RECENT MARXISANT BOOKS ON LAW: A REVIEW ESSAY*

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Just a decade ago, William Chambliss and Robert Seidman commented that the sociology of law was taking a new direction:

The sociology of law is undergoing a radical shift at the present time. Gradually, empirical studies of “the law in action” are replacing some of the ubiquitous dialogue over the “functions of law” and the place of “natural law principles” [1].

As Chambliss and Seidman had noted, a certain genre of research on law was in vogue in the 1960s and early 1970s. Participant observer studies were done of face-to-face interaction between police officers and civilians, plea bargaining and sentencing in the courts, the processing of cases by the juvenile justice system, and so on. Many of these studies highlighted the wide gap between the way the administration of law was supposed to work according to the law or an idealized standard of justice, and the way the law actually did work.

Although the field studies of the 1960s may have been radically different from the work done on law in earlier years, this was the only sense in which they were radical. For the most part, the organizing concepts were organizational socialization, displacement of the goal of full and effective law enforcement under organizational pressures and constraints, and discrimination against the poor and racial minorities. The mentality evidenced was usually that of disillusioned liberalism. Sociologists discovered that law enforcement is not always blind, even-handed or effective, but by and large they did not tie these failings to the dominant economic and political arrangements. How little the new and “radical” sociology of law was concerned with macrosociological questions is indicated by the absence

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in Chambliss and Seidman's very extensive bibliography on the sociology of law of any reference to Durkheim, Marx or Weber (not to speak of later scholars whose analyses of law had been influenced by Marx, such as Karl Renner or Georg Rusche and Otto Kirchheimer) [2].

The works under review, all of them published in the English language for the first time with the past two years, show how far the sociology of law has come in a single decade. With one partial exception (Edelman), none reports empirical research. All deal with theoretical and at times rather abstract questions about law in relationship to the society in which it is found. Each of them is grounded in Marxist theory, and in this sense, they — unlike the studies whose appearance Chambliss and Seidman noted a decade ago — can be characterized as radical in the conventional sense of the word.

The recent publication of half a dozen books having to do with Marxist thought regarding law is a product of the rapid growth of interest in Marxism within the social sciences in the past few years. Much of this interest has come from criminologists attempting to build on the radical, critical or "new" criminology of the early 1970s by developing a more rigorously Marxist approach. But the new interest is by no means confined to criminal law. The centrality of property and contract to Marxist theory is beginning to broaden the range of legal phenomena investigated by sociologists concerned with law [3].

Despite the revival of interest in Marxist thought, it has not been easy to find out just what Marx and Engels wrote about law. A few passages from their writings are quoted very widely, but other passages have remained virtually unknown. Some have not been available at all in English. Maureen Cain and Alan Hunt have done scholars a great service by collecting and reprinting Marx and Engels' writings on law and the state. The excerpts are conveniently classified according to a scheme derived from the writings of Louis Althusser, whose influence on British sociology has been particularly strong. References to writings of Marx and Engels not reprinted but dealing with law and related matters are provided, though without bibliographical notes telling the reader what these sources contain.

The editors' introductions to each section of the collection are quite helpful. Though brief, they provide an overview of the issues posed by the selections, background material needed to place them in context, and point to some of the unresolved theoretical problems in the texts. Readers accustomed to dogmatic expositions of Marx will find this material refreshing in its refusal to gloss over inconsistencies and theoretical difficulties.

The editors are surely correct when they point out that no coherent theory of law could be reconstructed by pasting together Marx and Engels' largely fragmentary comments. The provocative insights they contain are at
least as important for the questions they raise and the general analytical approaches they suggest as for the answers they give. Apart from suggesting new lines of investigation, this collection is valuable for documenting the oversimplification and distortion found in the summaries of Marx and Engels’ views on law presented by many Marxists and non-Marxists.

During the twenties and thirties, central European scholars drew on Marxist theory to develop more extensive and systematic treatments of law than can be found in Marx and Engels' own writings. Major portions of the writings of some of these scholars — notably Karl Renner, Georg Rusche, Otto Kirchheimer and Franz Neumann — have long been available in the English language. By contrast, much of the Russian work done in the same period has been unavailable to anglophone readers, or known only through short fragments and second-hand summaries [4]. Evgeny Pashukanis was one of the leading sociologically oriented Russian scholars concerned with law in this period. The present translations make Pashukanis' writings much more widely available than they have been.

Though Pashukanis' work is by no means free from problems, it is both truer to Marx and more sophisticated theoretically than most of the Marxist-derived work on law done until the past few years [5]. He was one of the first Marxist theorists to develop an explicit critique of the instrumentalist conception of law. As he notes in his most important work, Law and Marxism: A General Theory [6], previous Marxists who wrote about law stressed coercion as its central aspect. They described law as a weapon directly controlled by the ruling class and used to bludgeon subordinate classes into submission [7].

This instrumentalist position has now been widely criticized. It fails to distinguish legal from extralegal coercion and thus does not identify what is unique about law. Nor does it explain why the ruling class chooses to use law when it rules. At the same time, instrumentalism exaggerates the extent of direct ruling class control over the law. In so doing, it neglects the partial autonomy of the state and law from the ruling class in capitalist societies. The rudiments of this critique are already present in Pashukanis' book written more than fifty years ago. Had this work been known earlier, a good deal of the crudity and oversimplification in some of the radical criminology literature on law might have been avoided.

Pashukanis continues his critique of earlier Marxist writings on law by observing that another major theme has been the exposure of bourgeois freedom and equality as a sham whose only significance is to deceive the masses. Not at all, replies Pashukanis. Far from being a sham, freedom and equality are the principles by which a bourgeois society operates. This insight Pashukanis develops into what has come to be known as the "commodity exchange theory of law" [8].
According to Pashukanis, law is distinct from other forms of social regulation in that it deals with formally equal individuals who are stripped of their concrete peculiarities and decontextualized from their social relations. These abstract individuals are constituted as “subjects”, possessed of wills and capable of arriving at agreements with other subjects. And they are treated as “bearers of every imaginable legal claim” (1978:118).

To be sure, the degree to which the legal systems of particular societies embody these features varies. As a result, the positive law may be more or less legal [9]. Rather than investigate this variability systematically, Pashukanis argues that law is best understood by examining it where it is most highly developed, in capitalist societies. Here its special features will be most pronounced.

The commodity exchange theory of law asserts that abstract, formal, possessive individualism in law originates in commodity exchange. As economic transactions increasingly assume the character of the exchange of commodities, the qualitative distinctiveness of different goods is obliterated by their exchange value, which provides a common denominator that equalizes their differences. As labor becomes a commodity, it too is equalized; qualitatively different forms of human labor are reduced to abstract labor time. Categories like race, sex and national origin become irrelevant.

Commodity exchange requires that individuals be formally free to acquire and alienate property. The conflict of private interests in such transactions is the precondition for the legal regulation of private disputes. Where commodity exchange is absent, then the legal regulation of contracts involving purchase and sale obviously does not arise. The legal capacity to perform exchange transactions of a variety of kinds, and to call upon the state to uphold these transactions, Pashukanis asserts, is the source of the notion that individuals (as distinct from families, clans or associations) are the sole bearers of rights. Since a given individual sometimes buys and sometimes sells, sometimes lends and sometimes borrows, the idea of treating all parties to an agreement as equals quickly develops.

One of the obvious objections to any theory that asserts a unique correspondence between law and mode of production is that a number of the attributes of what we might loosely call “capitalist law” are already present, if only in embryonic form, in the law of precapitalist societies. Pashukanis’ formulation avoids this difficulty, for as he notes, commodity exchange is by no means entirely absent in precapitalist societies. With the establishment of the capitalist mode of production, however, it comes to play a much larger role in structuring social relations, gradually breaking down organic relationships and status distinctions of the precapitalist world.

The effect of these developments can be traced in law. For example, distinctions of rank were explicit in the law of feudal Europe and survived
into the period of mercantile capitalism, but virtually disappeared by the nineteenth century, when formal equality was formally enshrined in continental legal systems. The distinction between public and private law, which rests on an institutional separation of government from property and a restriction on governmental powers to interfere with private agreements, was almost unknown in the Middle Ages. Though the legal consequences of commodity exchange can be seen most fully in property law and commercial law, they are visible in criminal law as well. Pashukanis suggests that the retributive principle of equivalence between crime and penalty is based on the principles of commerce, but adds that it is only when capitalism reduces concrete labor to abstract labor power measured by time does imprisonment for a fixed term become the primary sanction.

Seen in this way, law is not to be identified with the commands of a sovereign (the view of Austin); nor is it merely a set of norms, as Kelsen has it. Rather, law is an ordering of social relations according to definite principles. That this ordering may be coercive is true but not distinctive. Law does not exist in the realm of ideas alone, as is implied by those who regard its principles as deceptively false. Nevertheless, Pashukanis views law as ideological.

There are several reasons for this judgment. First, the origins of legal relations in commodity exchange are obscured by legal doctrine, which gives them an a priori or deductive rationale. In other words, doctrine treats historically contingent relations as if they were self-evident and eternal principles. Second, contractual equality obscures the exploitation inherent in wage labor. This exploitation and its mystification take place not because the principles of bourgeois justice are described inaccurately in law; as is shown in Capital, it is through the routine operation of these principles that surplus labor is extracted in a capitalist social formation, and that its source is systematically obscured. Thus Pashukanis’ treatment of law parallels Marx’s treatment of commodity fetishism. Law represents the mystified form that social relations take under conditions of commodity fetishism. Thus legal relations are real even if also ideological.

The centrality of the formal properties of law in Pashukanis’ analysis inevitably brings Weber’s treatment of law to mind [10], but there are some important differences. For example, Weber examines rationality in legal discourse as one of its formal characteristics, but Pashukanis does not. Furthermore, Weber pays more attention to cultural and institutional influences on the historical development of law than Pashukanis does.

After noting that “the logic of juridical concepts corresponds to the logic of the social relations of a commodity-producing society” (1978:96), Pashukanis simply asserts that legal relations are “directly generated by the existing social relations of production”. This is not really adequate.
The processes by which economic relations influence the law need to be specified. Pashukanis concedes as much when he comments that the actual evolution of property law was “more complex” (1978:113) than in his simple scheme, though his own theory, he argues, demonstrates the significance of the trend. What the complexities were, and what might account for them, Pashukanis does not say. By contrast, Weber, while conceding the great impact that merchants had on the development of commercial law, also considered such influences on law as the bureaucratic administrations of the European monarchs, the organization of the legal profession, and the separation of church and state.

By making commodity exchange the critical explanatory variable, Pashukanis implicitly accords greater significance to the way commodities are distributed than to the way they are produced. In a critique written in 1930 and reprinted in translation in the Ink Links edition, Karl Korsch scores Pashukanis for this emphasis. Korsch’s criticism is somewhat overstated, since Pashukanis does attribute to capitalism the tendency for commodity exchange to govern more and more spheres of life. Korsch himself presents no evidence that Pashukanis was wrong [11] and his criticism seems oddly rigid for someone who accuses Pashukanis of being “scholastic” (1978:194). It is hard to see why modes of distribution should not have an impact on law.

Despite Pashukanis’ failure to articulate the causal processes that bring law into correspondence with economic relations, it seems likely that he was correct in maintaining that the spread of commodity exchange had a tendency to individualize and universalize European law. Yet it was probably not the only process to do so: Robert Nisbet has argued persuasively that military developments in first-century Rome also had an individualizing effect by weakening patriarchal family relations [12]. Once this possibility is raised, of course, the question of the relative importance of these different processes is inevitable. To date, no Marxist analysis of law has addressed it.

Another problem is posed for Pashukanis’ theory by evidence that under some circumstances, the spread of commodity exchange relations had an effect that was just the opposite of what Pashukanis suggests. For example, just after the American War of Independence, women had political rights throughout the states. These rights were taken away in the Jacksonian period, and women were excluded from occupations they had previously practiced. Sexual distinctions were thus being intensified in law and in society just at the time commodity exchange relations were being extended. This development can be understood in terms of the way the relationships between the sexes were being transformed by the development of the economy [13], but Pashukanis has no way of talking about this. Like
most Marxists of his generation, he had a blind spot when it came to the family and the status of women.

The prominence of racial distinctions in the law of capitalist countries is equally puzzling for Pashukanis. South Africa's apartheid legislation has not been materially weakened by the growth of its capitalist economy. The participation of the antebellum American South in the international cotton trade strengthened rather than weakened the slave system (including its legal dimensions). If in the last twenty-five years racism has become a less pronounced or explicit feature of American law, this seems less due to the spread of commodity exchange relations than to the civil rights/black power movement. In Germany, Nazi law reintroduced racial distinctions that had been dropped long before. And wherever the European powers established colonies, they set up legal systems that made explicit distinctions between Europeans and "natives", in part to protect the favored position of the colonial power and of white settler minorities in commodity exchange [14]. Pashukanis does not deal at all with colonial law (he was writing too early to be aware of the special problems of the post-colonial Third World).

These examples make clear that the connection Pashukanis postulates between law and commodity exchange requires qualification. Even if Pashukanis is correct in holding that commodity exchange tends in the long run to give rise to a law dealing with abstract individuals who are treated as formally equal, in the short- and medium-run, commodity exchange seems at times to have strengthened the particularism of law. Without a theory specifying the processes by which economic relations affect law, there is no way to understand when and under what conditions law develops in one direction or another.

Although Pashukanis denies that his theory leads to fatalism or precludes intervention, it follows directly from his argument that the impact of struggle on law could not be large. If, as he asserts, the form of law is determined by the existing economic relations, then it cannot be changed except by transforming them. Yet the shifts toward universalism in American law associated with the civil rights and feminist movements do not seem to have been brought about by fundamental changes in economic relations, but rather by collective struggles. In his attempt to rescue Marxism from instrumentalism, Pashukanis has evidently gone too far — he has eliminated conflict from his theory altogether [15].

By failing to examine the historical struggles of subordinate groups to achieve legal equality, Pashukanis fails to grasp the positive movement in the achievement of formal equality. When Marx wrote of religious emancipation in his essay On the Jewish Question, he criticized it for not going far enough: to free politics from religion was not to free it from pri-
vatizing and alienated commercial relations. He also insisted that as far as it went, religious emancipation was a positive accomplishment. In fact, formal equality would seem to be a necessary stage in the unification of the working class. Pashukanis is much more one-sided than Marx in his treatment of formal equality.

The quietism implicit in the commodity exchange theory of law is reinforced by Pashukanis' views about the effects of legal change: he insists that changed social relations give rise almost automatically to new law, but that law cannot bring new social relations into existence (1978:88). One may infer that a social movement would be wasting its time in trying to change the law. Even if it could succeed, the impact on the well-being of social members would be negligible. Korsch contrasts his position unfavourably with that of Engels, who emphasized the importance of demands concerning law to a socialist program.

Pashukanis' position that law cannot affect social relations (in particular, economic relations) is stated, but not derived from any argument about the nature of law or of social relations. Few Marxists are likely to deny that there are limits to the impact of law, but it is doubtful that they are as narrow as Pashukanis implies [16]. His position is a rather extreme version of the base-superstructure metaphor, in that it seems to deny that the superstructure (law) can have much effect on the base (economic relations) [17].

To sum up, in abandoning the position that law is simply an instrument of naked coercion in the hands of the ruling class, Pashukanis has adopted a position that has difficulties of its own. By postulating a tight correspondence between legal form and commodity exchange, Pashukanis excludes a priori the possibility that law and economy can come into contradiction with one another. It never occurs to him, for example, that legal regulation could hamper the expansion of the economy, as many laissez faire advocates argue is happening today. The possibility that disadvantaged groups could take the law's promises of equality seriously and be impelled into insurgency when they experience discrimination in civil society — a possibility that has great relevance for the civil rights movement in the U.S. [18] — is not considered. These are arbitrary and unauthorized exclusions. They indicate that Pashukanis lacks an adequate theory of the state and of the effectivity of law, and suggest more generally that he is not a dialectical thinker.

In the aftermath of foreign invasion and civil war, the young Soviet government faced difficult problems of socialist reconstruction. The jurists of Pashukanis' generation were particularly concerned with these problems as they related to the legal system. That the Czarist system was to be discarded went without saying for most of them. But along what lines should
a new system be established? The classical Marxist texts on law did not provide a clear answer. Engels had prophesied that the state would eventually wither away under socialism, but what of the short-run? A state seemed to be needed to organize the transition to socialism. What legal principles (if any) should it adopt?

Soviet jurists held a wide range of views on these questions. Typically these views were linked with particular conceptions of the nature of law itself. For instance, Pyotr Stuchka characterized law as a definite order of social relationships in production and exchange. This order is, he argued, a "system of organized protection of the class interests" [19]. Although Stuchka regarded law as a universal social institution or form (since there is always a definite order of production and distribution), he argued that its content and functions change with class relations. Because proletarian revolution involves a struggle over the distribution of the means of production, and since law is the way that this distribution is secured, it follows that part of the class struggle is conducted around the law, because of the law, and in the name of one's own class. This line of argument favors the elaboration of Soviet law on behalf of working class interests.

Another theorist, D. Magerovskii, took the normative character of law to be critical. The legal totality "stipulates conditions under which all members of society ought to behave in a specific way, that is, it teaches how the society in which they live should be organized" [20]. From this perspective, law is a valuable heuristic instrument for the implementation of Communist Party social policy.

Throughout the twenties, a vigorous debate about these matters filled the pages of Soviet law journals [21]. Pashukanis' book was a direct intervention into this debate. Pashukanis reasoned as follows: the essence of law is its correspondence with commodity exchange. A socialist society seeks to replace commodity exchange with production for use. Once this task has been accomplished, law will disappear, since the social relations to which it corresponds will not exist. Due to the underdevelopment of the forces of production, though, commodity exchange cannot be abandoned just yet. Hence law cannot be abolished either. It will retain bourgeois characteristics during the transition to socialism, even though it will have new substantive content. Marx had taken the same position about the character of law during the transition in the Critique of the Gotha Programme. A corollary is that there can be no such thing as proletarian law; law itself is ineradicably bourgeois. Pashukanis did not elaborate the implications of this position for Soviet policy in any detail, but the implication seemed to be clear: the transition was not to be brought about by developing a new legal system. The old system was to be retained, being cut back as the economy outgrew the need for a legal system.
To the claim of Marxists that law will eventually disappear, the objection is commonly raised that socially intolerable behavior will persist even in a socialist society, and law will be required to deal with it. Pashukanis readily concedes that "offenses against the person" (assaultive behavior) will never entirely vanish from a socialist society. This does not mean, he points out, that laws and courts will be required to deal with them:

Even progressive bourgeois criminology has become convinced that the prevention of crime may properly be viewed as a medical-educational problem. To solve this problem, jurists, with their "evidence", their codes, their concepts of "guilt", and of "full or diminished responsibility", or their fine distinctions between complicity, aiding and abetting, instigation and so on, are entirely superfluous. And the only reason this theoretical conviction has not yet led to the abolition of penal codes and criminal courts is, of course, that the overthrow of the legal form is dependent, not only on transcending the framework of bourgeois society, but also on a radical emancipation from all its remnants (1978-84).

Pashukanis goes on to contrast legal regulation with technical regulation. The legal regulation of private disputes presumes a conflict of private interests, while technical regulation presupposes a unity of purpose (1978: 80-81). Taking this contrast together with Pashukanis' comments on the treatment of crime make clear how much of the positivist criminologist's political views he had accepted [22]. Pashukanis assumes that no conflict of interests is implied in a "medical-educational" response to crime even though this response may entail coercion or opprobrium. This assumption rests on the notion that the accused offender has no interest in avoiding a compulsory cure or in wrongly being thought the perpetrator of an offense. More generally, Pashukanis seems to imply that once socialism has been successfully attained, no objective conflicts of interest will remain in society: hence there will be no need for special measures to protect individual interests against infringement. If any disputes remain (whether they are handled as criminal or civil matters in capitalist legal systems), they will be resolved according to criteria of technical rationality, presumably by those who have special expertise in the relevant matters.

Experience with "therapeutic justice" in the West has led many to become skeptical of the notion that crime is best viewed as a medical or educational problem, and that no dangers inher in disregarding real or alleged criminals' rights to remain free from compulsory treatment or education [23]. At the time Pashukanis was writing, though, his technocratic vision was widely shared by Western, non-Marxist intellectuals. It is only within the last decade that the critique of therapeutic justice has gained much of an audience in the West.

Leaving questions of treatment for criminals aside, some have argued that the legal history of the socialist societies [24] demonstrates that there are dangers in dispensing with due process protections even after capitalism has
been abolished. Returning from recent travels in the People's Republic of China, Jack Levine reports that during the Cultural Revolution false political accusations leading to trials, jailings and executions were made in connection with personal vendettas, and to advance individuals' careers in the state bureaucracy. He concludes:

The one clear safeguard against misuse of political power has been absent — China has no structural forms and institutions we would lump under the rubric of procedural due process ... Time and again ... I heard accounts of excesses which would have been prevented by regularized legitimized procedural protections [25].

Pashukanis' own death following his arrest in the purge of 1937 has been used to argue for the same position [26].

Since Pashukanis advocated an end to the rule of law only when socialism was fully achieved, these criticisms are not quite on target. Prior to that, Pashukanis insisted that law was to be retained; indeed, he held that law would inevitably have to be retained because commodity exchange still persisted [27]. Once socialism has been reached, Pashukanis maintained, individuals will identify so strongly with the interests of their fellows that the lines separating individuals from one another will become blurred, and self-aggrandizement at the expense of others will be inconceivable (1978:132, 155). One's assessment of this position will rest in part on how plausible one finds the claim that self-seeking behavior and instrumental orientation toward others originates in commodity exchange alone. We are skeptical. At the very least, the social psychology of egoism requires a fuller treatment than it receives from Pashukanis.

*Pashukanis: Selected Writings on Marxism and Law* contains the text of Pashukanis' book (with footnotes that are merely polemical having been deleted), as well as a selection of his essays written between 1925 and 1937. The essays are primarily of interest for what they show about Pashukanis' response to criticism leveled at his book by fellow Russian legal theorists. Pashukanis began to modify his initial position starting in 1929, and by 1932 he had repudiated much of the commodity exchange theory, rejecting what he now held was its artificial separation of form and content, and its denial that the legal superstructure can substantially affect economic relationships. He confessed to having treated the transition from feudalism to capitalism inadequately, though without detailing just what the inadequacies were [28].

In a chapter prepared in 1932 for a collectively authored book, Pashukanis asserted that the legal form is determined not by distribution, but by the mode of extracting surplus. In a capitalist society, he went on to say, law does more than facilitate commodity exchange, and is not reducible to economic relationships. Law, he said, had to be defined more broadly.
than in his earlier work; it is, he suggested, "the form of regulation and consolidation of productive relationships and other social relationships of class society". Although law depends on the coercive apparatus of the state and reflects the interests of the ruling class, the state itself cannot be said to create law, for the state itself is only a reflection of the economic needs of the dominant class in production (1980:287-8). In these later writings, the essence of law does not reside in the legal form, but in the identity of the class that holds state power. This would imply that formal law in a socialist society is qualitatively different from law with similar formal attributes in a capitalist society.

Some of these positions are clearly improvements over Pashukanis' original formulation. Obviously law affects the economy at the same time it is influenced by it. The greater attention paid to the mode of production has heuristic value in studying the transition from feudalism to capitalism. The broader definition of law opens the way to a more concrete discussion of the role of law in the transition to socialism.

On the other hand, Pashukanis' capitulation to instrumentalism is a theoretical retreat, and his conception of the state and the functions of law is extremely crude. Whether these deficiencies stem from weakening theoretical powers or from political pressure is unclear, though the editors hold that in the final essay he is clearly bowing to political pressure.

John Hazard's Foreword and the Introduction by Piers Beirne and Robert Sharlet place Pashukanis' essays in the context of Soviet politics in the 1920s and 1930s. Were the book not so very expensive ($41.50), the introductory material alone would be worth the price of the book. Most readers will find this background material more useful than the essays themselves.

Under the influence of the commodity exchange perspective, administrative planning in connection with the first Five Year Plan was beginning to replace the formality and contractualism of the NEP Codes by the late 1920s, and the codes themselves were being simplified. The administration of law was becoming more informal, and responses to crime were increasingly governed more by policy considerations than by law. In 1929 Stalin warned against promoting hostility toward law, something that the commodity exchange theory might tend to do through its contention that law was by its nature bourgeois. At a time when the kulaks were intensifying the class struggle, Stalin argued, it was necessary to strengthen the dictatorship of the proletariat. The state was not to wither away gradually, but to be used in the "revolution from above" to hasten forced collectivization and industrialization before withering away. At the start of the Five Year Plan, Pashukanis' original position that the law could not affect the economy was clearly untenable, and he modified his position
accordingly. His essay on the legal regulation of the economy takes economic planning in England during the First World War, and socialist planning in the U.S.S.R., as illustrative examples, making clear the practical concerns that stimulated his theoretical retraction.

Pashukanis came under attack again in the mid-thirties; for example, in 1934 Andrei Vyshinsky criticized his "legal nihilism" and called for greater legal formality. Greater contractual discipline was being demanded in the economy, family law was being strengthened, and in 1936 a new draft constitution was published. The legal culture of the NEP was being revived and systematized, and the legal values of stability and formality were being elevated in the new law curriculum (1980:31–34). Pashukanis' theoretical retreat was in all likelihood an attempt to protect his position and his life at a time when his ideas had become politically useless, if not dangerous. The attempt was not successful: following attacks in Pravda by Yudin and Vyshinsky, Pashukanis was arrested and disappeared.

Earlier writers on Pashukanis have described him as an anti-Stalinist martyr, but the introductory materials of this volume make clear that this was far from the case. Quite early in his career, Pashukanis denounced those who raised questions about his work as enemies of socialism, and demanded total ideological conformity of those who worked at the Institute he directed. His essays helped prepare the way ideologically for the Stalinist Terror. In 1927 he wrote,

> we do not recognize any kind of absolute legal capacity or any inalienable and subjective private rights. For such inalienability is the inalienability of capitalist exploitation (1980:190, emphasis in the original).

In 1930 he stated, "revolutionary legality is a problem which is 99 percent political." Pashukanis was no innocent anti-Stalinist.

Ownership of the Image, by Bernard Edelman, a French Althusserian barrister and philosopher, is the translation of a set of essays on themes related to law; the work originally appeared in 1973 under the title La Droit Saisie par la Photographie (Law Seized by Photography). Paul Hirst's introduction provides readers with background concerning Althusser's treatment of ideology, and the relationship between Edelman's work and Pashukanis' writings. Since much of Edelman's prose is cryptic, the introduction is especially helpful.

Like Pashukanis, Edelman sees law as the product of commodity relations: the legal subject is a formal representation of the economic subject in a society dominated by commodity exchange. The differences of social status given explicit recognition in the law of precapitalist societies are dissolved by the capitalist mode of production. Unlike Pashukanis, Edelman does not claim that these features of capitalist law provide a comprehensive characterization of law.
Edelman, and Hirst in the introduction, are more explicit than Pashukanis about the effects or functions of law. First, it constitutes subjects with the attributes needed for capitalist production. The legal subject is always an individual person, with the rights and capacities of a bourgeois: acquisition is his very mode of existence. The ideological (imaginary) representation of these subjects and their social relations contributes to the perpetuation of these relations by disguising their origins and consequences. The legal capacities of the subject are asserted to reflect the prior existence of these attributes in the individual, when they are in fact created by the law itself. The act of constitution is disguised and made to appear as a mere recognition of an ahistorical human nature. Moreover, the representation of exploitative social relations as based on equal exchange within the realm of circulation is necessary for exploitation to continue. These arguments are derived from Marx's treatment of capitalist exploitation and Althusser's treatment of ideology; Edelman elaborates on these positions as they are relevant to law and applies them to specific legal problems.

Given the similarity of Edelman's analysis of commodity exchange to Pashukanis' work, it is legitimate to ask whether he shares Pashukanis' conclusions about law in socialist societies. Edelman himself does not say. Hirst comments in the introduction that imaginary representations of reality (ideology) will continue to be needed to legitimate the technical division of labor and the distributive inequalities required by this division. Why the true reasons for these necessities will not suffice to legitimate them is unclear. But even if Hirst is right, ideology is not law. What's more, the necessity of law or ideology does not itself produce either. To determine whether law will be present in any given social formation, we must investigate the existence of processes that will give rise to law in that social formation. Edelman restricts his own inquiry to capitalist social formations, and thus cannot address this issue with regard to socialism [29].

A major part of Edelman's book concerns the evolution of French law regarding the ownership of photographic images. In mid-nineteenth century, the French courts were asked to decide whether a photograph of a scene in the public domain (e.g. a street scene) could be copyrighted. The courts said it could not, on the grounds that photography was a mechanical act that did not involve creativity or invest the product with the personality of its creator. Edelman sees the decision as an ideological reflection of the dominating position of craft production in the economy. All production must be by a subject; if there is none, nothing has been produced. Implicitly, the reasoning derogates machine production.

Early in the twentieth century, commentators began to point out that the livelihood of millions of people who worked in the photography industry would be jeopardized if legal protection were not extended to pho-
photographs [30]. Edelman assures us (but cites no evidence) that the large amount of capital already committed to the industry was responsible for the reversal. What is of interest is the rationale for the decision: that since photography involves specialized techniques, the product bears the imprint of its author. Yet the application of this criticism by the courts, we are told, proved to be uncertain and confused as late as 1959.

The introduction of film photography posed a conceptual dilemma for the courts. Without copyright protection, the film industry would not have been possible. Edelman implies that the courts had no alternative to providing protection [31]. The question was how to provide it. Unlike still photography, film-making is a collective endeavor: it involves a producer, director, script writer, actors, musicians, etc. The legal system requires that rights take the form of ownership, and only an individual can own something. If ownership is to be awarded to the creator, to the person who is uniquely responsible for the product, which one of the many who collaborate on the film is to be recognized as the creator? The courts decided that it is the producer, because he bears the financial risk. All the other participants are assimilated to the category of proletarians who perform uncreative labor, and who are, therefore, interchangeable, replaceable. Capital itself is recognized as the creative “subject”.

Edelman comments about the decision and the reasoning used to justify it that the growth of the productive forces of the industry was leading to the socialization of creativity, the socialization of the subject. This development was undermining the bourgeoisie ideology of individual subjectivity and creativity. Torn between the need to accommodate the industry and the existing legal doctrine of authorship, the court did not hesitate to endorse the former.

Edelman goes on to analyze several other court cases involving the rights to images (and in an appendix, the conflict between the executive and judicial branches regarding the distinction between the social and political rights of Algerian workers in France), but the points being made are not always clear and at times the interpretations seem strained.

Obliquely, Edelman seems to be saying that as the film industry develops along capitalist lines, it poses questions for the courts which are embarrassing to the existing bourgeois legal doctrine. The courts must decide the disputes that are brought to them, and they do so in ways that are commensurate with the requirements of the industry. Yet they must legitimate their decisions, not in terms of the practical consequences of adopting one rule or another, but in terms of doctrine. However, the reasoning needed to legitimate decisions in this way necessarily becomes more and more strained. Thus, by bringing certain disputes into court, photography “seizes” or “catches” law “in the act” of ideological deception as it tries
to accommodate predetermined verdicts to a recalcitrant doctrine [32].

That judges employ tortured reasoning to arrive at conclusions they have decided to reach for reasons they would prefer not to state will hardly come as a surprise to anyone who routinely reads decisions. That Edelman finds this realization an embarrassment to law may have to do with differences between continental and Anglo-American legal systems; judicial decision-making has traditionally had less legitimacy in the former.

In light of Edelman's anti-capitalist political thrust, it seems relevant to observe that doctrinal inconsistencies are unlikely to be unique to capitalist legal systems. Do judges in socialist societies not sometimes have to strain to legitimate their decisions? Of course it may be true that the points at which inconsistencies appear are different in different legal systems. In fact, the location of those points where inconsistencies crop up may tell us much about the points of tension between law and social relations. Edelman's project, therefore, may be quite instructive as it relates to contradictions in French legal doctrine.

Edelman is not entirely consistent in the way he treats the ideological dimensions of law. In much of the book, law is assumed to represent the social relations present in the economy. The mystification of these relations in legal ideology is asserted to be critical to their reproduction. This position is a direct application to law of Althusser's treatment of ideological state apparatuses [33]. Althusser uses this term to denote institutions (such as the family and the school) that inculcate bourgeois ideology and thus function to reproduce a capitalist social system culturally. He calls them state apparatuses even though they are not necessarily part of the government, because they perform the function of the state: reproducing a class society. It is implicit in Althusser's analysis of I.S.A.'s (ideological state apparatuses) that no contradiction between ideology and the functional needs of the capitalist system can emerge [34].

Some of the objections that have been raised against Althusser's essay are relevant here. What are the institutional mechanisms that prevent ideological state formations from developing and disseminating ideas that are antagonistic to the perpetuation of capitalism? That Edelman and other critics of capitalism are capable of doing so makes us realize that capitalism has not found a way to eliminate all criticism. We must ask, then, why judges are incapable of writing decisions that are dysfunctional to capitalism. This question cannot be answered without a theory of the state, or at least of the judiciary. Edelman has none.

In holding that law is a major contributor to the ideological hegemony of the bourgeoisie, Edelman may be generalizing too readily from the way lawyers think. They may take legal doctrine seriously [35], but that does not mean that the rest of the population does. Although Edelman
focuses on the way the law recreates the subject and the capitalist mode of production ideologically (that is, cognitively), he presents no evidence whatsoever that laypersons pay much attention to the conceptual underpinnings of law, much less that they passively accept the premises of legal doctrine [36]. Popular discontent with court decisions in controversial cases in the United States shows how limited the power of legal institutions is in gaining acceptance for unpalatable ideologies. Edelman’s own rejection of legal ideology provides evidence that the law does not conquer all.

Edelman’s exaggeration of the attention paid by non-lawyers to legal decisions prevents him from seeing that in its coercive aspects, the law makes a contribution to the reproduction of capitalism that is quite different from the contributions made by nonlegal sources of ideology. It does this not only through the criminal law, where specific performance is commanded or forbidden (and in particular, where attempts to alter property relations and political arrangements may be criminalized), but perhaps even more importantly, by upholding or failing to uphold voluntaristic private agreements and actions. To understand the basis on which law does this, it is critical to understand legal doctrine. But it is not by socializing laypersons that this doctrine has its effect. Rather, it is through the threat (and sometimes the reality) of enforcement and nonenforcement [37].

The state’s ability to impose costs for noncompliance permits it to define who can appear as a subject in contractual relations, and what sorts of relations actors will enter into. Thus there is no law requiring people to marry. But in specifying through law what sorts of relationships the courts will recognize as marriages and uphold, it is capable of influencing private decisions about entering such relations. That some people enter into relationships or agreements even though they will not have the coercion of the state to back them up in case of a dispute demonstrates that there are limits to the state’s power, but the power clearly exists. In any event, to the extent that the law does reproduce capitalism, this analysis suggests that it does so in a very different way than the family or the school.

On the assumption that the law affects people primarily by shaping their belief systems, Edelman calls on “militant intellectuals” to expose “the poverty of the apologetics of the system” in their own academic disciplines (p. 112). Why not? His expectation, though, that “the critique of the ideological notions of the law carries within itself the death of bourgeois legal science” (p. 111) seems naively idealistic in its failure to recognize the material supports for bourgeois ideology. It is as if Edelman thinks that unmaking bourgeois ideology is sufficient to defeat the bourgeoisie practically. We thought Marx had shown the fallacy of this sort of idealism no little while ago.
Edelman outlines a rather different view of the effects of legal ideology in a brief chapter on ideological struggle. Quoting Engels, he argues that when the proletariat adopts the bourgeois notion of equality and demands that the law be taken “at its word”, the ultimate, latent aim of the demand (whatever its manifest content) is the abolition of classes (p. 110). This is so, he says, because the fulfillment of bourgeois ideals requires the abolition of bourgeois society. This is a more dialectical line of reasoning; it says that the law is more than an ideological state apparatus because, in holding out promises that cannot be fulfilled within existing social arrangements, the law tends to destabilize a social formation. It does not merely gain acceptance, but encourages protest and opposition. To take this view of law is implicitly to look beyond the mere negation of bourgeois categories such as equality toward their possible preservation at a higher level. It thus has somewhat different strategic implications than the earlier view. If law only mystifies people into accepting an alienated and exploited condition, then the legal theorist and propagandist strives only to expose the obfuscation. But if the law itself is implicated in the contradictions of a social formation and contains at least the germ of liberating social arrangements, a more complex stance toward law is required.

The book concludes with essays on aspects of the treatment of law in Kant and Hegel. According to Edelman, Kant was writing during the transition between feudalism and capitalism. In his writings on law, Kant attempts to reconcile the personal dependency of wife, children and servants on the master of a household (a pattern associated with the feudal mode of production) with the freedom and equality of rights needed by the new capitalist mode of production. Edelman is concerned with the duplicity entailed in the attempt. The structural contingency underlying the necessity of preserving personal dependency for wives and children, Edelman suggests, was their exclusion from the process of production. This discussion is based on the premise that family relationships are determined in the last instance by production, so that relationships between subjects are determined by the subjects’ relationships to property.

The notion that wives engaged in housework are not productive is one that has come in for much feminist criticism of late. Even if one accepts Edelman’s position, however, it is not at all clear what is a cause and what is an effect here. Why were women not part of the production process? Is it not likely that they were excluded because they were subject to the patriarchal domination of their husbands? More must be said about the position of women in Kant’s time before Edelman’s argument can be accepted.

Edelman’s essay on Hegel’s *Philosophy of Right* carries further the theme of Edelman’s discussion of Kant (to the effect that social relations are determined “in the last instance” by production) by analyzing the production
of the concept of the universal subject in connection with the evolution of property. As property and laborers were liberated from the constraints of feudalism, everything could be sold except the subject; hence slavery became the paradigm of alienation. It was then that all rights were conceived as deriving from the subject, and that all rights came to be rights over things. The thrust of Edelman's comments is to provide a material basis for Hegel's conception of the subject, while revealing the confusion in Hegel's treatment of the subject. Instead of realizing that the subject is produced by property, Hegel sees property as produced by the subject.

An adequate assessment of these essays will have to await a reviewer with greater competence in German philosophy. We found the exposition intriguing but also so condensed and eccentric in its use of language as to border on the unintelligible. The essays are really too brief to deal with their topics adequately. This is, in fact, true in much of the book. Edelman has little interest in marshalling evidence, or in relating the evidence he presents to his theoretical argument. Too often he is murky as to just what the argument is.

The bulk of Colin Sumner's *Reading Ideologies* is devoted to an elucidation of the concept of ideology and its use in empirical research to determine whether a given discourse is ideological. The great variety of definitions of ideology found in the literature makes for terminological confusion and stimulated this attempt at clarification. The final chapter applies the conceptual framework developed in the first part of the book to law.

Although any internally consistent definition may be logically acceptable as any other, some definitions are too narrow or embody too many hidden assumptions to be useful in theorizing or in empirical work. Definitions that require ideological statements to be false, to mask self-interest, or to be generated by a mode of production or system of economic relationships unnecessarily restrict the concept. To overcome these limitations, Sumner proposes to define ideology as "elements of consciousness generated within and integral to social practice, reflecting the structure of such practice and the appearances which social relations give to phenomena" (p. 6). This definition is derived from a careful reading of Marx, though it is not found in Marx's own writings. Since social practices are found not only in the economy, but also in the political and cultural spheres, the definition allows the researcher to entertain a wide range of sources for ideology. No assumption is made that ideology is generated only within ideological state apparatuses, that it represents ruling class interests, or that it is essential for the continued existence of the economic "base". It does not deny subjectivity to the proletariat. In all these respects it contrasts favorably with Althusser's treatment of ideology. Indeed, Sumner's analysis of the concept is the finest treatment of ideology we know.
Sumner devotes careful attention to the operationalization of the concept of ideology. How does one determine whether a given discourse is ideological? Sumner examines the methodology for answering this question given or implied by content analysis, structuralism, semiology, and neo-structuralist Marxism, and finds all of them wanting. His brilliant and incisive critiques can be read with profit by anyone interested in these perspectives, even if ideology is not at the center of their interest.

Over the past decade or so, criticism that exposes the weaknesses of existing social science methodologies but that fails to point the way to a more viable alternative, has become all too familiar. Fortunately Sumner is not content with a demolition job; he tackles the problems raised by his own critique head-on, and outlines an empirical procedure for investigating ideologies. The procedure is one that will be extremely difficult to carry out, but it will also permit a degree of rigor that has been lacking in earlier work on ideology.

With this lengthy but essential preparation, Sumner returns to law. He reviews the various positions that have been put forth as Marxist theories of law, and shows that a number of them — structuralist work on legal form, as well as instrumentalist accounts — have been reductionist and economistic. Although some of his criticism may be outdated by the publication of more recent translations (e.g. of Pashukanis), it largely seems valid. Sumner points out, for example, that other writers (Poulantzas, Althusser, Alan Hunt) may have exaggerated the impact of law on popular mentality. Social members have minds of their own, and may not always be deceived when law obscures objective social relations.

Sumner's own treatment of legal ideology is disappointingly superficial; though he is more careful and avoids the crudities of most earlier writers on law, his own chapter is only the sketchiest beginning of an analysis. He does, however, outline in some detail how his methodological strictures can be applied specifically to the analysis of ideology in case-law and statute.

Although Paul Hirst's On Law and Ideology is concerned with the same topics as Sumner is in Reading Ideologies, the single chapter on law is not concerned only with its ideological aspects. Since this review is concerned with analyses of law, and since Hirst's discussion of law does not draw substantially on his treatment of ideology, comment here will be restricted to the material on law.

Hirst begins by observing that two quite distinct functions of law have been posited in Marxist literature: the regulation of class conflict by a state which guarantees the continuation of class society, and the regulation of the relations of possession. Hirst's own discussion is restricted to this second function. As he points out, the distinctions between public
and private law, criminal law and civil law make it plausible that the analysis can be delimited in this way [38].

Hirst proceeds to review and criticize the Marxist understanding of the way law and economy are related. The Marxist analysts, he says, imagine a society of independent private producers who are brought into relationship with one another by exchanging their products. The legal subject is assumed to be identical to the economic subject, who is an individual person. The trouble with this, according to Hirst, is that in a modern capitalist economy, the leading economic units are not persons but corporations. To focus on individuals is to fail to come to grips with the specific legal conditions of the corporation’s existence.

That capitalist production is carried on in corporations instead of family businesses or partnerships has consequences for the way firms operate. The legal provisions that make the corporation possible were by no means required by the capitalist mode of production, nor were they clearly advantageous to producers (e.g. by concentrating the capital needed for producers to expand production so that they could take advantage of economies of scale), or at least so says Hirst. Financial and commercial interests were the key supporters of the acts in England (Hirst does not cite any of the American studies of the legislation that made corporations an important form of business organization). Although Marx was acutely aware of how wages and working conditions are influenced by the class struggle, Hirst finds him blind to the struggles among capitalists over the legal definition of property rights and the organization of capital.

For Hirst, the possibility of influencing business operations through legal regulation is of more than theoretical interest. Once one recognizes that law can influence the way corporations operate, the ground is prepared for legal struggle over the conditions under which corporations can operate. Surely this is true, but it is hardly a novel insight. Unions have been attempting to influence the legal regulation of the wage agreement and working conditions for a long time. They have been joined in recent years by environmentalists concerned with pollution law, and by community activists who have attempted to stop corporations from abandoning their plants. It is hard to imagine (as Hirst implies) that many contemporary Marxists believe that law is incapable of affecting the way business enterprises function. Why would capitalists pay so much attention to the law unless it affected them? Here Hirst is knocking down a straw argument.

Hirst goes on to discuss the treatment of these issues in the work of Pashukanis and Renner. For both, the socialized character of corporate production foreshadows socialist production. For Pashukanis, monopoly capitalism separates ownership and control, transforming capital into an impersonal force, and destroys the coincidence between economic subject
and legal property ownership (since management makes decisions about the property of the shareholders). The establishment of trusts and combines reduces the role of the market in economic transactions, replacing it with technically determined coordination between firms, preparing the way for socialism and the death of law (1978:129–32). Renner argues similarly; he maintains that within the corporation the law of value does not operate, and neither private property nor law exist. The separation of ownership and management transforms stockholders into parasites who do nothing but collect dividends, though speculation introduces an irrationality that ultimately becomes an obstacle to the development of the forces of production. Hirst rightly criticizes these analyses by pointing out that the corporation cannot be treated only as a transition form: it is a capitalist organization that must be understood in its own right [39].

Hirst’s observations about the treatment of the corporation in classical Marxist writings on law have a broader theoretical relevance. Both Pashukanis and Edelman, along with other contemporary writers who have fallen under the Althusserian spell, take individualism to be the essence of bourgeois ideology. They thus interpret any explicit recognition of group membership as a departure from bourgeois ideology. The absurdities to which this leads can be seen in the work of Bob Fine, who argues that Bentham’s Panoptican was bourgeois because it proposed to treat prisoners as abstract individuals by placing them in solitary cells, unable to communicate with one another, and governed by a uniform regimen. Following Pashukanis, he attributes this plan to commodity exchange relations [40]. Are we to infer that modern American prisons, which offer group counseling and permit prisoners to gather in the yard and converse, are not bourgeois? The whole question of what elements of ideology are bourgeois requires more careful investigation. We see no basis for excluding a priori such doctrines as corporatism, even though they clearly break with individualism. These doctrines, we note, have great relevance for legal developments during the New Deal in the U.S., and in fascist Italy and Nazi Germany, all of them capitalist in the organization of their economic systems.

Hirst extends his critique of the treatment of the corporation in Marxist literature by noting that Marxist theorists have paid just as little attention to the organization of the state as they have to the organization of business enterprises. For Pashukanis, the legal form is a direct reflection of commodity exchange; hence it needs to be studied in its own right. As a result, the legislative process itself, and the ways the law is enforced, are not opened up for investigation. It is implausible that these matters are legally inconsequential, and there is no obvious reason why they should not be considered as worthy of investigation as the form of law.

Taking these remarks together with his comments on the organization
of business enterprises, we may infer that Marxist theory suffers from the lack of a theory of organizations [41]. Hirst contends that the deficiency is built into the logic of Capital:

*Capital*'s conception of the way the economy secures its non-economic conditions of existence makes it virtually impossible to conceive of economic subjects which are not directly represented by human subjects. Corporate agencies are almost without exception regarded within Marxism as being reducible to the actions of functionaries who take the place of the personification "capitalist". For the structure of capitalist economy in *Capital* to operate, relations between economic enterprises must be reducible to relations between human subjects mediated through their experience (p. 105).

Hirst goes on to argue that the relationship between class position, subjective experience and action assumed in Marxist theory makes it extremely difficult for Marxism to take the existence of the corporation (and implicitly, other types of organization) into account. This argument, though, rests on Hirst's questionable reading of *Capital*, and is not persuasive. It is hard to see that fundamental problems are posed for Marxist theory by the existence of organizational structure effects.

Even if it is true that Pashukanis' and Renner's works deal only with the legal status or form of the human individual, Hirst has not laid an adequate conceptual basis to challenge them. In particular, Hirst has not shown which of their conclusions would be altered if explicit recognition were to be given to organizations. As far as we can see, Pashukanis' and Renner's analyses would work equally well, or suffer from the same difficulties, if applied to collective legal entities such as corporations, unions, etc. It is up to Hirst to demonstrate logically, or through the analysis of evidence regarding legal and historical materials, that their theories cannot be applied to collective socio-economic and legal entities, or that they can be applied to them, but lead to erroneous conclusions. This he does not do, and as a result, his critical endeavor flounders.

Carrying his critique of Marxist analyses of law further, Hirst links Pashukanis' reductionism (explaining law in terms of commodity exchange) to the Marxist concept of totality, which Hirst rejects. Though often used to refer to the principle that no phenomenon can be understood alone, but only in relation to the entire complex of phenomena [42], Hirst gives the term a narrow interpretation. For him, totality means that a social formation is intrinsically capable of securing the conditions of its existence. This principle should be repudiated; ignoring as it does the possibility of a contradiction that leads to the transformation of the social formation, it is a functionalist concept that has little place in a Marxist analysis.

On the basis of his rejection of the principle of totality as he interprets it, Hirst argues against Pashukanis that law has no single essence or content, no unity of form or function apart from that which it is given in
the legislative process and by the legal institutions responsible for enforcement. By way of illustration, Hirst points out (correctly) that not all rights take the form of possession, as Pashukanis indicates. Political rights, e.g. voting, freedom of speech and assembly, are not alienable the way property is. Even is private law, marriage does not deal with rights of possession (p. 156).

As a corrective to the oversimplification found in Pashukanis, these comments have their usefulness. They underscore the point that not all aspects of law can be explained by the direct, unmediated effect of the economy. They come indeed perilously close to asserting the absolute autonomy of law from economic arrangements, and to denying the possibility of any generalizations about the relationship between the character of law and other features of a social formation. In this they surely go too far.

Hirst's essay does point to serious weaknesses in the work of Pashukanis and Renner. On the other hand, his contention that these weaknesses are symptomatic of fundamental conceptual problems in Marxist theory is inadequately developed, and to us, not at all convincing [43].

Collectively, the six books discussed here signal that something new is afoot in the sociology of law. The reprinting and translation of older work and the publication of several new analytical studies make clear that a renaissance of interest in utilizing Marxist theory to understand law is underway.

While the present works contribute to that renaissance they also reveal how much remains to be done. If the critical problem for a Marxist theory is to understand the place of law in relation to the social formations in which it is embedded, then a number of questions must be addressed. One involves the distinctive form, content and practices of law in each social formation. What accounts for these differences? What are the sources of change, and of stability in law? In posing these questions in relation to the social formation rather than the mode of production or distribution, we explicitly allow for cultural and political influences on law. One of the most serious limitations of the commodity exchange perspective of Pashukanis and Edelman — and indeed, of most Marxist work on law — is that it excludes, or at least neglects such influences. We can also taken into account the absence of any one-to-one correspondence between state form and mode of production (there are, for example, many capitalist states, not one). These variations in state form can be expected to have major legal ramifications.

To date, most attempts at explaining law have been restricted to capitalist social formations. As the work of Pashukanis and Edelman illustrates, attention has been paid primarily to those capitalist formations whose eco-
nomics systems are competitive, based on minimally regulated contractual relations. Although Marxists have paid some attention to the changes in the character of the state associated with the transition to the oligopoly stage of capitalism, relatively little work apart from the early writings of Kirchheimer, Neumann, Sinzheimer and Korsch has been done on the specifically legal aspects of this development. The transition to an economy dominated by oligopolies has been accompanied by legal innovations (e.g., regulatory law, labor law, a shift away from unrestricted contractualism) that have given law formal attributes that are rather different from those discussed by Pashukanis and Edelman.

Still less work has been done on law in precapitalist social formations [44] or in existing socialist societies. Until these yawning gaps are filled, a systematic comparative treatment of law will not be possible.

To carry out the sort of program implied by these comments, a surer command of legal history than in displayed in the works reviewed here will clearly be required. It is a sorry reflection that works done under the auspices of a theoretical perspective that more than any other elevates the importance of history, should draw so little on the work of legal historians [45]. The handful of Marxist studies making careful use of historical materials (e.g., the works of Piers Beirne, Ronnie Ratner, E.P. Thompson, and Douglas Hay et al.) set a standard for other Marxist analysts of law to emulate [46].

A second set of questions concerns the impact that law has on belief systems (with legitimacy being an issue of particular interest) and behavior. The existing literature displays a range of views. Some instrumentalists have supposed that the values and norms embodied in the criminal law are radically different from those held by the majority of the population. For them, law affects behavior primarily by threatening violators with punishment. By contrast, Edelman (at times) seems to think that the law gains mass consent for bourgeois ideas quite effectively. Like his mentor Louis Althusser, he takes for granted that people (except Althusserians) passively acquire the cognitive representations of the social order disseminated by the ideology-producing institutions of society. Yet Edelman also suggests that law can provide the conceptual basis for working class rebellion. Pashukanis stands apart from all these positions by denying that law can have any significant effect on social relations.

The weaknesses of all these positions are sufficiently manifest as to require little elaboration. Clearly the relationships between law and popular consciousness are complex [47]. The acceptance of legal ideology, for example, is uneven, depending on the particular issue at stake. People do
take law into account in carrying out their affairs; when they do so, though, they do not merely follow law. They attempt to evade it; they bend it to their purposes, and assert their own interpretations of what law is and should be. Social historians have begun to chart these complexities [48], and field researchers have begun to study them in contemporary settings [49], but much remains to be done.

The possibility Edelman raises but does not explore — that people will take seriously the promises bourgeois society makes to them but does not fulfill — locates in the conflict between the promise of formal legal equality and rights, and substantive inequality a potentially major contradiction in contemporary capitalist (and perhaps socialist) societies. This conflict was of central importance to the civil rights and feminist movements, and can be anticipated to recur. One burden of a Marxist theory of law is to address the strategic questions posed by this possibility. How can a socialist movement best exploit the conflict? What are the potential gains of a movement based on this particular conflict? Given that socialist movements have generally sought to transcend the formal equality held out as an ideal in capitalist societies, what are the limitations of this approach?

Finally, Marxist analyses of law must open a discussion of a socialist public sphere, the possible form and substance of socialist law and justice, as well as the organization of a socialist state. Marx took these issues quite seriously in his writings on the Paris Commune, but those ancient texts are not remotely adequate for a society in which governmental administration has grown to enormous proportions. The recent “radical criminology” advocacy of community controlled popular justice institutions does not begin to deal with these issues in their complexity. Yet the historical legacy of Stalinism makes them central in the minds of many. On these issues we are still at square one.

Notes

2 These omissions have been noted by Pierr Belne (1976) Fair Rent and Legal Fiction: Housing Rent Legislation in a Capitalist Society, London: Macmillan, p. 5.
3 The sociology of law studies done in the 1960s gave far less attention to legal cases dealing with such matters as divorce and child custody, auto injuries, breach of contract, landlord-tenant relations, labor-management disputes, business regulations and other civil cases than they did to criminal cases. This, Richard Quinney (1973), Critique of Legal Order, Boston: Little Brown is devoted entirely to criminal law enforcement, even though criminal law is a very small portion of most lawyers’ practice, and though the courts deal with a vast volume of cases that are not criminal.
4 This is not to imply that no major German works from the twenties and thirties remain untranslated. For example, the writings of Karl Korsch, Hugo Sinzheimer and Franz Neumann on labor
law have never appeared in English. A wide selection of Russian writings on law can be found in Michael Jaworskyj (1967), Soviet Political Thought: An Anthology, Baltimore: Johns Hopkins Press.

5 Thus the widely discussed essay of Isaac D. Balbus (1977), "Commodity form and legal form: an essay on the 'relative autonomy' of the law", Law and Society Review 11: 571–588 scarcely advances beyond Pashukanis’ analysis, or for that matter, beyond the position staked out by Karl Marx in his essay on the Jewish question.

6 The work was first published in Russian in 1924. The Ink Links edition is translated from the German edition of 1929; the Academic Press edition is translated directly from the first Russian edition.

7 At times Pashukanis did lapse into instrumentalism. Thus, in discussing criminal law, he commented that “criminal justice in the bourgeois state is organized class terror” (1978:173). This little outburst, however, is extraneous to his theory.

8 Another Russian jurist, Pyotr Struchka, had developed an earlier version of this theory, limited to civil law; Pashukanis extended the idea to all of law.


10 Since Pashukanis studied in Germany from 1910 to 1914 (receiving a doctorate in law from the University of Munich), his interest in the formal aspects of law could conceivably represent Weber’s direct influence, but the extent of Pashukanis’ familiarity with Weber’s work is uncertain. He was generally familiar with German jurisprudence, and cites it frequently.

11 There is evidence that the establishment of capitalism as a mode of production did transform the substance of law. Jeremy Palmer (1976) shows that the classification of crimes as *mala prohibita* or *mala in se* was radically transformed during the English industrial revolution in "Evils merely prohibited", British Journal of Law and Society 3:1–16, and Ken Foster (1979) shows that the contract of employment in England lost many of the features of the law governing master-servant relationships between 1750 and 1850, in "From status to contract: legal form and work relations, 1750–1850", Warwick Law Working Papers 3(1), May. But these developments are easily accommodated by Pashukanis’ theory, since they reflect the transformation of labor power into a commodity.


15 It is by no means incompatible with the commodity exchange theory to assert that group conflict is an important source of change in legal form. We know from the history of the past two centuries that subordinate classes (as well as nationalities, sexes, etc.) have struggled for formal legal equality. But why do they demand formal equality for abstract individuals rather than for groups (such as might be found in a corporativist society)? One possible answer would be the importance of commodity exchange relations, but this is a line of inquiry that Pashukanis himself does not pursue.

16 Writing as he was during the period of the NEP (New Economic Policy), when the Soviet Government was forced by economic difficulties to permit the reintroduction of capitalist enterprises, Pashukanis may have been impressed with the limitations on the ability of a government to restructure economic relations when the forces of production were not sufficiently well-developed to permit the restructuring. This is, of course, only speculation.

the transactions between agents of production . . . arise as natural consequences out of the production relationships. The juristic forms in which these economic transactions appear as willful acts of the parties concerned, as expressions of their common will and as contracts that may be enforced by law against some individual party, cannot, being mere forms, determine this content. They merely express it.


18 Our point can be illustrated by a vignette from the sit-in movement. During a sit-in at a lunch counter in Greensboro, N.C. in 1960, civil rights leader Ruby Hurley referred to the U.S. Constitution, exclaiming, “What we’re saying, Mr. White Folks, is this: You wrote it, and all we want you to do is live by it!”


20 D. Magerovskii (1967), “‘Dialectical realism’ as a method of cognition of social phenomena”, in Michael Jaworskyj, op. cit., p. 83. The original was published under the title “Sotsialnoe Bytie i Nauka Prava” (“Social existence and the science of law”) in 1922.

21 The debate ended in 1931, when the Communist Party demanded ideological conformity from legal theorists. The principal speaker of the All-Union Congress of Legal Theorists at which this policy was announced, was Pashukanis. The Congress is discussed in Michael Jaworskyj op. cit., pp. 277–85, who also reprints portions of the transcript of the discussion.

22 In view of the consensus among contemporary radical criminologists that positivist criminology was and is ideologically reactionary and fundamentally incompatible with Marxist theory, the sympathy many Bolsheviks gave it is an intriguing problem in the sociology of knowledge. This sympathy was expressed prior to the Russian Revolution, and continued throughout the 1920s in the Soviet Union. Soviet criminology in that period was similar in character to criminology done in Europe and the U.S. at the same time. According to Louise Shelley (private communication), these criminologists were generally Social Democrats. The deep similarities between the political views of the late nineteenth and early twentieth century positivist criminologists, the Leninist theory of the vanguard party, and the Social Democratic conception of the mass party and its professional leadership may account for this appeal, but the matter cannot be pursued here.


24 The debate over whether particular societies such as the U.S.S.R., or People's Republic of China are properly called socialist continues. For convenience the conventional term will be used here.

27 One might infer from this position that the essentially bourgeois character of law would provide the protections individuals needed in this transition period, though Pashukanis himself does not say so. His silence on this question may have reflected his embarrassment over the fact that the Soviet government at the time he was writing did not provide the protections to individuals that are commonly found in capitalist democracies.
28 It may be that Pashukanis realized that his comments about the inability of law to change fundamental economic relationships were incompatible with the role Marx gave it in the transition from feudalism to capitalism, but there is a more fundamental weakness in Pashukanis’ theory as it relates to feudal law. Since commodity exchange was a small part of the medieval European economy, Pashukanis’ theory tells us that the specific attributes he regards as the essence of legality would have been found only to a small degree in the positive law, that is, in law as it was actually practiced. The theory says nothing, however, about the larger part of feudal law, the part that did not embody principles of abstract, formal individualism. Thus Pashukanis’ theory is not a general theory of law, as he claims.
29 Pashukanis’ argument that commodity exchange gives rise to law; hence law will disappear when commodity exchange disappears, depends on commodity exchange being the only source of law in every possible social formation. Edelman does not make such a sweeping claim, and therefore cannot draw Pashukanis’ far-reaching conclusion.
30 The argument was almost surely specious. If large numbers of people were already earning their livings in the unprotected industry, it seems unlikely that the protection was necessary. Edelman provides no data regarding the number of photographs actually copyrighted after this became possible, but it is hard to imagine that the number was large.
31 An implicit functionalism lurks here. Why did the courts have no alternative? The answer would presumably be that the courts cannot render a decision that runs counter to the interests of a major segment of capital. That the courts are reluctant to do so seems very likely; that they cannot seems like an exaggerated form of structural determinism.
32 Implicitly, Edelman is positing a necessary congruence between the substance of judicial decisions and the needs of industry, while allowing the language in which decisions are written to be autonomous from those needs. The language is determined by legal doctrine, but this doctrine itself has no influence on the outcomes of cases. It is worth noting that Edelman largely restricts his analysis to court decisions, while Pashukanis deals with all sources of law indiscriminately.
34 The functionalism of Althusser’s I.S.A. essay is not characteristic of his other work; see for example (1977), *For Marx*, London: New Left Books.
35 Even this can be doubted. It seems likely that most lawyers take a pragmatic approach to doctrine. They are interested in it for what it will permit them or their clients to do, not necessarily because they believe it is the Truth.
36 Herbert Gintis (1980), 1, “Communication and politics: Marxism and the ‘problem’ of liberal democracy”, *Socialist Review* 10(2/3):189–232, has observed that a number of bourgeois ideals such as equality are ambiguous in scope and meaning. This ambiguity facilitates their creative, inventive use by subordinate classes and strata.
37 In taking this position, we are not setting coercion against legitimacy as entirely distinct aspects of law. The manner in which coercion is exercised is important for the law’s legitimacy, and the legitimating principles of law do have some influence on how legal institutions apply coercion. The point we are making is that law is not merely a set of recommendations or advice regarding behavior. It is in its coercive aspect that a statute or court verdict differs from an Ann Landers column or a Sabbath sermon.
38 The claim that each of these functions can be identified with a particular branch of law may be plausible, but is not necessarily true. Labor law is not part of the criminal law, but it surely regulates class conflict in ways that help to perpetuate class society. A more careful analysis of the functions of different parts of the law is needed.
39 The American New Left in the 1960s developed a sharp antipathy for bureaucratically structured, hierarchical organizations, and a corollary attraction to the position that socialism must entail a transfer of power within the work organization to the producers themselves if alienated work relations are to be eliminated. This view implies that the organizational structure of the enterprise is not entirely technically determined, but entails a significant class control component. Thus the position that Hirst criticizes in the writings of Marx and of early twentieth century Marxists is not one that has had much appeal for contemporary American Marxists.

40 Bob Fine (1980), "The birth of bourgeois punishment", Crime and Social Justice 13:19—26. It may well be true that the individualism found in an economy characterized by petty commodity and small-scale competitive capitalist production played a role in gaining acceptance for the proposal to place prisoners in solitary confinement (a notion which preceded Bentham), but an exclusive focus on this possibility runs the risk of leading us to lose sight of the class content of this reform. Solitary confinement was intended to make possible the destruction of the popular culture that reformers believed was a major source of criminality. They wanted to cut off communication among prisoners and between prisoners and their family and friends on the outside.

41 Hirst seems to be unaware of recent Marxist efforts along these lines, such as the work of Wolf Heydebrand (1977), "Organizational contradictions in public bureaucracies: toward a marxian theory of organizations", Sociological Quarterly, 83—107.

42 See for example G. Lukacs (1971), History and Class Consciousness, Rodney Livingston (Trans.), Boston: M.I.T. Press.

43 Part of the trouble is that the book is not self-contained. From time to time, Hirst indicates that fuller argumentation can be found in another recently published, co-authored work: Anthony Cutler, Barry Hindess, Paul Hirst and Athar Hussain (1977—78), Marx's Capital and Capitalism Today, London: Routledge and Kegan Paul.

44 Discussions of Roman law, for example, are generally limited to passing comments linking those elements that display the features of capitalist law in embryonic form to commodity exchange.


47 The Gramscian notion of hegemony, we suggest, may prove more fruitful in helping us to grapple with this complexity than the Weberian notion of legitimacy. The thrust of our comments, of course, is that hegemony is not necessarily complete or achieved automatically. For a recent discussion of Gramsci's conception of hegemony see Anne Showstack Sassoon (1978), "Hegemony and political intervention", in Sally Hilb (ed.), Politics, Ideology and the State, London: Lawrence and Wishart.
