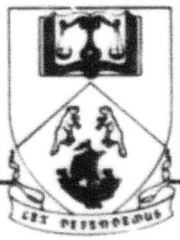

Articles

Marxism and The Rule of Law

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The revival of interest in Marxist legal analysis has prompted a reconsideration of the function of the concept of the rule of law. Appreciation of the rule of law as an instrument of legitimation of the economic and political order has assumed particular significance in Canada due to the recent enactment of the Canadian Charter of Rights and Freedoms. *In this article the author examines the two aspects in which the rule of law may be said to exist — the democratic and the juridical — and through the application of Marxist analysis to several recent political events demonstrates the relationship of the rule of law to developments in the politico-legal system characteristic of late capitalism.*

Le regain d'intérêt pour l'analyse juridique marxiste a suscité un réexamen de la fonction du principe de la prééminence du droit qui, comme instrument de légitimisation de l'ordre économique et politique en place, revêt une importance toute particulière depuis l'adoption de la Charte canadienne des droits et libertés. *Dans l'article qui suit, l'auteur étudie les deux aspects — démocratique et juridique — sous lesquels le principe de la prééminence du droit est habituellement présenté et démontre, par l'application de l'analyse marxiste à une série d'événements politiques récents, la relation entre ce principe et l'évolution politico-juridique du système capitaliste avancé.*

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CLASSICAL MARXISM AND LAW

Classical Marxism was at its unsentimental best when it came to law. When dealing in their writings with legality, Marx and Engels sought to discredit completely any notion of an autonomous or egalitarian legal realm capable of transcending or resolving the discord, unfulfillment and subjugation of everyday life or (most importantly) of restraining the oppressive social power of class society. This attitude can be found with remarkable consistency whether one consults the earlier or the later works, and is equally evident in theoretical and agitational writing. For example, in *On the Jewish Question*, an early theoretical work concerned with "freedom of religion", Marx criticized the various French and American 18th-century bourgeois-revolutionary declarations of the "Rights of Man", including "equality before the law", as "the freedom ... of a man treated as an isolated monad and withdrawn into himself".[1] Although this "political emancipation" which banished religion "from the field of public law" constituted "a great progress", it was a very far cry from "real emancipation":

> But we should not be deceived about the limitations of political emancipation. The separation of man into a public and private man, the displacement of religion from the state to civil society is not a stage but the completion of political emancipation, which thus does not abolish or even try to abolish the actual religiosity of man.[2]

In *The German Ideology*, written a few years later with Engels, law is assimilated to religion: "It must not be forgotten that law has just as little independent history as religion". It is a "juridical illusion which reduces law to mere will"[3]: that is, which treats it as independent of the real relationships of people. The state in its "independence" is an "illusory communal life" and the struggles within it "nothing but the illusory forms in which the real struggles of different classes are carried out among one another".[4] In *The Communist Manifesto* bourgeois jurisprudence is labelled: "but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class".[5]

Marx's mature works do not substantially depart from these formulations. Rather, the ideas are deepened and given more precision. The classic statement is in the Preface to *A Critique of Political Economy*, where Marx employs the architectural metaphor of "base" and "superstructure". It was from studying law, Marx says, that he found that "legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life". The "real foundation" of society is "[t]he sum total of [its] relations of production ... on which arises a legal and political superstructure". Property relations are "but a legal expression" for the "ex-

[1] K. Marx, *Karl Marx Selected Writings*, D. McLellan (ed.) (Oxford: Oxford University Press, 1977) 53.

[2] *Ibid.*, at 47.

[3] K. Marx and F. Engels, *Writings of the Young Marx on Philosophy and Society*, L.D. Easton and K.H. Guddat (trans. and ed.) (Garden City, N.Y.: Doubleday and Company Inc., 1967) 471.

[4] *Ibid.*, at 425.

[5] *Supra*, footnote 1 at 234.

isting relations of production". Law is, like politics, religion, aesthetics and philosophy, an "ideological form" in which we "become conscious of the [productive relations] conflict and fight it out".[6]

When he published *Capital* (Volume I) eight years later, Marx both reaffirmed his adherence to the base/superstructure metaphor[7], and elaborated it on two fronts. Toward the end of the book, the chapters on "The Expropriation of the Agricultural Population from the Land" and "Bloody Legislation Against the Expropriated", detail the role of law in the "blood and fire" of "so-called primitive accumulation".[8] A more complicated theory of law informs the earlier parts of the book where juridical relations are assimilated to and rooted in the deceptive "fetishistic" form of commodity exchange, which mystifies the actual social relations of domination and dependence which underlie it. The "juridical relation, whose form is the contract ... mirrors the economic relation",[9] and when applied to the *wage* contract is the basis of "all the notions of justice held by both the worker and the capitalist"[10]. The mystification lies in the contrast between the "equality before the law" of the "sphere of circulation" and the unequal relation of capitalist and "*his* worker", which prevails in the "hidden abode of production".[11]

Finally, to conclude this brief tour of Marx's attitude toward law, in the *Critique of the Gotha Programme* written in the last decade of his life, we find the following critique of the notion of a "fair distribution of the proceeds of labour":

> Do not the bourgeois assert that the present-day distribution is 'fair'? And is it not, in fact, the only 'fair' distribution on the basis of the present-day mode of production? Are economic relations regulated by legal conceptions or do not, on the contrary, legal relations arise from economic ones? Have not also the socialist sectarians the most varied notions about 'fair' distribution?[12]

In the same document Marx wrote: "Right can never be higher than the economic structure of society and its cultural development conditioned thereby". In fact, he went even farther: "Equal right is ... constantly [and here Marx meant to include even the first stage of communism] stigmatized by a bourgeois limitation. It is ... a right of inequality, in its content, like every right."[13]

[6] *Ibid.*, at 330.

[7] K. Marx, *Capital: A Critique of Political Economy Volume No. I*, B. Fowkes (trans.) (Hardmondsworth: Penguin Books, 1976) 175.

[8] *Ibid.*, at 874-75.

[9] *Ibid.*, at 178.

[10] *Ibid.*, at 680.

[11] *Ibid.*, at 279-80 (emphasis added).

[12] *Supra*, footnote 1 at 566.

[13] *Id.*

MODERN DEVELOPMENTS IN MARXIST LEGAL THEORY

So, far from an autonomous, egalitarian sphere, the legal realm for classical Marxism was rooted in the social relations of production whose oppressiveness it not only did not counteract, relieve or even escape, but rather ratified, mystified and enhanced. This theme has been carried on in the work of modern Marxist legal theorists with often brilliant results. One of the most significant developments was the attempt in the 1920s by Soviet theorist E.B. Pashukanis to develop a Marxist theory of law along the lines of Marx's treatment of the fetishism of the commodity in Volume I of *Capital*. Pashukanis' theory has been much maligned and misunderstood;[14] it does contain some major flaws (mostly having to do with its neglect of the sphere of production), but it made a great contribution in elucidating the specifically bourgeois and historical character of certain basic juridical categories. The most important of these is the "legal subject" endowed with precisely that amount of free will necessary to deny for purposes of ratification in the legal realm the unequal and compulsory nature of the relations of production. Pashukanis made an important distinction, not often recognized in commentary on his work, between law on the one hand and other types of social rules and political norms on the other, precisely on the basis of this defining feature of the legal subject.[15] He was thus able to give meaning to the notion of the "withering away of law". Whatever the merits of this distinction for his specific purpose, it is of enormous significance, as we shall see, in understanding the current controversy surrounding the notion of the rule of law.

The revival of interest in Pashukanis' theory in the late 1970s, which involved a retranslation of his major works and many review articles, was part of a Marxist legal renaissance. I will mention only three major developments. First, there is the vigorous and compelling defence by G.A. Cohen,[16] on a sophisticated functionalist basis, of the base/superstructure metaphor itself and of law's superstructural character. Cohen's work has cleared up many of the major misconceptions surrounding the claim that law is superstructural, including the objection that this claim renders law irrelevant. In contrast, Cohen argues that "bases *need* superstructures, and they get the superstructures they need because they need them".[17] That is, capitalist relations need the law and that is why the law exists and takes the form it does. Though Cohen does not seriously address the precise mechanism by which law protects relations of production ("might without right may be impossible, inefficient or unstable"),[18] others have stressed the normative aspect of law in

[14]See, for example, C. Sumner's articles: "Pashukanis and the 'Jurisprudence of Terror' " (1981), 10 *Insurgent Sociologist* 99; and "Law and Civil Rights in Marxist Theory" (1981), 9 *Kapitalistate* 63.

[15]E.B. Pashukanis, *Law and Marxism: A General Theory*, Barbara Einhorn (trans.) (London: Ink Links Limited, 1978) 79, 124, 137, 177, 179, 184, 187, 188.

[16]G.A. Cohen, *Karl Marx's Theory of History: A Defence* (Princeton: Princeton University Press, 1978); and G.A. Cohen, "Forces and Relations of Production" in B. Matthews (ed.) *Marx: A Hundred Years On* (London: Lawrence and Wishart, 1983).

[17]*Ibid.*, *Karl Marx's Theory of History: A Defence* at 233 (emphasis added).

[18]*Ibid.*, at 231.

"legitimating" oppressive relations — the second development I want to mention.

A good example of this sort of work is that of Peter Gabel who has explained the changing nature of the dominant forms of legal philosophy (from the positivism of H.L.A. Hart to the neo-natural law theory of Ronald Dworkin)[19] and of contract law (from freedom of contract to unconscionability)[20] on the basis of the changing nature of capitalist social relations themselves which consequently need new sorts of legitimations. So "legal positivism appears as a legitimating paradigm which romanticizes the functional requirements of free market capitalism" and neo-natural law provides "a legal paradigm that justifies regulatory interventions by government officials and co-operative or 'moral' behaviour between litigants".[21] In each case, jurisprudence "manages only to transpose the objective requirements of the existing social system into a normative legal order".[22] And similarly, the change in contract law does not occur "because a new and more equitable style of legal reasoning has somehow sprung into being through a progressive maturation of the judicial mind".[23] Instead, "at each stage in our history the ideological imagery of contract law served to legitimate an oppressive socio-economic reality by denying its oppressive character and representing it in imaginary terms".[24] Gabel's concern here is clearly with the analysis of fundamental changes in jurisprudential and judicial discourse over so-called "hard cases"; but of course the less lofty (but more characteristic) activity of ratifying as "legal" the violent enforcement of class relations through the administration of criminal and civil sanctions in "easy" cases (which is, after all, the every day activity of most courts and most lawyers) can be regarded as of essentially the same character.

Some objections to the general notion of legitimacy, especially as it applies to legal institutions, have recently been raised by Hyde[25] who argues that there is no evidence or other reason to believe that either the form or content of legal reasoning has any significant impact on what people think of or do about the social order. Although neither this argument nor the evidence offered by Hyde are very convincing, it is worth pausing to consider the implications of his position. Primarily, it would leave us completely unable to account for the huge expenditures of effort and ingenuity over the millenia in the more or less intricate ideological defence of legal decisions and the legal defence of political practices and arrangements. The enormous and (for reasons we will come to) increasing amount of attention that has been paid in political rhetoric and in the mass media to what the courts and the legal profession do and how

[19]P. Gabel, "Book Review of Ronald Dworkin, *Taking Rights Seriously*" (1977), 91 *Harv. L. R.* 302.

[20]P. Gabel and J. Feinman, "Contract Law as Ideology" in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Random House, 1982).

[21]*Supra*, footnote 19 at 309.

[22]*Ibid.*, at 315.

[23]*Supra*, footnote 20 at 178.

[24]*Ibid.*, at 181.

[25]A. Hyde, "The Concept of Legitimation in the Sociology of Law" (1983), 1-3 *Wisconsin L.R.* 379.

they defend what they do would have been completely without effect on mass behaviour. Paradoxically, the truth of this proposition would not diminish the *explanatory* power of the legitimacy paradigm which, however, would have to be explained as a massive misunderstanding. Hyde appears to concede that those who engage in the incessant legal debates, arguments and justifications believe their words have some effect and that is why they engage in the behavior. Arguments that no one is paying any attention do not touch the claim that the form and content of this rhetoric is meant to present the enforcement of class relations in acceptably mystifying terms. However, we would still be left with a very odd result.

In fact, there is little plausibility to the position advanced by Hyde. In the first place it depends on a very narrow notion of "legitimacy" which excludes all motives for behaviour or approval that are not purely concerned with *pedigree*; that is, with the *source* of the practice or value said to be legitimated. According to Hyde, rational reasons for compliance, such as fear of sanctions, prudence or self-interest, do not involve legitimacy. Neither do habit or custom. Since, according to Hyde, all action can be reduced to these matters, legitimacy is irrelevant. Furthermore, most of the evidence for the lack of a "legitimacy effect" is deduced from the low public salience of courts and their decisions relative to other influences on public opinion.

This restrictive notion of legitimacy rests on a host of misconceptions about the function of law and misses a large part of the role played by law in the social order. First, it misunderstands the implications of the social nature of law for the relevance of legitimacy. Legal sanctions, for instance, are different from a punch in the nose. When a driver stops at a stop sign out of fear of the sanction, his or her fear depends on a whole pattern of activity unintelligible except for the practice of legitimating state action by law. The driver only needs to fear because of a prediction that he or she will suffer punishment. In Canada, that means a prediction that the police will act in a certain way and that what they do will be sanctioned by a court as "legal", according to all the bewildering professional techniques which that entails. Hart recognized this long ago when he emphasized the fact that law exists where the officials accept the applicable social practice.[26] Secondly, it is impossible to distinguish pedigree effects from matters of fear, rationality or habit. It is the habit of having courts make judgments and the fact that nobody seems to object to their right to do so that makes pedigree relevant. Their right to do so is in turn tied up with other prudential reasons or with notions — for example, "democracy" — for which prudential reasons can be offered: "preferable to anarchy" or the "least worst form of government".

In fact, though, legal legitimation is not at all limited to matters of pedigree. Nowadays, at least, the official talk of lawyers and judges also makes a direct appeal to prudential matters or to various ideals which may be prudential, conventional or a mixture of the two. For example, if justice is giving everyone his or her "due", an appeal to justice is an appeal to one's own hopes, interests and fears about what one is going to get for oneself. In fact, the ability to legitimize concrete state practices by reference to the various ac-

[26]H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1961).

cepted and popular ideals seems to be one of the main functions of courts. Hyde considers this "probably true but hardly interesting".[27] His reasons are not forthcoming, but it appears that he would only be satisfied if court rhetoric had *itself* an observable, transforming effect on our ideals: When that effect ranks below the effect of other institutions or matters, this counts for him as evidence against any legitimating function of the courts whatsoever. The problem with this whole approach is that it means one is forced to attribute only negative significance to the obvious fact of life that courts and other legal and political institutions rarely disagree about substantive matters and almost never about jurisdictional questions. If, instead, we viewed legal institutions as merely one segment of a whole set of arrangements depending for their effectiveness on co-ordination and consensus, that is, as an integrated system developed by "trial and error ... over many generations",[28] we could understand that "effectiveness" could co-exist with low "salience". I do not mean that each segment of the arrangement should be viewed as merely adding its own voice to a chorus singing in unison. Harmony is a more appropriate metaphor, with each institution having its own distinct part, its own form of legitimation, which is, in turn, recognized by the others. We should think, in other words, in terms of a division of rhetorical labour. When the government avoids a course of action by saying it is a matter for the courts or vice versa, it is not helpful to ask which institution is more important. Rather we should ask what ideals this form of rhetoric is seeking to evoke. It is even possible to identify, as we shall see, the ascendancy of one form over another at certain periods.

The third theme I want to mention in recent Marxist legal theory can be seen partly as a response to these qualms about legitimacy, at least in so far as mass legitimacy is concerned. This is the whole discourse on "discipline", which though Marxist in origin comes to modern Marxist legal theory via the powerful thought of (the now, sadly, late) Michel Foucault who applies it in interpreting the origins of the modern penal system. In *Discipline and Punish*, Foucault shows how the emergence of the bourgeois notion of the rule of law, including equality before the law, was accompanied by a system of criminal punishment quite different from the one which had gone before. While the old system of spectacular corporal punishments, intended to obliterate crime in a demonstration of superior military strength, was consistent with the pre-bourgeois bases of political power, the new penal system had a different purpose geared to new democratic forms of political power. According to Foucault, modern penal systems are not intended to eliminate crime but rather to "distinguish", "distribute" and "use" it.[29] Consequently, the apparently egalitarian nature of punishment is subverted by dividing offenders into "delinquents" (that is, "*real* criminals")[30] who are in need of discipline and mere violators of laws who are not in need of discipline. In the same way

[27] *Supra*, footnote 25 at 415.

[28] D. Hay, "Property, Authority and the Criminal Law" in D. Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975) 53. This article has been badly misunderstood by Hyde.

[29] M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977) 272.

[30] *Ibid.*, at 277.

modern political systems subvert (or "handle") democracy through discipline. Legal popular sovereignty is rendered harmless and rulers keep control over the masses, despite universal suffrage, through discipline.[31] The object of discipline is ultimately the integration of subordinates into their subordinate places. Its central mechanism is *surveillance* which is the precise word Foucault uses in French for the title of his book ("*Surveiller et Punir*").

Foucault's work is only implicitly related to issues of class, or, rather, class is for him only one aspect of the abstract "power of normalization".[32] On the other hand, Melossi and Pavarini in their study of the origins of the penitentiary, *The Prison and The Factory*, draw an explicitly Marxist connection between Foucault's discussion of discipline and the notion of the two spheres found in Marx's *Capital*. As the title suggests, the study notionally locates the prison with the factory in the "hidden" sphere of production. The prison, they show, was designed as a "factory producing proletarians" by educating them in the discipline necessary for exploitation.[33] In the same way that for Marx the factory reveals the secrets of the free and equal sphere of circulation, the prison reveals for Melossi and Pavarini the secrets of the otherwise democratic appearance of the rules of criminal law. Equality before the law and punishment on retributive principles are contradicted and undermined by reformative purposes which allow the punishments to be tailored to the extent to which the offender shows himself or herself to be willing and able to fulfill the assigned role of submission in the productive process.

MARXISM AND CANADIAN CRIMINAL LAW

In my opinion, this disciplinary paradigm, with the proper Marxist interpretation, provides the key to understanding modern criminal law both in its everyday and in its more obviously political uses. As an example of the more obviously political uses, we have the long-running R.C.M.P. affair which demonstrates the disciplinary thesis in the richest imaginable combination of its terms. Here we have crimes committed in the exercise of a class-based surveillance function which go unpunished by virtue of a system of criminal law concerned not with the punishment of crime but with discipline. The story has often been recounted, especially by me,[34] so I will briefly summarize it. Crimes are committed by the police against various left-wing groups in an effort to suppress what is essentially legal political activity in the interest of social change. But the ordinarily swift and efficient "criminal justice system" which processes hundreds of thousands of cases each year in its predictable succession of investigations, trials and punishments suddenly becomes stricken by a strange paralysis of indecision. The system suddenly loses confidence in itself (actually, the police lose confidence in the system) and proceeds

[31] *Ibid.*, at 222.

[32] *Ibid.*, at 308.

[33] D. Melossi and M. Pavarini, *The Prison and the Factory: Origins of the Penitentiary System*, G. Cousin (trans.) (London: The Martins Press, 1981) 145.

[34] M. Mandel, "The Discrediting of the McDonald Commission" (1982), 61 *Can. Forum* 14; "McDonald and the R.C.M.P." in Canadian Broadcasting Corporation, *Ideas. Law and Social Order 1* (Toronto: C.B.C. Transcripts, 1983) 1; and "Democracy, Class and Canadian Sentencing Law" (1984), 21 *Crime and Social Justice* 163.

hesitatingly with a plethora of new precautionary measures. First there has to be a Royal Commission (the McDonald Commission), packed with trusted friends and associates — naturally lawyers — of the alleged Liberal Party masterminds of the offences.[35] The Commission must then take four years to absolve (unsurprisingly, on the flimsiest of grounds) those very friends of any legal or political responsibility for the crimes it admits did occur. With respect to those crimes, the Commission has the temerity to recommend that the "appropriate authorities" (which in many cases include these self-same Liberal friends just absolved), decide what to do about the perpetrators of crimes within their jurisdiction, with the proviso that those who were "just following orders" be absolved. This would bring matters just about to "square one", give or take a few steps, except for the fact that before even releasing the Commissioner's report, the Federal government hires two more Liberal lawyers (one of them an ex-Supreme Court of Canada justice) to discredit the Commission's legal findings that crimes had indeed been committed and releases their "opinions" with the report, describing them as having been written by "independent outside legal counsel". (This complicated subplot of the legal analysis of the McDonald Commission is a good example of how what are essentially esoteric questions of abstract legality, debated hotly among experts, can become important political issues. Rarely has there been such a public exhibition of the glorious inconclusiveness and manipulability of legal materials.) There follows a number of increasingly astounding events, including the spectacle of the then Attorney-General, Mark MacGuigan, announcing in November 1982 that the decision had been taken secretly four months earlier by his predecessor (Jean Chretien) not to prosecute anybody and that since that decision had been taken by a prior attorney-general, *nobody* would take responsibility for it! On the provincial side (outside of Quebec, the governing party of which was after all a victim of R.C.M.P. crimes) not only have there been no prosecutions but the Attorney-General of Ontario has actually intervened to stop private prosecutions of Mounties by their victims.[36]

No doubt there was a good measure of hypocrisy and "saving of one's own skin" involved in this affair. But this aspect is not the most interesting one from the point of view of legal theory. What is interesting is the persistent form of *excuse* which has found itself into the rhetoric of the various apologias for the failure to prosecute these criminals and for the failure of judges to punish them when they have been found guilty, as some have been in Quebec. This argument addresses the *motives* of the offenders and speaks volumes about the rule of law. According to the explanation released by the Department of Justice: "There was no suggestion ... that the members were motivated by anything save a desire to effectively protect the national security or enforce the criminal law. The members were not motivated by personal gain, whether financial or otherwise".[37] Now, as I have argued elsewhere, the

[35]See the evidence and judgment in *Re Copeland and McDonald et al.* (1979), 42 C.C.C. (2d) 334 (F.C.T.D.), 88 D.L.R. (3d) 724, [1978] 2 F.C. 815.

[36]*Dowson* v. *The Queen* (1983), 7 C.C.C. (3d) 527 (S.C.C.).

[37]Department of Justice Canada, *Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission*, (Ottawa, 1983) 11.

motive excuse turns out to be really a way of distinguishing between the various concrete social interests which are served (or disserved) by the conduct involved.[38] It can therefore minimize what would otherwise be very serious crime, such as the breaking and entering and theft committed by the R.C.M.P. against the left-wing Agence de presse libre du Québec, which was transformed into a lesser charge by virtue of the omnibus section 115 of the *Criminal Code* so that the offenders could be congratulated and given an absolute discharge for their "noble and selfless purpose"[39]. Or it can aggravate an otherwise non-imprisonable offence when the same omnibus provision is used to enable the court to imprison a rebellious trade unionist, such as Jean-Claude Parrot, for deliberately "challenging and defying the authority of Parliament" and having no "remorse".[40] What distinguishes these cases is neither the legal character of the offences nor their concrete harmfulness to any victims nor even the personal nobility, sincerity or selflessness of the actors, but rather the social interests being defended and opposed in each case. In disrupting the activities of a group formed to defend workers, poor people, students, native peoples and the Quebec Independence Movement, the R.C.M.P. was acting on behalf of not just "the government", but of the ruling interests whose dominance is defined by the subordinance of the groups just listed. Parrot, on the other hand, was acting on behalf of workers and against the government and, in effect, employers in general — all of whom have a vested interest in holding down public sector wages. In these cases the law, by a very selective and misleading concern with motives, really tailors itself to be the handmaiden of powerful social interests. The primary mechanisms operating here are all those discretionary aspects of criminal law from enforcement through to sentence and the execution of sentence,[40a] all of which undermine the seemingly universal form of criminal prohibition: "Everyone who does *x* is guilty of an offence and is liable to *n* years imprisonment".

The examples I have just given are famous ones about which much has been made during the ten years since the police crimes were first revealed. But part of the reason for the success of the criminals in escaping punishment has to do with the fact that the excuses upon which they relied and the discretionary and disciplinary mechanisms through which they escaped are really part of the accepted everyday reality of criminal law. This point is worth emphasizing because it demonstrates the continuity between "political" and "non-political" crime and punishment. The virtually exclusive and greatly disproportionate use of prisons and other intrusive forms of punishment for economically marginal groups is not at all due to the application of an equal law to persons in unequal circumstances as it is sometimes suggested even by

[38]M. Mandel, *A National Referendum on the Cruise Missile* (Ottawa: Operation Dismantle, Inc. 1983).

[39]*R.* v. *Coutellier, Cobb and Cormier*. Unreported decision of the Cour de Sessions de la Paix, Montreal, Vincent J., 16 June 1977, a translation of which is reprinted in L. Arbour and L.T. Taman, *Criminal Procedure: Cases, Text and Materials* (Toronto: Emond-Montgomery, 1981) 240.

[40]*R.* v. *Parrot*. Unreported decision of Evans C.J.O. of the High Court of Justice for Ontario, 7 May 1979. The appeal, which did not concern the sentence, is reported in (1980), 27 O.R. (2d) 333.

[40a]Parrot not only received a prison sentence, but was refused temporary absence when he was eligible.

those trying to apply a Marxist analysis.[41] The general results of research into the actual bases for the invocation of criminal sanctions is quite overwhelming in its conclusion that the criminal law is applied in anything but an equal manner where class is concerned. This phenomenon occurs at all levels of the system, including the judicial sentencing stage. I have shown elsewhere[42] how the Canadian sentencing system departs substantially from democratic principles of equality before the law and is as much concerned with the enforcement of the social relations of production (that is, class relations) as it is with the prevention of harm to individuals through crime. Sentencing judges consistently tailor sentences to the degree to which an offender , whatever the offence, fulfils his or her role in the productive system, and to the degree to which offences, whatever their legal severity and the harm they do to individuals, oppose or protect the "productive relations" *status quo*. This is made possible by an institutional structure reposing great discretionary authority in sentencing courts and by a legal theory which both guides and legitimates the exercise of this discretion on the bases of "denunciation" and "rehabilitation".

Furthermore, whatever democratic elements exist in sentencing (that is, those that vary the punishment according to the concrete harmfulness of the conduct and the legal characterization of the offence), are completely undermined by what Foucault has called "the principle of the modulation of penalties"[43]. In the prison system, this principle comprehends all those variations in penalty which penal authorities administer, including the location of the prisoner on the infinitely graded continuum between minimum and supermaximum security, temporary absences, various forms of "remission" and the largest single modulator, the parole system.[44] In the decision as to what proportion of his or her prison sentence a prisoner will serve outside of prison under the parole board's discretionary authority, the offence itself recedes entirely into the background and the important factors have almost everything to do with the individual. The parole board seeks to discover, through a variety of tests stretching back before the offence was committed and continuing through the prison sentence to the parole period, who among those in its charge will or will not accept their assigned role in the general authority structure which, over the vast realm of the "private sphere", is none other than the class structure. For those few who hold dominant positions, so-called "corporate criminals", there is no difficulty in making this determination. Prison was not meant for them in the first place. But for most people, the role which the productive process assigns to them is subordination to the arbitary personal authority of capital. Consequently, the parole board expects them to demonstrate their willingness to submit to arbitrary personal authority wherever it exists. Parole thus intensifies those undemocratic features of the sentencing process which make punishment depend upon who one is and not upon what one has done. In so doing, parole further sacrifices (to the point of

[41] I.D. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law" (1977), 11 *Law and Society Rev.* 571.

[42] *Supra*, footnote 34, "Democracy, Class and Canadian Sentencing Law".

[43] *Supra*, footnote 29 at 269.

[44] M. Mandel, "Democracy, Class and the National Parole Board (1985), 27 *Crim. L.Q.* 159.

complete abandonment) the goal of prevention of harm to victims of crime to the goal of strengthening class relations. The sentencing and parole systems combined, therefore, contrary to what might be expected from reading either the *Constitution* or the *Criminal Code*, reveal the criminal law to be "superstructural" in the sense that it is concerned with the strengthening of class relations and the social *status quo* as distinct from the defence of the legal *status quo* of equal citizenship and equal protection of the law.

E.P. THOMPSON AND THE TWO SENSES OF THE "RULE OF LAW"

Classicial Marxism thus contains a powerful critique of the rule of law which is essential to understanding actual, current legal institutions and practices; recent years have seen a resurgence and a refinement of this critique. Now this has caused at least as much of a negative reaction on the left as it has on the right. Several socialist scholars[45] have expressed great discomfort with the traditional and renewed Marxist devaluation of the rule of law. There seem to be two major elements to this discomfort. One has to do with the Stalin period in the U.S.S.R. It seems to be felt that a Marxist devaluation of law in theory condones and even prepares the way for the Stalin period's very real devaluation of law in practice. More extreme versions of the critique implicitly blame Pashukanis' theory for his own liquidation, calling it a "jurisprudence of terror".[46] Secondly, there seems to be some embarrassment over a supposed inconsistency between devaluing law theoretically and engaging in political struggles which inevitably involve legality in some way or another, whether in defending attacks on legal rights from the right or in pressing for new, better and stronger legal rights from the left. Classical Marxism's devaluation of law has made Marxists defensive about taking law seriously as well as making socialist activists defensive about Marxism. The result has been a revolt aimed at investing the rule of law with revolutionary respectability.

One of the main sources of inspiration for this revolt on the left and unquestionably its most powerful and eloquent statement yet is found in the work of E.P. Thompson. The *locus classicus* is the widely read conclusion to his *Whigs and Hunters* of 1975. *Whigs and Hunters* is a social and political history of the aptly-named "Black Act" of 1723 which applied liberal doses of the death penalty to the participants in class struggles between the great financial and merchant bourgeoisie (who had occupied the centre of government and were exploiting the perquisites of office including large country estates) and the rural gentry, yeoman farmers and other forest people whose customary rights were being eroded and infringed. The "Black Act" was a piece of class legislation if there ever was one, "serving first of all the interest of Government's own closest supporters".[47] In addition to applying the death

[45]See, *supra*, footnote 14; V. Rabinowitz, "The Radical Tradition in Law" in D. Kariys (ed.), *The Politics of Law: A Progressive Critique* (New York: Random House, 1984); D. Sugarman, "Introduction and Overview" in D. Sugarman (ed.). *Legality, Ideology and the State* (London: Academic Press, 1983); and R. Kinsey, "Despotism and Legality" in B. Fine *et al.* (eds.), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchison, 1979).

[46]*Supra*, footnote 14, "Law and Civil Rights in Marxist Theory"; and P. Beirne and R. Sharlet, *Pashukanis: Selected Writings on Marxism and Law* (London: Academic Press, 1980).

[47]E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin Books, 1975) 206.

penalty to any manner of interference with property, the Act contained some interesting innovations such as execution for failure to surrender within a specified timed after being accused,[48] the concept of collective responsibility and abrogation of local venue rules. These already ample provisions were further enlarged by an obliging judiciary, not only ready as ever "to wag their tails for the ruling classes"[49], but which actually was that class in the case of John Pepper who, as the Justice of the Peace in a prosecution he himself had brought, imprisoned adversaries without the nicety of legal grounds.[50] In this era of the suspension of *habeas corpus* and prosecutions against the press, it was nothing for the Chief Justice (Lord Mansfield) to compel text-writer Sir Michael Foster (a former judge) to suppress from his writings the report of a case of dubious but enlarging interpretation in which Lord Mansfield had dissented and then later to rely upon this case as an unreported, but "very deliberately considered" authority.[51] Whether a prosecution would be launched under the "Black Act" was influenced strongly by the presence or absence of ministerial protection, and acquittals — even on trumped-up charges — had to be dearly purchased with expensive legal fees. Pardons then, as paroles now, depended heavily on social position. Latter-day attorney-generals anticipated Roy McMurtry, former Attorney-General of Ontario,[52] by stepping in to stop "iron-clad" prosecutions of their own authorities when they committed crimes in the defence of property.[53] Thus "the flexibility of the law" has a long history.

At the end of this long and painstaking chronicle of the trampling under of anything resembling the rule of law, Thompson comes to its defence. It is, he says, "a cultural achievement of universal significance"[54] and "an unqualified human good"[55], despite the unavoidable admission that "[i]n a context of gross class inequalities, the equity of law must always be in some part sham"[56]. Thompson's argument is essentially that, though inevitably undermined by class divisions, the rule of law still imposes significant limitations on power because were it otherwise its ideological value would be nil:

> If the law is evidently partial and unjust, it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony .... [T]he rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away."[57]

[48] This provision was applied at least once: *ibid.*, at 173.

[49] *Supra*, footnote 7 at 903.

[50] *Supra*, footnote 47 at 172.

[51] *Ibid.*, at 253.

[52] *Supra*, footnote 35.

[53] *Supra*, footnote 47 at 232.

[54] *Ibid.*, at 265.

[55] *Ibid.*, at 267.

[56] *Ibid.*, at 266.

[57] *Ibid.*, at 263.

Can anyone deny that placing limits on official power is a worthwhile project? Thompson argues that a crucial way in which limits are placed is by never ceasing to insist upon the *ideal* of the rule of law, however aware we are as Marxists and socialists of its persistent "sham part" in class society. Far from justifying an actual practice or institution, then, Thompson defends a *critical posture* which holds existing institutions up to their own standards. The final chapter in *Whigs and Hunters* is really Thompson's attempt to justify and explain why he has taken legal injustice seriously and thus why we should take law seriously even in the face of other, perhaps more materially significant, aspects of class power. Part of the reason for Thompson's insistence has to do with Nazism and Stalinism: "[t]o deny or belittle [the rule of law] is, in this dangerous century ... a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power".[58] Another has to do with being true to the actual forms taken by popular resistance to oppression:

> [F]ar from the ruled shrugging off this rhetoric as an hypocrisy, some part of it at least was taken over as part of the rhetoric of the plebeian crowd, of the "free-born Englishman" with his inviolable privacy, his *habeas corpus*, his equality before the law .... [S]ome of [these individuals] had the impertinence, and the imperfect sense of historical perspective, to expect justice. On the gallows men would actually complain in their "last dying words", if they felt that in some particular the due forms of law had not been undergone. (We remember Vulcan Gates complaining that since he was illiterate he could not read his own notice of proclamation; and performing his alloted role at Tyburn only when he had seen the Sheriff's dangling chain.)"

We might sum all this up by saying that the appeal for Thompson in the rule of law lies entirely in its *democratic virtues*. It places inhibitions on power and thus becomes a source of popular (defensive) power and figures strongly along with other legal notions as the language and form of popular resistance to oppression. Though this democratic theme is rather deeply buried in the polemics of the conclusion to *Whigs and Hunters*, it is brought to the surface in Thompson's later writings on law collected in *Writing by Candlelight*. Here what is decried is the interference with or replacement of *popular* legal institutions, such as the coroner's jury and the criminal jury, by that other most legal of institutions, the *judiciary*, which Thompson anything but celebrates: "[N]o British liberty has ever arisen from the decision of judges".[60] Thompson himself is very anxious to distinguish between the "rule of law" and "the rule of the people by any old codger in a wig"[61]. It seems to me that in order to understand what is going on here we need in fact to recognize frankly that there are two opposing senses of the rule of law: the *democratic* and the *juridical*. The democratic sense, invoked by Thompson, is one that stresses the inhibitions placed on official power (including judicial power) by clear rules strictly applied and adhered to, ideally in the context of popular institutions of law-making and legal procedure. Even more ideally, these rules contribute in content to real equality and freedom. This is the ideal invoked by the slogan "a

[58] *Ibid.*, at 266.

[59] *Ibid.*, at 263, 268.

[60] E.P. Thompson, *Writing by Candlelight* (London: The Merlin Press, 1980) 218.

[61] *Id*

government of laws and not of men". The juridical sense, described by Pashukanis, is the one that stresses those characteristic features of judicial administration which work to strengthen the *status quo* of unequal social power, including the free-willed legal subject abstracted from its social context, the legal discretion of criminal punishment, the case-by-case analysis of the common law and the hegemony of the legal profession. We will return to this distinction shortly, but this elaboration should suffice for present purposes.

Not only is it clear that it is the democratic and not the juridical rule of law which Thompson is anxious to protect, but it is also clear that in this endeavour he is not at all at odds with classical Marxism. Marx was well aware of the importance of inscribing political victories in law. Even as he blasted the "juridical illusion" and the "tail-wagging judges", he wrote in *Capital* of the greatly valued struggle to limit the length of the working day: "In the place of the pompous catalogue of the 'inalienable rights of man' there steps the modest Magna Carta of the legally limited working day, which at least makes clear 'when the time which the worker sells is ended and when his own begins' ".[62]

In the *Critique of the Gotha Programme,* Marx criticized the call for a "free state" on the basis that democracy required restrictions on the freedom of state: "Freedom consists in converting the state from an organ superimposed upon society into one completely subordinate to it, and today, too, the forms of state are more free or less free to the extent that they restrict the 'freedom of the state' ".[63] So Marx had a completely different view of legality when it was at the service of democracy. That is why, for example, he congratulated the Communards for subjecting the judiciary to popular control, but did not exhort them to abolish the institution: "Like the rest of public servants, magistrates and judges were to be elective, responsible, and revocable".[64]

This is not to say that there are no serious disagreements between Thompson and classical Marxism. For one thing, Marx was unrelenting in his insistence on the necessity not only of linking science to politics, as in the famous 11th thesis on Feuerbach,[65] but also of linking politics to science. His entire body of work, especially the "political" tracts from the *Communist Manifesto* to the *Critique of the Gotha Programme*, underscores his belief that political agitation must be done on the basis of a true understanding of capitalism and its law. This belief naturally entailed a merciless critique which did not take at all seriously the prejudices and misconceptions of the ruling class even if they were shared by the exploited.[66] Furthermore, his point of reference for both politics and science was always socialism, with which, he writes in the Preface

[62] *Supra,* footnote 7 at 416.

[63] *Supra,* footnote 1 at 564.

[64] K. Marx, "The Civil War in France" in *Karl Marx and Frederick Engels: Selected Works* (Moscow: Progress Publishers, 1968) 292.

[65] *Supra,* footnote 1 at 158: "The philosophers have only interpreted the world, in various ways; the point is to change it".

[66] *Id.*: "In every epoch the ideas of the ruling class are the ruling ideas."

to *A Critique of Political Economy*, "the prehistory of human society [is brought] to a close".[67] Thompson on the other hand, perhaps as part of his laudable effort to give dignity to popular forms of protest,[68] seems incapable of penetrating beneath popular conceptions which are not always democratic but often authoritarian (as in the episode with Vulcan Gates where the symbol of the Sheriff convinces the condemned man to cease resistance). More importantly, this analysis seems to have unhinged Thompson's practical political programme in defence of democratic rights from the struggle for socialism, thereby preventing him from coming to grips not only with the severe limitations on democratic rights in capitalism, restricted as they inevitably are to the public sphere, but also with their inherent fragility in the face of the enormously undemocratic and overwhelming power of the private sphere. Thus Perry Anderson has written:

> The full potential of the political issues of democracy raised by Thompson can only be realized by persistent and public demonstration of their convergence in socialism. Radical libertarian campaigns in the present are not to be won with continuist appeals to a constitutional past, but by credible programmes for a common future finally emancipated from it.[69]

So Thompson and classical Marxism seem to disagree on the strategy for preserving what little democracy there can be under capitalism and for expanding it beyond those narrow horizons. But the important point for present purposes is that they seem to agree on the antithetical nature of the two aspects of the rule of law which I have called "democratic" and "juridical".

Failure to appreciate this ambiguity in the notion of the rule of law is not only at the heart of the controversy over Thompson but is also the basis for the many misunderstandings of the significance of the work of Pashukanis, whose contribution was to isolate that aspect of legality which was specifically bourgeois and therefore inevitably repressive. It was this element that he called the specifically "legal" element, which is a far cry from condemning "all law" (that is, everything we know as "law") as bourgeois, even if only "in form".[70] It is even further from suggesting that there should be no limits to official power in socialism.[71] This element consisted in the centrality of a private, isolated, autonomous and egoistic legal subject possessed above all of a free will, so that it could be considered apart from the concrete conditions of class

[67] *Ibid.*, at 390.

[68] E.M. Wood, "The Separation of the Economic and the Political in Capitalism" (1981), 127 *New Left Rev.* 66.

[69] P. Anderson, *Arguments Within English Marxism* (London: New Left Books, 1980) 205.

[70] *Supra*, footnote 14, "Pashukanis and the 'Jurisprudence of Terror' ".

[71] Though I do not deal directly in this paper with law under socialism, it is worth a few words because of the effect which phenomena such as Stalinism have had on the current socialist critique of the traditional Marxist devaluation of law. In short, it seems to me that socialism poses no distinct problems for the analysis of the rule of law. This certainly seems to have been Marx's own position in the material quoted earlier. Democratic limits on power are clearly indispensable under socialism. Without them we simply do not have socialism. On the other hand the importance of the distinction between the democratic and juridical notions of the rule of law persists in the quest for democratic socialist political institutions. To put it in Thompson's terms, we will obviously have to continue to insist on the ideal of the (democratic) rule of law even when its "sham part" has been reduced or eliminated by the reduction or elimination of social class power. Otherwise I have nothing to add on this subject and it is consequently unnecessary for me to evaluate the complicated arguments of, for example, P. Hirst's "Law, Socialism and Rights" in P. Carlen and M. Collison (eds.), *Radical Issues in Criminology* (Oxford: Martin Robertson, 1980).

and history in which real human beings and legal decisions are situated. This legal classlessness which paradoxically enforced and legitimated oppressive class relations was thus the antithesis of real democracy because it excluded from the reach of democracy the entire realm of the so-called "private sphere". It has been argued, and with some plausibility, that Pashukanis' approach to law is of declining relevance in late capitalism which is defined by the merger of the private and public spheres through state involvement in the economy. Thus there is a proliferation of many "laws" which, though far from democratic, do not seem to assume this juridical form. These laws encompass the detailed, often class-specific, and end-oriented regulatory legislation which is the form taken by much modern government activity. The argument that the proliferation of these norms has superseded Pashukanis' theory has been made explicitly by Fraser[72] and O'Malley[73], and implicitly by Gabel[74] and Gabel and Feinman[75]. The latter have underscored the more communitarian and less "atomized" form of legitimation being practiced by the legal defenders of the *status quo* of late capitalism. It must be noticed, of course, that this development was well under way when Pashukanis was writing and that he was fully aware of its implications. He distinguished very sharply between "technical and legal norms"[76] and recognized that "every juridical theory of the state which attempts to encompass *all* state functions is nowadays inadequate"[77].

It seems to me, however, that despite these factors Pashukanis' approach is of continuing and even increasing relevance in late capitalism precisely because it helps us grasp the distinction between the two senses of the rule of law which I have been trying to elucidate. For one thing, the juridical factor is far from eclipsed in modern law. For example, as we saw earlier, it remains the focal point for the subversion of democracy by class relations in criminal law and punishment.[78] But the importance of this approach lies not only in the *persistence* but also in the *expansion* of the juridical factor in modern life. In fact, the ambiguity in the notion of the rule of the law and the contradiction between its two senses is to be found increasingly close to the centre of Canadian politics on issues of great, and in one case of potentially earth-shattering, importance.

[72] A. Fraser, "The Legal Theory We Need Now", (40-41), *Socialist Revolution* 147.

[73] P. O'Malley, *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (Sidney: George Allen & Unwin, 1983).

[74] *Supra*, footnote 19.

[75] *Supra*, footnote 20.

[76] *Supra*, footnote 15 at 79.

[77] *Ibid.*, at 137.

[78] There is a strong link between the work of Melossi and Pavarini on the one hand and Pashukanis on the other. See, *supra*, footnote 33 at 56, 182.

THE RULE OF LAW, THE LEGALIZATION OF POLITICS AND THE CRUISE MISSILE

It is this precise ambiguity in the notion of the rule of law that was utilized by the drafters of the *Canadian Charter of Rights and Freedoms,* who placed it at the head of a document that marked the ascendency of the *juridical* rule of law at the expense of the *democratic* rule of law: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law".[79] And it was this ambiguity that was exploited by the Federal government in claiming that the *Charter* "transferred power to the people". As the Government of Canada itself explained, the only power it gave the people was "the power to appeal to the courts".[80] Neither the richness of this ambiguity nor its potential in *riches* was lost on the Canadian Bar Association when it declared April 17 (the day of the *Charter's* proclamation) to be "Law Day", so that an annual promotional campaign could be undertaken for the legal profession.[81] Precisely speaking, the *Charter* transferred legal power to the courts not to apply laws but to strike them down on the basis of an enactment that hardly even pretended to guide that power.

Glasbeek and I have characterized the enactment of the *Charter* as part of a trend, which we hypothesized to be pervasive, toward the "legalization of politics", using "legal" here in the traditional (juridical) Marxist sense.[82] This general trend, we argue, is due to the specific accumulation and legitimation problems, noted by several authors,[83] which confront advanced capitalist countries in our epoch. As the public and private spheres become "recoupled" through state involvement in the economy, accumulation becomes politicized. This occurs, and not only by coincidence, as capitalism becomes increasingly unable to deliver the goods: that is, as capitalist relations of production increasingly stand between people and their production and consumption needs. Consequently, capitalism must seek forms of legitimation that are abstract (in the sense that they do not depend on meeting people's concrete needs) and that avoid the genuine participatory democracy which might endanger the freedom to accumulate. The institutionalization of judicial review which the *Charter* represents, is a logical response, we argue, not only because of the reliability of the courts as protectors of the social *status quo,* which makes litigation a safe alternative to genuine democracy, but also because of the *form* of legal discourse by which the legal profession justifies both the *status quo* and its role in defending it. We argue, following Pashukanis, that legalized (juridical) discourse even in late capitalism is legitimation of a characteristically abstract

[79]Part I, *Constitution Act, 1982* which is Schedule B, *Canada Act 1982,* 1982 (U.K.) c. 11, Preamble.

[80]Government of Canada, *The Constitution and You* (Ottawa: Minister of Supply and Services, 1983).

[81]On 18 April 1983, the Canadian Bar Association took out a four-page "Special Advertising Feature" in *The Globe and Mail* which, along with the many private law firm advertisements, included items such as: "Know your rights: The new Charter should be studied by every Canadian", "Our court system: an integrated structure" and "When you need a lawyer, where do you go?". See also "Contests, mock trials mark Law Day today", *Toronto Star,* 17 April 1984.

[82]H.J. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms", [1984] 2 *Socialist Studies* 84.

[83]J. O'Connor, *The Fiscal Crisis of the State* (New York: St. Martins Press, 1923); J. Habermas, *Legitimation Crisis,* T. McCarthy (trans.) (Boston: Beacon Press, 1975); and, *supra,* footnote 68.

type which suppresses the historical and material (class) aspects of the conflicts with which it deals, by treating them instead as questions of "principle" concerning the rights of free-willing legal subjects. As contrasted with other political institutions, courts are constrained to prefer arguments of a deontological rather than utilitarian nature, rights to goods and principles to policies. Their increasing prominence in the resolution of political controversy signifies a corresponding advance for their particular rhetoric. Legalized politics is *simulated* politics, intended (like other forms of capitalist politics) to domesticate class struggle, but in a way better suited to the problems of late capitalism than are other forms of politics.

It is clear that in Canada there were specific local and immediate goals pre-eminent in the whole process of setting this mechanism in place, namely the protection of minority language rights (especially English rights in Quebec) to offset the centrifugal forces working against the Canadian union. But there can be little doubt of the importance of the general trend to legalized politics as the means to this difficult specific end. For example, a crucial ingredient in the entrenchment of the *Charter* was the decisions of the Supreme Court of Canada in the *Constitution Reference* cases of 1981,[84] which provided an acceptable formula for amending the Constitution even without the participation of Quebec and obviated the need for a "divisive" referendum. The enactment of the general supervisory provisions of the *Charter* functioned in a similar manner to provide a justification for the judicial enforcement of the very specific language provisions guaranteeing English language education in Quebec contrary to the provisions of Quebec's *Charter of the French Language*. The tortuous judgment of Deschênes C.J.S.C., striking down this popular and otherwise valid Quebec law,[85] is a perfect illustration of how uniquely specific the language provisions of the *Charter* are when compared to the more general provisions. On appeal, the Quebec Court of Appeal simply recognized that the provisions of the Constitution were "adopted with a precise and resolute purpose of restricting the effects" of the Quebec law and were "so precise" and "so specific" that the ordinary rules of *Charter* interpretation could not apply.[86] The Supreme Court of Canada took essentially the same approach in unanimously affirming the judgment invalidating Bill 101.[87]

The phenomenon of legalized politics finds perhaps its most vivid illustration in the bizarre and ironic *Operation Dismantle* case[88], the issue of earth-shattering importance to which I referred above. I want to conclude by outlin-

[84] *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; and *Re: Attorney-General of Quebec and Attorney-General of Canada* (1982), 140 D.L.R. (3d) 385 (S.C.C.).

[85] *Quebec Association of Protestant School Boards et al.* v. *Attorney-General of Quebec et al.* (No. 2) (1982), 140 D.L.R. (3d) 33 (Que. S.C.).

[86] *Quebec Association of Protestant School Boards et al.* v. *Attorney-General of Quebec et al.* (No. 2) (1984), 1 D.L.R. (4th) 573 (Que. C.A.) at 576.

[87] *Attorney-General of Quebec* v. *Quebec Association of Protestant School Boards et al.* (No. 2) (1984), 10 D.L.R. (4th) 321 (S.C.C.).

[88] *Operation Dismantle Inc. et al.* v. *Canada et al.*, [1983] 1 F.C. 429; appeal allowed by the Federal Court of Appeal (1984), 3 D.L.R. (4th) 193, [1983] 1 F.C. 745; affirmed by the Supreme Court of Canada (1985), 59 N.R. 1.

ing this case in some detail as my personal involvement with it has made me privy to some information which, while not secret, is not as widely known as it should be, even in Canada. In July 1983 the Federal government announced its decision to accede to requests to allow the American government to conduct a series of cruise missile tests in Canada. The first test actually took place on 6 March 1984. Opinion polls indicated that most Canadians who had an opinion on the matter opposed the tests. Those of us opposed believe that allowing these tests brings us significantly closer to a nuclear holocaust, partly because of the unverifiability of the cruise missile, which makes arms' agreements almost impossible, and partly because of its potential first strike capability. Further, refusing the tests was one of the few ways to demonstrate concretely to the American people our independence from and opposition to their government's aggressive, brutal, dangerous and, incidentally, *lawless* foreign policy of which the United States' nuclear hegemony is the major symbol.[89] (This point or something like it was made with great force by E.P. Thompson when he spoke in Toronto on 25 August 1983.) However, this popular opposition to cruise testing did not find a proportionate expression in Parliament where the two major parties combined to defeat a New Democtratic Party motion against the test 213 to 34.

Most Canadians know that following the government's announcement, a coalition of peace groups headed by Operation Dismantle commenced an action in the Federal Court to have the tests declared unconstitutional as contrary to section 7 of the *Charter*, which guarantees the right to life, liberty and security of the person. They know this because every stage of the action — from the footsteps of Operation Dismantle's lawyer into the Federal Court building to file the papers, to the rejection by Cattanach J. of the government's motion to have the suit thrown out, to the acceptance of that motion by a unanimous Federal Court of Appeal, to the unsuccessful appeal by Operation Dismantle to the Supreme Court of Canada — was carefully photographed, reported and analyzed in the media. It would have been hard to be in Canada during the second half of 1983 without knowing of the Operation Dismantle action.

On the other hand, very few people seem to know that this court action was only one of two initiatives spearheaded by Operation Dismantle against the cruise missile. The other was a proposal for a binding national referendum on the issue, launched in August following Prime Minister Pierre Trudeau's statement that he would "reconsider" the tests if it could be demonstrated to him that a majority of Canadians were opposed to them.[90] Though reputedly a deep thinker, Trudeau could not imagine how this could be done outside of a general election fought on the issue of membership in NATO; Operation Dismantle thought a referendum with the simple question: "Are you in favour of the cruise missile being tested in Canada? Yes or No" would suffice. The

[89]See the condemnation by the International Court of Justice of U.S. mining of Nicaraguan harbours, in *The Globe and Mail*, 11 May 1984, of which the United States' nuclear hegemony is the major symbol (This point or something like it was made with great force by E.P. Thompson when he spoke in Toronto on 25 August 1983).

[90]*Supra*, footnote 38.

organization expressed its willingness, however, to include a separate question on NATO membership.[91]

The proposal for a referendum on the cruise tests was announced at a press conference on 2 August 1983 in Toronto, chaired by Mayor Arthur Eggleton who announced himself in favour of the idea and said he would vote against cruise tests and for membership in NATO. But a curious thing happened. The media, frothing at the mouth about the court case, was not interested in the referendum. The electronic media virtually blacked it out (one national radio announcement and one local TV story). Two of the major Toronto papers (the anti-cruise *Star* and the right-wing *Sun*) prominently reported the story, while one (the pro-cruise *Globe and Mail*) buried it as deeply as possible. Only the *Star* ran a second story; as news the referendum was completely dead in a week. One may speculate as to the reasons for this attitude on the part of the press, but partly it was due to a sure sense that the referendum would not occur. This feeling was partly a self-fulfilling prophecy, but was also due to an almost complete lack of support in Parliament. In fact, virtually the only follow-up that Operation Dismantle did on the referendum was to poll all 282 Members of Parliament. Only 18 replied, of whom 15 opposed the referendum and three were in favour. One MP wrote on his questionnaire: "This is pure NDP". He could not have been more wrong. One of the biggest blows to the referendum proposal was that it was opposed by NDP members on the recommendation of their disarmament spokesperson Pauline Jewett. Her letter to the NDP caucus of August 11, recommending opposition to the referendum proposal, expressed an opposition in principle to binding referenda, arguing that this would place what she apparently considered to be positive legislation (bilingualism, abolition of capital punishment, right to abortion and foreign aid) in jeopardy. But there was also a definite preference expressed, on this issue at least, for the electoral process over even non-binding referenda. Jewett's letter stated:

> Canadians at the next federal election can make political choices that will reflect their views and concerns about the cruise missile. Canadians can nominate federal election candidates from all parties who will denounce and end cruise testing if elected. Canadians can, if fact, put a government in place, the NDP, that will refuse the cruise in Canada .... Elected politicians need a good shaking up and the government of Canada should be changed for that fight.

It was obvious to everyone that the NDP had no hope of forming the next government of Canada or of stopping the cruise missile test in a parliamentary forum against the combined opposition of the Tories and the Liberals. As the only party to oppose cruise testing, its self-interest in making a federal election the only means of expressing opposition to the tests should also be obvious. What is interesting about this episode is not the opportunism of a self-styled "party of principle", but rather the way the NDP felt that it could consistently oppose the referendum and yet support the court challenge by Operation Dismantle, which it did vigorously both within and without Parliament, even to the extent of protesting the government's appeal of the original ruling. A

[91]Far from its first venture in the referendum business, Operation Dismantle had previously arranged 132 municipal referenda on general disarmament questions. In fact, the organization's main purpose and goal for its seven years of existence was to have a worldwide referendum on balanced disarmament sponsored and organized by the United Nations General Assembly.

victory in the court case would, of course, have bound Parliament to the decision of a few judges. When challenged on this point at a speech at Osgoode Hall Law School on 15 February 1984, Jewett said that "judicial decisions are part of our democratic tradition and binding referendums are not".

Without institutional or press support and embroiled in the increasingly expensive court battle,[92] Operational Dismantle simply had no time or energy for pursuing the referendum. The supreme irony came on 21 December 1983 when the group announced that its seven-year quest for a UN sponsor for the worldwide referendum had ended in success with Costa Rica agreeing to bring it before the General Assembly. Operation Dismantle's newspaper, "The Dismantler",[93] carried the large headline "WE DID IT" to announce the event. Not one newspaper even mentioned that the sponsorship had occurred (a wire story was simply not picked up); again there was a virtual blackout in the electronic media. Not that Operation Dismantle was totally ignored by the press on December 21. On that day there was more than adequate coverage of the story that the Supreme Court of Canada had granted Operation Dismantle leave to appeal. This effectively put Operation Dismantle out of operation for the next year and a half, except for some brief moments in court during the argument on the appeal and a failed attempt to stop the second test in February 1985 by an interim injunction. To paraphrase Operation Dismantle's leader, Jim Stark, the organization put all of its eggs in one legal basket — the Supreme Court of Canada. In his view, expressed in January 1985 when the massive protest marches against the cruise missile had dwindled from the tens of thousands to the hundreds:

> We made our decision a year and a half ago, that protest in the streets, letter-writing campaigns, telephone campaigns were not going to stop the cruise missle tests. The only chance of stopping those tests, short of the government seeing the light, was a decision by the Supreme Court of Canada. So we have put our eggs in that basket.[94]

Consequently, when the Supreme Court of Canada unanimously decided against Operation Dismantle in May 1985, the group was reduced to trying to salvage something from its near two-year quest by proclaiming that the decision was "a victory for the strength of the Charter and the civil rights and liberties of Canadians",[95] on the ground that the Supreme Court of Canada had recognized a judicial power to review Cabinet decisions on *Charter* grounds. (This from a group that alleged in its Statement of Claim that testing the cruise was a foot in the grave for all humanity!) Similar congratulatory remarks were made by Liberal and NDP members in the House of Commons when requesting the government not to insist on its right to costs. A Liberal member characterized the decision as the "finest hour" of the *Charter*.[96] An

[92]Operation Dismantle had been busily soliciting funds, having been denied access to the government's blatantly biased *Charter* funding program. See *The Globe and Mail*, 30 November 1983; and (1984), *Ont. Lawyer's Weekly* (16 March) 8.

[93](1983), Vol. 5, No. 4.

[94]*Toronto Star*, 20 January 1985 at A3.

[95]*Ibid.*, 9 May 1985 at A1.

[96]John Nunziata, *House of Commons Debates*, 10 May 1985 at 4604; see also Liberal Warren Allmand to the same effect at 4610.

NDP member characterized it as "a very important court action ... which established the fundamental principle that Cabinet decisions are subject to the Charter of Rights".[97] The Prime Minister, in his response, agreed that the courts' new role made this "the kind of a democracy ... for which we are all thankful".[98] Though the Government did ultimately forgive its costs, Operation Dismantle's lawyers were apparently not so generous about their fees.[99]

It is true that Operation Dismantle had hoped that its case, *win or lose*, would have an educative effect. It certainly does not seem to have damaged the affection we are all supposed to have for the *Charter*. But has it taught anybody anything about nuclear weapons? If it has, it has probably taught people that peace groups are not serious in their claims about the dangers of these weapons. Certainly the Supreme Court of Canada's own reasoning did nothing to dispel this. Though, as Wilson J. pointed out in her separate concurring opinion, a motion of this sort is usually disposed of by accepting the allegations in the Statement of Claim as true for the purpose of determining whether there is a case in law, the majority of the Supreme Court took the most unusual step of expressing a view on the facts, without hearing any evidence. Speaking for five of the six judges, Dickson C.J. held that the facts alleged by Operation Dismantle, and, as several opinion polls showed, accepted by millions of Canadians, "could never be proven".[100] The unverifiability of the cruise missile, which Operation Dismantle alleged and which it wanted to prove would render arms control agreements unenforceable, met with the response from the majority that "it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise missile could precipitate a system of enforcement based on co-operation rather than surveillance".[101] To the claim that deploying the cruise missile could lead to a "pre-emptive strike or an accidental firing",[102] the majority argued that "[i]t would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or a pre-emptive strike".[103] Thus a group formed to fight for popular democracy on disarmament was sucked into the legal vortex, gutted, legalized and all but obliterated by judges completely unresponsible to any electorate, who, without hearing any evidence, may have lulled Canadians into a dangerously false sense of security while everybody celebrated their authority to do so. This is legalized politics *par excellence*.

On the other hand, the development of a court-centred politics has not been wholeheartedly embraced even by the courts themselves. In fact the

[97] Svend Robinson, *ibid.*, 14 May 1985 at 4721.

[98] *Ibid.*, 10 May 1985 at 4611.

[99] *The Globe and Mail*, 10 July 1985 at 8.

[100] *Supra*, footnote 88 at N.R. 11.

[101] *Ibid.*, at 7.

[102] *Ibid.*, at 12 (unreported version, *per* Dickson C.J.).

[103] *Id.*

reasoning in this case and other ones under the *Charter* and debates about them in the press and media suggest that Glasbeek and I may have neglected something very important in our preliminary assessment of the *Charter*, which we wrote before any cases were decided. This factor is the persistence of parliamentary democracy itself as a legitimator,[104] which has figured heavily in the denial of claims under the *Charter*. Two of the five judges[105] in the *Operation Dismantle* Federal Court appeal directly invoked it as one ground for denying jurisdiction under the *Charter* to assess the government's decision. On the other hand, none of the other three acknowledged any separation-of-powers type constraints, invoking only the lack of judicial expertise on certain matters (here defence)[106] or ignoring the issue altogether[107]. On the question of the propriety of judicial review, LeDain J.A. stated as boldly as had Cattanach J. in the trial division: "The *Charter* places limits on both the sovereignty of Parliament and on the prerogative powers of the Crown."[108] Appeals to democracy were likewise made by two members of the Ontario Divisional Court[109] when it upheld the contitutionality of provincial wage controls in the public sector in *Re Service Employees' International Union*,[110] while declaring nevertheless that the "right to strike" was included in the *Charter* protection of "freedom of association". An appeal to the Ontario Court of Appeal was disposed of in a manner that made it unnecessary to decide the constitutional question. Moreover, the proposition that the right to strike was included in "freedom of association" was expressly denied by the Federal Court of Appeal in a case involving federal wage controls in the public sector.[111] In the latter case all of the judges invoked a lack of economic expertise but did not mention parliamentary democracy.[112]

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[104]P. Anderson, "The Antinomies of Antonio Gramsci" (1977), 100 *New Left Review* 5, 27.

[105]Pratte and Ryan JJ.A.

[106]LeDain and Marceau JJ.A.

[107]Hugesson J.A.

[108]*Supra*, footnote 88 at [1983] 1 F.C. 747. LeDain J.A. has since been elevated to the Supreme Court of Canada.

[109]Galligan and Smith JJ.

[110](1983), 44 O.R. (2d) 392.

[111]*Public Service Alliance of Canada* v. *The Queen* (1985), 55 N.R. 285.

[112]These wage control cases also form another interesting parallel with the cruise missile case when compared to union response to the 1976 wage control program. Of course that program was much more pervasive than the current one, going beyond the public sector, and indeed there was a court action based on federal jurisdiction, the *Charter* not having yet been enacted. However, the fact remains that on that occasion the trouble was taken to organize a one-day general strike to protect the law. This time, the unions went straight to court.

At this point, it is appropriate to comment on a suggestion by several readers that the relationship between Marxism and the cruise missile is not very clear. This point of view seems to want to restrict Marxist analysis to direct confrontation between capital and workers. However, Marxism has much more ambitious claims, namely to explain even struggles which do not appear at all "economic" by reference to the economic structure of society. It is my argument here that changes in the *form* of politics *in general* can best be understood by references to changes in the economic structure occurring in late capitalism. Furthermore, it seems to me that the struggle over the cruise missile in Canada and indeed international nuclear politics are also best understood from the point of view of the United States' interests and capabilities as the world's foremost capitalist power. It should be obvious to anyone that the United States' ability to have its way in Canada has something to do with economic power. I would also not be the first to argue that relations between Quebec and English Canada have strong economic elements to them and that the language issue in Quebec has strong class elements to it.

Some judges, then, in refusing *Charter* claims, include in their rhetoric a preference that certain matters be decided by parliament. Of course, in cases upholding the social *status quo* as well as the legal *status quo*, courts can afford to be democratic in their rhetoric. Even so, some judges do not find such a posture necessary. Furthermore, no such preference for parliamentary democracy is expressed, as would be expected, in decisions which invalidate legislation. Deschênes C.J.S.C. commenced his judgment in the *Protestant School Board* case with the declaration that the *Charter* "carries with it the attribution to the courts of an important part of the legislative power";[113] his reasoning is remarkable for its absence of any restraint whatsoever. And in striking down the Quebec government's attempt to exempt Quebec laws from the *Charter*, the Quebec Court of Appeal has demonstrated that even clear exercises of the "legislative override" in section 33 can be subject to judicial nullification.[114] Furthermore, the Supreme Court of Canada's early decisions under the *Charter*, in which the judges have been less than inhibited in striking down legislation, pay minimal obeisance to notions of parliamentary sovereignty. In *Hunter* v. *Southam Inc.*[115] the Supreme Court of Canada unanimously struck down a provision of the *Combines Investigation Act*[116] dealing with search and seizure, on the grounds that it departed from the judicially established common law procedures laid out in the *Criminal Code*. However, the Court did not even ask whether extraordinary provisions were needed to deal with extremely powerful corporate criminals (in this case one of the two major newspaper chains in the country alleged to have been involved in collusive practices). All that was invoked was a "large and liberal interpretation" approach to the *Charter*, which, the court neglected to point out, inevitably narrows the field for Parliament. The *Protestant School Board* case also pre-empted discussion of the rationale of the legislation in question by interpreting the language provisions of the *Charter* as "unique";[117] no mention of issues of parliamentary democracy can be found in the decision. The same was the case for the majority opinion in *Operation Dismantle*, which contains no doubts whatsoever about judicial competence:

> Cabinet decisions ... are ... reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the *Charter* .... I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts (*per* Dickson C.J.)[118]

Though Wilson J. discussed the issue of judicial competence in political matters in her separate concurring judgment, it is essentially a defence of the court's power, albeit by means of some less than convincing — indeed question-begging — distinctions:

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[113] *Supra*, footnote 85 at 33.

[114] *Alliance des professeurs de Montréal* v. *Procureur général du Québec* (unreported, 14 January 1985), thereby perhaps rendering unnecessary the Canadian Bar Association's longstanding call for the repeal of section 33; see *The Globe and Mail*, 16 March 1983).

[115] (1985), 55 N.R. 241.

[116] R.S.C. c. C-23, s. 10.

[117] *Supra*, footnote 87 at 335.

[118] *Supra*, footnote 88 at N.R. 14, 19.

> [T]he courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed .... [B]ecause the *effect* of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s.7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts ....[119]

We are clearly in a transitional phase during which the courts are not yet sure of their footing. Furthermore, it is reasonable to expect a change in rhetoric once the practice of deciding these matters in court becomes more familiar. And the "medium" has its own "message"; that is, the practice itself is a kind of discourse, however judges may reason. On the other hand, these contradictions underline the fact that there are serious obstacles to the full legalization of politics which is, after all, only a *strategy* necessitated by the difficulties of advanced capitalism; and not all strategies are successful ones. Perhaps this one will prove too little, too late. Then again, Canada has been remarkable for the ability of a little in the way of legitimation to go a long way.[120]

CONCLUSION

If Marxism is understood as the science of socialism and socialism as the radical democratization of social life, we should not have any difficulty in comprehending the Marxist attitude toward law. For most of its history, law has been in direct opposition to democracy, and here I am referring not only to the relatively late appearance of universal suffrage. Law has, for the most part, in form and in content, enforced and legitimated the very undemocratic relations of production — the class relations — through institutions which the public is merely invited to attend (if admission is allowed at all) as spectators and certainly never as fully equal participants. While there are some democratic elements in the law worth fighting to preserve (such as those procedural guarantees celebrated by Thompson) and many democratic legal ideals worth fighting to achieve (such as a radically egalitarian criminal law in which both corporate and judicial power are restrained), it must be emphasized that in our era at least, at a time when class power is not only not diminishing but rather is consolidating, thriving and expanding (as it has a habit of doing during depressions), we are witnessing the reassertion of that old, familiar, *juridical* and most undemocratic rule of law. Canada, of course, is completely within the economic and cultural orbit of the United States which holds the pa-

[119] *Ibid.*, at 34, 35.

[120] See H. Chorney and P. Hansen, "The Falling Rate of Legitimation: The Problem of the Contemporary Capitalist State in Canada" (1982), 4 *Studies In Political Economy* 65; and P. Ehrensaft and W. Armstrong, "The Formation of Dominion Capitalism: Economic Truncation and Class Structure" in G. Drover and A. Moscovitch (eds.), *Inequality: Essays on the Political Economy of Social Welfare* (Toronto: University of Toronto Press, 1981).

tent on legalized politics. It would be worth learning whether the phenomenon is observable in other national contexts. But even if only from our point of view, *that* rule of law — the one that is actually resurgent — is best symbolized, not by the blindfolded sword lady, but by that fateful day in March 1984 when an American B-52 bomber, cruise missiles strapped under its wings, circled diplomatically at the edge of Canadian airspace, waiting for a Federal Court judge to wave it in with a copy of the *Canadian Charter of Rights and Freedoms* in hand, to do what Canadians mostly opposed.[121]

[121]On the day before the cruise missile was tested, Operation Dismantle applied for a temporary injunction in the Federal Court. Judgment was reserved until the next day, but the Court did not open until some time after the tests were scheduled to begin. It seems that the B-52 pilot was instructed to circle outside Canadian air space until the decision denying the injunction was actually released. It was only then that the test went ahead.