra-parliamentary struggle waged by the working class to enforce the legislation; nor does it confront the profoundly conservative implications of collective bargaining in co-opting, institutionalizing, and bureaucratizing the militant class struggle of the 1930s. The latter approach fails to confront the fact

21. *Ibid.*, pp. 44-47.

22. *Ibid.*, pp. 48-49.

23. See, e.g., G. William Domhoff, *The Higher Circles* (New York, 1970), pp. 238-249.

that almost all forces in the business community, including those that would be expected to be associated with "corporate liberal reformism," bitterly and fiercely resisted the Act and were forced to obey its command (and, later, to find ways to shape it to their own ends) only by the extraordinary struggle of working people in the union organizing campaigns of the 1930s. In short, the Act must be seen in both its aspects, as a prospect or aspiration for democratic and, to some degree, anti-capitalist social change, as well as a buttress of the institutional system for state administration and containment of the class struggle.

A resolution of this complexity is to be found in many post-1930s developments: changing political conditions presented by the War and the Cold War; changes in the labor movement; and so on. But I argue that one of the important processes at work, beginning as early as 1937, was the relatively imaginative intervention of the National Labor Relations Board and the courts, particularly the U.S. Supreme Court, in interpreting and administering the NLRA. This intervention articulated and advanced certain crucial rights of workers and yet, at the same time, defused or "deradicalized" the latent anti-capitalist potential of the Act, thereby laying the cultural, and later the institutional foundations of the architecture of the post-War administered and regulated class struggle. Achieving this balance — progressive advancement of employee rights so as to relegitimize the capitalist state at a moment of extreme crisis, yet the articulation and structuring of these rights in a manner ultimately amenable to capitalist domination of the workplace — required no small quantum of intellectual and political effort and skill. This law-making, i.e., institution defining, effort was part of the vast political and planning enterprise which brought late capitalism into being. The legal process, particularly the law-making practice of the NLRB and the Supreme Court, not only served to "protect" capitalism in its moment of crisis, but contributed to defining what the character of capitalism would become and creating the institutional and social relationships of the late capitalist workplace.²⁴

The chief analytical operation underlying the project of developing a "constitutive theory" of law, that is, the step of conceiving of law-making as in principle a form of objectification, is an analogue to the call within philosophical discussion for clarity on the distinction Marx made between "objectification" and "alienation." "Objectification," the ontological foundation of human freedom, is the process by which the subject, shaped by the material "substratum" of consciousness, embodies itself in products and relationships which form the social interworld, whereas "alienation" is the historically contingent social process by which objectification is so distorted and impeded that we are unable to experience and know ourselves as the authors of our objectifications or our destinies.²⁵ Though Marx's writing was primarily concerned with unmasking the alienated character of the work process in capitalist society, "labor" (as distinct from "capitalist wage-labor") was for him a metaphysical category expansive enough to encompass all forms of social practice, including legal practice.²⁶

24. This argument is developed in some detail in my essay, *op.cit.*, note 2.

25. See Peter Berger and Stanley Pullberg, "Reification and the Sociological Critique of Consciousness," *New Left Review*, No. 35 (January-February 1966).

26. Cf. Herbert Marcuse, "The Foundation of Historical Materialism," in *Studies in Critical Philosophy* (Boston, 1972). In order to reach the political conclusions drawn, *infra* part IV, I find it unnecessary here to enter the debate as to whether, contrary to my assertion in the text, Marx's concept of objectification was in fact narrowly restricted to the labor process proper to the exclusion of other forms of intersubjective practice, and that therefore Marx's theory is an inadequate ground upon which to construct a vision of post-revolutionary society.

My argument is that we can conceive law-making as, *in theory*, a form of expressive social practice in which the community participates in shaping the moral, allocative, and adjudicatory texture of social life, but that in class society, this process is alienated. In history, law-making becomes a mode of domination, not freedom, because of its *repressive* function — its connection with official (class) violence; its *facilitative* function — its emphasis on the promotion of transactions desirable from the standpoint of reproducing capitalist domination in particular and the social order in general; and because of its *ideological* function — its presentation as just and fair that which is inequitable, cruel, and inhumane.²⁷ Indeed, what has been least appreciated by Marxism is that the distinctive *form* of legal practice in liberal capitalist culture, liberal legalism,²⁸ is itself an alienation. Because of its connection with official coercion; its purported (i.e., ideological) separation of morals and politics from judicial action; its overwhelming emphasis on the formal, adjudicatory model of dispute resolution; its impersonal, anti-participatory character; its insistence on the presentation of all moral and allocational judgments in the form of general, suprahistorical rules; its pervasive attempt to separate form and substance in legal decision-making; its control by experts socialized in elite institutions and distant from the lived reality of everyday life in capitalist society, and its exaltation of the claims of property over those of human dignity, it is inevitable that the *form* of liberal legalist justice must be a negation of the human spirit even when the impulse to justice forces its way into the *content* of particular legal decisions. Developing a vision adequate to the revolutionary project of constructing a free society imposes the obligation to unmask the nature and practice — including the form as well as the content — of

27. See Tushnet, "Perspectives," *op.cit.*, note 3, which develops these categories.

28. I mean by "liberal legalism" the particular historical incarnation of legalism ("the ethical attitude that holds moral conduct to be a matter of rule-following," see Judith Shklar, *Legalism* [Cambridge, Mass., 1964], p. 1), which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general "democratically" promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ration decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis ("legal reasoning"). The rise and elaboration of the ideology, practices and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating "legal reasoning" and the legal process.

Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

On the connection between liberal legalism and the rise of capitalism, see Morton Horwitz, *The Transformation of American Law* (Cambridge, Mass., 1977); Franz Neumann, "The Change in the Function of Law in Modern Society," in *The Democratic and the Authoritarian State*, Herbert Marcuse, ed. (New York, 1957); and Roberto Unger, *Law in Modern Society*, *op.cit.* For the connection between liberal legalism and liberal metaphysics, see Duncan Kennedy, "Legal Formality," 2 *Journal of Legal Studies* 351 (1974); "Form and Substance in Private Law Adjudication," 89 *Harvard Law Review* 1685 (1976); and Roberto Unger, *Knowledge and Politics* (New York, 1975).

capitalist law-making, and to begin to conceive emancipatory alternatives in the legal as well as all other dimensions of life.

IV. *Political Consequences*

The transition from an instrumental to a constitutive theory of law entails several political consequences of importance to the socialist movement. E.P. Thompson has taken the lead in pointing to the first: the realization that the legal process cannot be treated by any serious movement for social change as a mere sham, but rather that it must be taken seriously as an enormously important aspect of social life and arena of social struggle; indeed, even from a critical perspective, legalism must be viewed as a great human achievement.²⁹ To treat law as mere sham is to dishonor centuries of struggle in which the poor and oppressed attempted to fill the law with humane content, to hold the law to its own pretensions to justice. Class struggle was expressed and mediated through the forms of law. Moreover, there is a difference, which Thompson implores us to remember, between the rule of law and the rule of absolute, arbitrary force. He movingly reminds us that the subordinated classes — 18th-century rural people clinging to communal, “reasonable use” conceptions of property rights in the produce of the royal forest; the rural poor who invoked the elaborate texture of customary consumer protection regulation as a moral basis for violent collective action to enforce a “just price” in the sale of grain;³⁰ the artisans and working people of London at the turn of the 19th century demanding freedoms of association as well as the conditions of a decent life,³¹ the dominated and oppressed have often perceived their grievances in *legal* terms and articulated their needs and interests in terms of rights thought to be promised or owed by *law*. Frequently, they nourished the tree of liberty with their blood. “In fact, some of them had the impertinence, and the imperfect sense of historical perspective, to expect justice.”³² Thompson calls our attention to a hitherto historically anonymous English blacksmith named William “Vulcan” Gates, who was hanged under the Black Act of 1723 for deer stealing in a time of intense political disturbances. Gates was condemned under a provision of the statute permitting the Privy Council to “proclaim” an accused who if, after public notice of the proclamation did not surrender for trial within 40 days, was deemed convicted of a felony. On the day of his execution, Gates refused to cooperate with the ritual, in effect advancing the claim that since he was illiterate, he lacked the capacity to read the notice of his proclamation and accordingly his conviction was unjust.³³ To be sure, his execution would have been no less a crime of class justice even had there not been that defect in the proceedings against him. It is the task of critical legal thought, on all occasions, to unmask the role of law in buttressing class domination, to unmask its pretensions to fairness whenever, as if often or even usually the case, law serves to perpetuate injustice and, above all, to combat the illusion that legal solutions alone can be found to the social and political problems of class society. But in fashioning our vision of a free society, which for Marx is “the actual appropriation of the human essence through and for man. . . the complete and conscious restoration of

29. E.P. Thompson, “The Rule of Law,” in *Whigs and Hunters, op.cit.*, note 3, pp. 258-269.

30. E.P. Thompson, “The Moral Economy of the English Crowd,” *Past and Present*, No. 50 (February 1971).

31. E.P. Thompson, *The Making of the English Working Class* (New York, 1963).

32. Thompson, *Whigs and Hunters, op.cit.*, p. 268.

33. *Ibid.*, pp. 162, 173-75, 268.

man to himself *within the total wealth of previous development*," and of which the "entire movement of history is . . . both its actual genesis . . . and also for its thinking awareness the conceived and conscious movement of its becoming,"³⁴ must we not take seriously, indeed prize, the historical process and humane cultural achievement which created in this illiterate blacksmith the capacity, in some small measure, to vindicate his own dignity by advancing this extraordinary claim to fair treatment? Must we not recognize that legal culture can and has provided a context and a moral basis for resistance to injustice? "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class' hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being just*."³⁵

But I stop short of an uncritical endorsement of Thompson's views and in so doing point to a second political consequence. He writes that "the rule of law itself [is] an *unqualified* human good."³⁶ Yet once we discard the purely instrumental view of law as sham, the *form* of law is no longer a mere detail but a profound channeling mechanism in part through which legal practice in class society takes on its character as alienation.³⁷ While acknowledging the difference between arbitrary and unbounded state power, on the one hand, and the checks and inhibitions on domination imposed by the rule of law on the other, we need not be blind to the retrogressive character of the institutional and cultural practice embodied in the "rule of law ideal," i.e., liberal legalism. We must not confuse the concept of law with the historically specific forms that law assumed with the rise of capitalism. On the contrary, the focus on the regressive character of the form of law in capitalist society becomes an urgent priority.

Third, equally as urgent is the refusal to postpone the discussion of what forms of law-making and legal practice will characterize the free society of the future. The critical theory of law not only opens entry to, but demands inquiry into what forms of non-legalist dispute resolution, community-based, but providing institutional protection of individual autonomy and self-definition, will accompany the transition to post-capitalist society. Will mediation and arbitration take primacy over adjudication? Can community-based, "informal" justice replace separate legal institutions and the domination of the legal process by experts? What will be the role of experts, if any, in a free legal process? Is rule-formalism desirable or necessary to a free society? Need legal rules be formulated as abstract, supra-historical norms? How does one fashion institutional guarantees for the protection of individual and collective opposition midst the transition to a form of social life in which the communal human essence and need are to be liberated and made governing principles? Is a conflict between autonomy and community inevitable in all forms of social organization, or can autonomy and community become bases of the meaning of each other? Most broadly, how does the character of the revolutionary process determine the nature of the political outcome? The very enterprise of critical legal thought poses to Marxist

34. Karl Marx, "Economic and Philosophical Manuscripts (1844)," In Lloyd Easton and Kurt Guddat, eds., *Writings of the Young Marx on Philosophy and Society* (Garden City, N.J., 1967), p. 304. Emphasis altered.

35. Thompson, *Whigs and Hunters*, *op. cit.*, p. 263.

36. *Ibid.*, p. 266. Emphasis added.

37. On this point, see particularly the work of Peter Gabel cited in note 3.

political theory a spectrum of such questions about the institutional forms of socialist democracy, emphatically asserting that a conception of such institutions is *needed*. Socialist law cannot be the mere pouring of new content into the institutional forms of liberal legalism, nor, worse still, a mere change in the personnel of the state. The determinist tradition within Marxism, which equates law with instrumental domination, can lead to the projections of law into socialism in only one of two modes: (a) either the complete absence of law, a dangerous fantasy which denies the role of objectification as the ontological foundation of human freedom and can lead only to the arbitrary tyranny of Stalinism; or (b) as "socialist positivism," the conception of law as an instrument for the creation of what must, by its own definition, be "enlightened domination" through manipulating people toward "good" ends. A view which treats legal practice as inherently coercive and instrumental, as an alienated "otherness," cannot ground a theory of the institutional forms of an emancipated society.

Finally, the constitutive theory of law has implications for the model of work we, as lawyers and legal workers, adopt in our own practice (here the word is used in its narrower connotation). The purely instrumental pursuit of client interest cannot serve as an adequate model of political lawyering. We must begin to see our work, our relationships to our clients, our self-definition in counseling and in the courtroom, as itself part of the process of articulating and foreshadowing the legal forms of the future. The fact that we must live and work within alien institutions we do not control, which do not permit us collectively to guide our own destiny, ought not prevent us from conceiving of our own participation in the legal process to the extent possible as an experiment in the possibility of our freedom. This cannot but make us better, more sensitive and more political lawyers, and help us to avoid the long-term occupational hazards of "radical lawyering": the slide into reformism or cynicism.

I plead guilty to the charge of raising issues today while providing little guidance toward their resolution, but I am deeply committed to the necessity of the inquiry. As Lukács once wrote: we "must be able to comprehend the present as becoming. . . . Only he who is willing and whose mission it is to create the future can see the present in its concrete truth."³⁸

38. Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone (London, 1971), p. 204.