Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence

Richard F. Devlin FRSC

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LAW'S CENTAURS: AN INQUIRY INTO THE NATURE AND RELATIONS OF LAW, STATE AND VIOLENCE

By Richard F. Devlin

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I. INTRODUCTION

I write about violence as naturally as Jane Austen wrote about manners. Violence shapes and obsesses our society, and if we do not stop being violent we have no future. People who do not want writers to write about violence want to stop them writing about us and our time. It would be immoral not to write about violence.

Edward Bond

The truth must always be respected whatever consequence it might bring.

Antonio Gramsci

The unfortunate truth claim which I wish to pursue in this paper is that the deep structural presupposition (which is almost universal amongst lawyers and clearly dominant among lay people) that law and violence stand in stark opposition is false. I argue that violence is endemic to any conception of modern law, that it is authorized by the legislature and/or executive, sanctioned by the judiciary, and perpetrated by what are euphemistically called the forces of law and order—the police, the military et cetera. In brief, I wish to posit the disquieting thought that legal violence is a *sine qua non* of advanced western society.

This paper develops an argument to reinforce this critical claim. As a theory the paper is intended to do two things. First, to explain my own personal experiences with a legal system and, after some reflection, I hope, your own also. Second, it seeks to

1 Edward Bond, *Lear* (London: Eyre Methuen, 1979) at v.


3 A number of people in both Ireland and Canada have contributed to this paper at different times and in different ways. As usual not all can be mentioned, but I would like to express particular gratitude to Toni Pickard and Donald Galloway whose (de)(con)structive criticisms made this paper what it isn't. Special thanks also to John Whyte, Phil Goldman and Jerome Bickenbach at Queen's University at Kingston, Allan Hutchinson and Hans Mohr at Osgoode Hall Law School. Margaret Hess and Denise Boissoneau made it accessible. Thanks also to my parents. Finally, mention should be made of Sandy Dobrowolsky without whose criticisms, support, enthusiasm and reassurance this paper would never have been completed. All the usual disclaimers apply.

4 At this point it is appropriate to confess my Northern Irish background, and to explain that my quest for theory arises out of the failure of traditional jurisprudence to adequately explain and justify the vicious nature of my native legal system. For one recent scholarly discussion of certain activities see R.J. Spjut, "The 'Official' Use of Deadly Force by the Security Forces against Suspected Terrorists: Some Lessons From Northern Ireland" [1986]
transcend the "stifling debate" between Liberalism and traditional Marxism in both its economistic or instrumentalist forms.\textsuperscript{5} I shall begin by outlining a theory of the modern state as the material condensation of social relations which has as its primary purpose the maintenance of cohesion through a subtle interplay of what can be called hegemonic processes and coercion. On this foundation I proceed to develop an Interactional Theory of Law, outline some of the functions which modern law fulfills, and suggest an explanation of the relationship between these various functions. I will conclude with a few brief comments on what I see to be the significance of my argument.

II. THE STATE\textsuperscript{6}

A state which dwarfs its men (sic) in order that they may become more docile instruments in its hands even for beneficial purposes will find that with small men no great thing can be accomplished!

John Stuart Mill\textsuperscript{7}

A. From Reification to Relationalism

Given that our object of analysis, the state, is complex and sophisticated, any theory which takes the state seriously must also be

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\textsuperscript{5} Reduced to its most simple form, Instrumentalist Marxism suggests that both state and law are malleable tools in the hands of the dominant elite. Economistic Marxism suggests that state and law are superstructural, and hence epiphenomenal reflections of a determinative economic base.

\textsuperscript{6} This section introduces new concepts and analyses of the state and social relations which may seem strange to lawyers; I would therefore bring to the readers attention the following Gramscian canon of interpretation:

When a theorist presents a whole series of concepts and principles of explanation concerned with a particular problem, they must be considered as a connected and a reciprocally qualifying system rather than located in isolation or in a unilateral fashion.


\textsuperscript{7} J.S. Mill, \textit{On Liberty}. 
complex and sophisticated if it wishes to be comprehensive. The reader should therefore treat the concepts which are introduced here as a group of interrelated and balancing "thought constructs" which serve as heuristic devices for a better understanding of contemporary society and state. As Poulantzas suggests:

The final aim of the process of thought is the production of the most concrete concepts ... which allow knowledge of real, concrete, particular objects, namely social formations always original in each case. This logical order, leading from the most abstract to the most concrete concepts ... allows a concrete analysis of a concrete situation.8

Law can only be understood in context, as part of the broader moral, political, social, economic, philosophical, psychological, sexual, and ecological spectrum. To believe otherwise is to be a jurispudential navelgazer. At the same time, however, it is not possible to discuss everything at once. I therefore propose to approach law from the political perspective, or more specifically, through a theory of the state. I am not claiming that this is the correct or only approach to law, rather, I suggest that this is the most useful approach for my present purposes.9 The theory of the state is intended to provide a framework for the analysis of law, and the theory of law, in turn, reinforces the theory of the state. There is a homology between state and law.

Liberalism and traditional Marxism tend to have a rather technical conception of the state: they treat it as an entity, either personalizing or commodifying it. Liberalism, working on an

8 Nicos Poulantzas, Political Power and Social Classes (London: Verso, 1973) at 17-18 [hereinafter P.P.S.C.}. It is important to make explicit my intellectual indebtedness to Poulantzas. His work is significant for two reasons: first, he has developed the most advanced analysis and critique of the state in contemporary political theory. Second, Poulantzas' own academic history includes doctoral studies in law, which on completion he abandoned (and ultimately rejected) to deal with the more pressing question of the nature and functions of the capitalist state. However, as Jessop points out in his excellent critical intellectual biography Nicos Poulantzas: Marxist Theory and Political Strategy (New York: St. Martin's Press, 1985) Poulantzas' interest in law was a "continuing subterranean influence." Ibid. at 26-50, 322-325.

assumption of consensus, portrays the state as a subject, the neutral arbitrator and great leveller above and beyond the mass of social interaction. Traditional Marxism, on the other hand, working on an assumption of conflict, portrays the state as an object, a malleable instrument in the hands of the ruling class for dominating the working class. Both approaches not only oversimplify and are ideal typical but also misunderstand and mischaracterize the nature of the state. I suggest that we must "flick the switch," that we stop thinking of the state as a thing — subject or object — and that we recognize the state as relational.

Drawing on, but substantially adapting, Marx's theory of alienation, a strong argument can be made that our awareness of

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10 This assumption of consensus is very powerful. It argues that because we are all citizens of the same society, and belong to the same culture, there is basically only one perspective on events. Some social scientists have called this a "central value system." This view denies any major discrepancies between the different social groups or between maps of meaning in a society. A conceptual viewpoint such as this has very important political consequences; it assumes that we all have the same interests in society (for example peace, order and good government), and that we all have a roughly equal share of power in society. The assumption portrays western liberal democratic societies as if there were no major cultural or economic breaks, and no major conflicts of interests between various classes or social groups. The assumption implies that our political institutions — Parliament, the two or three party system, universal suffrage, et cetera — guarantee equal access and participation for all in the decision-making process. Finally it assumes that the Rule of Law protects us all equally. The assumption leads to the belief that for whatever disagreements that do exist, there are legitimate and institutionalized means for expressing and reconciling them. Although it does concede that there may be differences of outlook, argument and even opposition, it assumes that these all take place within a broader framework of agreement — our shared experience of democracy — to which everyone subscribes.

11 For a paradigm example of this assumption of consensus and a vision of an essentially harmonious society see Ronald Dworkin, Law's Empire (Cambridge, Mass.: Belknap Press, 1986) which portrays the state as a neutral, if pluralist, subject capable of incorporating and accommodating a wealth of diverse social desires and interests. For a rather sceptical response to the ideal of consensus, see Michael Mann, "The Social Cohesion of Liberal Democracy" (1970) 35 Am. Soc. Rev. 423.

our common humanity has disintegrated; that "anxious privitism" and stereotypical notification are hallmarks of contemporary society, and that, at best, we live in a world that has fragmented into a plethora of interest groups. Therefore, as against Marx, there are not just two great camps, the bourgeoisie and the working class; rather these groups or classes have themselves become fragmented. The bourgeoisie is currently composed of large land owners, non-monopoly capital (with its commercial, industrial, and banking fractions), monopoly capital, the national bourgeoisie, and the international bourgeoisie.13 Similarly the working class has also split between the aristocracy of labour, technicians, labourers, the unemployed and the unemployable. Other groups such as the bureaucracy and intellectuals gain their identity independent of economic factors. Furthermore, from a different perspective, there are "pluriclassite" groups whose interests also transcend class boundaries — groups based upon nationality, religion, ethnicity, culture and gender. Finally, it may not be too much to suggest that contemporary society is pervaded by a sense of "contradictory consciousness" which Bob Jessop describes as:

a condition in which, on the one hand, there is consensus across all classes and all party groups on dominant values, elites and institutions at the symbolic level ...; on the other hand ... disaffection and dissent is particularly marked in the subordinate classes who have confused and ambivalent attitudes towards the dominant economic, social and political order.14

More specifically, Joseph Femia, synthesizing the research of Almond and Verba, W. G. Runciman, Almond and Silver, Rodman and several other sources, argues that contradictory consciousness is empirically valid:

Drawing these survey results together, it would seem that the average man(sic) tends to have two levels of normative reference, the abstract and the situational. On the former he expresses a great deal of agreement with the dominant ideology; on the latter he reveals not outright dissent but a diminished level of commitment.

13 For a discussion of bourgeois fractionalization in Canada, see Reg Whitaker, "Images of the State in Canada" in Leo Panitch, ed., The Canadian State (Toronto, University of Toronto Press, 1977) at 28.

to the bourgeois ethos because it is often inappropriate to the exigencies of his class position. Serious discontent and militant postures often come to the surface, but they are not accompanied by a realistic appraisal of alternative structures.\footnote{Supra, note 2 at 223.}

Following Gramsci, and more particularly Poulantzas, it is argued that the state should be conceived of as a material condensation of the alienated social relations of contemporary society.\footnote{The state is a relationship of forces, or more precisely, the material condensation of such a relationship among classes and class fractions such as this is expressed within the state in a necessarily specific form.} The purpose of the state is to serve as a factor of social cohesion, to keep society together, to prevent it from becoming irrevocably fragmented and thereby, ultimately, to maintain social relations as currently constituted. The argument can be put another way, in perhaps less jargon laden terms. It seems to me that people express their different ideas and attempt to achieve their ideals through certain material apparatuses such as legislatures, courts, banks, universities, hospitals, trade unions, the church, the media, the family \textit{et cetera}. To achieve a goal, one directs one's efforts to a particular, or a variety of, state apparatuses. The state is a vital way in which people go about organizing their mutual interaction.

This relational interpretation undermines Liberal pluralism which tends to view the state as a distinct, neutral arbitrator.\footnote{W.L. MacKenzie King, \textit{Industry and Humanity} (Toronto: University of Toronto Press, 1973).} On the contrary, the state is the very locus where conflicts occur and battles are fought.\footnote{See, for example, Bernard Edelman, \textit{Ownership of the Image} (London: Routledge & Kegan Paul, 1979).} As Poulantzas succinctly comments:

Conceiving the state as a relation, as being structurally shot through and constituted with and by class contradictions, means firmly grasping the fact that...the state is destined to produce class divisions and not really be a monolithic fissureless block, but is itself by virtue of its very structure (state as relation) divided.\footnote{"Reply to Miliband and Laclau" (1976) 95 New Left Rev. 63 at 74-75.}
The state, as a factor of social cohesion, reflects and condenses all the contradictions of a society as alienated and mutually contradictory as is the capitalist one. Moreover, political practice becomes the practice of a political class or social group, and state power is always the power of a definite class or group to whose interests the state corresponds. The relational theory therefore denies the validity of the consensus approach because cohesion is achieved neither through unanimous agreement nor mutual compromise, but, as we shall see, through a dialectic of hegemonic processes and coercion.

The relational approach also denies the instrumentalist view, for although the state may serve the long term interests of the dominant class or group, it need not always "cohere" in favour of that group. As Leo Panitch pithily suggests, the state does not act at the behest of the bourgeoisie or one of its factions, but on their behalf. By managing the inherent contradictions of contemporary society, it maintains the political conditions necessary for continuing the capitalist mode of production. This necessitates a state that is at least partially responsive to the needs and demands of the working classes and other pluriclassite groups in a post-industrial society.

This is not, however, a pluralist argument; it neither perceives all groups as having equal influence, nor does it claim that the state’s policies are a reflection of everyone’s mutually qualified interests. Empirical research from a variety of sources has comprehensively undermined pluralistic claims and these can be

20 Jessop, supra, note 6 at 61.


reinforced by a brief analysis of the concept of a "Power Bloc" which provides theoretical support for such empirical refutations.

As argued earlier, the state fulfills its basic purpose of maintaining social relations through its cohesive role. One of the ways in which the state attempts to cement society together is through the creation of a "hegemonic condition," a situation of widespread spontaneous consent and acquiescence. The concept of the power bloc explains one of the ways in which certain sections of the social ensemble consent to the capitalist social formation.24 Within modern social relations the dominant bourgeois class factions recognize that the maintenance of the capitalist mode of production is mutually beneficial. They wish to maintain the capitalist mode of production and they modify their interaction so that it will not transcend the limits necessary for the continuation of these relationships. These groups come together in form of the power bloc.

However, within the power bloc there is a continual vying for position between the various bourgeois factions,25 so that whichever faction becomes dominant has the majority of its policies fulfilled. The nature of the state changes the various permutations in the nature of the power bloc, but still remains the capitalist state. For example, when the power bloc was dominated by the national, non-monopoly bourgeoisie, the role of the state was predicated on a laissez-faire philosophy. However, with the ascendency of monopoly capitalism the state's role has become strikingly interventionist. The predominant group in the power bloc can be described as the "hegemonic faction" in so far as it is in a position of leadership and the policies adopted by the state usually correspond to its interests. This, however, is neither instrumentalism nor economism. The other factions within the power bloc "modify" the excesses of the hegemonic faction, and the power bloc as a whole is constrained in fulfilling only its own interests by the requirement of fostering hegemony in order to gain consent. The hegemonic faction does not use the state to further its own

24 See Poulantzas, P.P.S.C., supra, note 8 at 296-303.

25 For an account of factionalization within Canada, see Reg Whitaker "Images of the State in Canada" in L. Panitch, supra, note 13 at 28.
interests; rather it is the most powerful of all the social groups both within and without the power bloc. The other groups within the power bloc accept the preeminence of the hegemonic faction because it maintains social relations as currently constituted, but at the same time vie for the coveted position themselves. They only accept the hegemonic faction because many of their interests are being fulfilled due to the continuation of the capitalist mode of production. Viewed in this light, the power bloc itself is a manifestly unstable equilibrium.

The instability of the power bloc provides an important insight as to why liberalism provides "the best possible political shell" for capitalism. In order to become a hegemonic faction a social group requires allies to bolster its position. Since other groups within the power bloc covet the same position they are patently unreliable, therefore the hegemonic faction seeks alliances with other social groups outside the power bloc. This means that both the hegemonic faction and non-hegemonic factions form alliances with non-power bloc groups intending to further their own interests. In order that non-power bloc allies have influence (and also to induce them into alliances in the first place), they must have some real power. Representative democracy, parliament, trade unions, suffrage, rights and other welfare-statist type policies are institutions through which these groups realize their power. Liberal democratic institutions do provide real benefits and sources of power for other social groups which allow them to impose limitations on the power bloc and the hegemonic faction. These are not simply palliatives designed to obscure bourgeois domination (as instrumentalist Marxist's have argued); they are, as E. P. Thompson has suggested, "unqualified human goods." They arise out of the inherent incapacity of the bourgeoisie to develop sufficient unity which would enable them to control by sheer oppression. To gain supremacy the dominant classes are forced to compromise; compromises which further exacerbate the instability of equilibrium.

27 Ralph Miliband, "Poulantzas and the Capitalist State" (1973) 82 New Left Rev. 83.
28 *Whigs and Hunters* (New York: Pantheon Books, 1975) at 266.
Three important consequences emerge from the relational theory of the state. As a preliminary point, it must be made clear that I am not offering a general theory of the state for the simple reason that such a general theory is impossible to attain. Contrary to some liberal interpretations, the state is not an *a priori* determinant, but rather it is determined by a host of social, political, economic and ideological forces which are in continual flux. Different types of state exist in different politico-historical conjunctures. The theory offered here is a theory of the state in post-industrialist society.\(^{29}\)

Second, the relational theory requires an expansion of the term state, one which rejects the dichotomy of state and civil society. As Gramsci argues,

... the general notion of the state includes elements which need to be referred back to the notion of civil society (in the sense that one might say that the State = political society + civil society, in other words, hegemony protected by the armour of coercion).\(^{30}\)

If, at this stage, hegemony is taken to mean economic, political, intellectual and moral leadership,\(^{31}\) and we accept that the role of the state is one of cohesion, then it becomes clear that any dichotomy of state and civil society is false. Gramsci realized that there was a crucial interconnection and overlap of the two levels because "the state" could also serve hegemonic functions, and "civil society" could serve coercive functions. Further, the expanded theory directly challenges the public/private distinction which is fundamental to liberal theory.\(^{32}\)

\(^{29}\) Poulantzas, *P.P.S.C.*, supra, note 8 at 19.


\(^{31}\) Ibid. at 45.

Third, the relational theory of the state demands some account of the relationship between politics and economics. It is suggested that the relationship be conceived of as one of "relative autonomy." Economic developments should be considered to be of primary importance, creating the "developmental directive" or what Gramsci calls, "the basic trajectory of human history." However, while changes in economic productive forces are of primary importance, it is vital to emphasize that political, ideological, legal and cultural forces are by no means devoid of independent influence. The modern state is not a reflexive instrument designed to facilitate the economic interests of the dominant social groups. Indeed, "... at certain moments the automatic thrust due to the economic factor is slowed down, obstructed or even momentarily closed down." On this view economic factors are by no means decisive because as Femia posits, "economic crises only create a terrain more favourable to the diffusion of certain modes of thought, certain ways of posing and resolving questions concerning the entire subsequent development of national life."

Furthermore, the concept of relative autonomy is also useful to explain the relationship between state apparatuses and contemporary social struggles. As I indicated earlier, the various state apparatuses are not the simple instruments of any particular class or class faction; yet, in the long term, they do tend to preserve the capitalist mode of production in that their basic function is cohesion, (that is, to temper excesses, smooth out the rough edges and keep the reproduction turning). Cohesion, as will become clear, is achieved through the subtle interplay of coercion and hegemonic processes. The latter aims to satisfy as many of the sectional groups as possible within contemporary society without affecting the essential economic necessities of the dominant mode of production. By definition this means that no one group has absolute control

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34 Femia, supra, note 2 at 116.
35 Ibid. at 117.
over a state apparatus since absolutism would jeopardize the basic function of cohesion. This will become clear in the next section.\(^{36}\)

To sum up the argument to this point, the state must be conceived of as a continual process of the formation of unstable equilibria between the interests of the various social groups in society — but the balance is such that the interests of the dominant class or group tend to prevail. However, the equilibrium can never be made stable because the situation of complete hegemony can never be attained due to the contradictions of modern society; contradictions which hegemony ultimately exacerbates. The modern state is not a monolith; rather it is a strategic, contestable terrain and, as such, should be understood as a continuing sequence of unstable equilibria. Cohesion seeks to moderate this instability by one of two forms: through the creation of hegemony or through the invocation of coercion.

B. Hegemony

Hegemony is one of the most bandied about terms in modern social, political, moral and legal theory. It is imperative that we clarify its meaning as early as possible. In my interpretation, hegemony is a condition to be attained; a situation of political, moral, economic and intellectual leadership. The hegemonic condition is one in which all members of society "spontaneously consent"\(^ {37}\) to the social structure. Consent is a degree of conscious attachment to, agreement with, or willingness to accept, the legitimacy of a certain society. A situation of perfect hegemony would be one of perfect cohesion.

Hegemony is quite distinct from the processes which lead to its creation, but for convenience, it is appropriate to call them "hegemonic processes" if it is remembered that they are means, not ends. This distinction can be demonstrated through an analysis of

\(^{36}\) The reader may be dissatisfied with my obviously superficial discussion of relative autonomy. However, I concretize my conception in the ensuing analysis of law. See, *infra* at 249-54.

\(^{37}\) *S.P.N.*, *supra*, note 30 at 95.
the relationship between hegemony and ideology. Marx only
developed the concept of ideology as far as "false consciousness" in that he believed that each class has its own ideology. Thus, for
every example, he indicated that if the proletariat adopted the values, beliefs and lifestyle of the bourgeoisie, then they had been seduced into a false consciousness. This interpretation portrays ideologies as "political numberplates" which people carry on their backs since ideology is understood to be specific to each class. Such an approach is inadequate because it implies two things: first, it assumes some sort of conspiracy on the part of the ruling class to "brainwash" the other classes. Second, it envisions ideology as being merely ideas, tinted glasses which obscure "the reality." On the contrary, ideology should be interpreted from the perspective of its contribution to the creation of a hegemonic situation for a particular class, class faction, or social group. Following Althusser we should conceive of "ideology as materiality." Ideologies exist. They are concrete, constitutive elements of the social and material relations of society. They are lived relations. As Sumner argues,

[iдеology] is an integral and substantive element of all social practice. It is an active force within all aspects of social development and not just an animal that roams around the ephemeral reserves of the superstructure.

Ideologies are not the tinted glasses through which we see the world, but rather they are the ways in which the world operates. By descending into the arena of social relations they become active determinants of social interaction. They are both creations and creators of social exchange.

38 The ensuing discussion of hegemony and ideology makes it clear that the vision of the state being presented in much broader than the "repression/ideological deception" couplet. Most importantly it emphasizes the creative, proactive role of ideology. This will become even more explicit in the discussion of law as ideology.


40 Poulantzas, P.P.S.C., supra, note 8 at 202.


An important consequence of this interpretation is that the dominant ideology does not solely reflect the interests of the dominant class. The dominant ideology, as an integral part of social relations, will incorporate the ideals and interests of other social groups. Thus, in a sense, ideologies are eclectic, incorporating elements of "sub-ideologies." However, a dominant ideology will remain dominant because society is not pluralist. Such an ideology strives to maintain the social relations as currently constituted.\(^{43}\)

As a lived relation, ideology directly intervenes in the reproduction of the relations of production. The dominant ideology fulfills a practical social function in that it cements and unifies a whole social block within each political-historical conjuncture. Ideology can fulfill this role because it is not an external obfuscation, but rather it is an internalized *weltanschauung*, which turns out to be a self-fulfilling prophecy.\(^{44}\) Ideology cannot be assessed in terms of whether it is true or false: the relevant criterion is efficacy. Ideology depends on the extent of mass adhesion for its validation.

In this light, it is possible to realize how ideology contributes to the creation of a situation of hegemony because it generates "the will to conform"\(^{45}\) and "spontaneous consent,"\(^{46}\) those two characteristics which demonstrate that some class faction or social group has attained hegemony. Ideology is a process, and hegemony is a condition to which ideology contributes.\(^{47}\) Hegemony, if it could be achieved, would be the answer to the state's basic function as a factor of cohesion. There would be widespread consensus (or at least acquiescence), and social conflict would be minimized. But the ideal is different from the reality. According to Femina's reading of Gramsci there are three possible "levels" of hegemony: integral,
Integral hegemony is the paradigm condition where there is mass affiliation approaching almost absolute commitment. Such a society would exhibit a substantial degree of moral and intellectual unity, resulting in an "organic" unity or communitarian relationship between the ruler and the ruled, a relationship without contradictions or antagonisms on either a social or ethical level. The inherently exploitative nature of post-industrial society negates the possibility of ever achieving such purity.

Decadent hegemony is a situation where the elite is incapable of commanding unequivocal allegiance from the non-elite. Thus, the potential for social disintegration and conflict is ever-present (at least beneath the surface). In this situation the non-elite do attain some benefits from the social structure but their needs, mentality and inclinations are not truly in harmony with those of the power bloc.

The lowest level of hegemony — minimal hegemony — rests on the ideological unity of the economic, political and intellectual elites, which are adverse to any infiltration by the popular masses. Few of the interests of the subordinate groups are fulfilled, but such a state staggers on by the co-option of the leaders of potentially hostile groups, (cultural, political, social and economic). Such groups are, therefore, "decapitated;" there is little or no commitment to the social structure. Widespread alienation and a strong potential for massive dissent is only thwarted by the capacity of the power bloc to co-opt potentially radical leaders. At best only "primitive rebellion" would be possible.

The important point to be taken from this analysis is that a capitalist state, by its very nature, is unable to attain a situation of integral hegemony. The state attempts to cement together modern society in order to create a unity, but is precluded from achieving its goal by the imperative of maintaining the capitalist mode of production. Capitalism’s contradictory social relations are further

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48 Supra, note 2 at 46-49.

49 This surface is often determined by the media which often has very strong relations with the power bloc.

50 Eric Hobsbawn, Primitive Rebels (Manchester: Manchester University Press, 1971). Britain under the Thatcher regime may well be in this situation.
complicated by the attempt to achieve hegemony, because its attainment necessitates that real benefits be given to the subordinate classes (for example, universal suffrage or the welfare state). These in turn enable the subordinate classes to make even more demands (since they are part of the expanded conception of the state) or put extra burdens on the state's resources. Integral hegemony is constitutively unachievable in capitalistic social relations.

Contemporary western liberal democratic societies are therefore caught within a paradoxical situation. They are societies based on inherently exploitative relationships which generate dissent, anxiety, alienation and mutual antagonism. At the same time they require at least acquiescence in order that the state can continue to claim legitimacy for itself. The imperatives are stability and preservation of the status quo. However, when these cannot be achieved through the assimilation or accommodation of all members of society, resort must be had elsewhere. In brief, hegemony is an unattainable ideal because the contradictions are too great ... but cohesion can still be maintained through coercion.

C. Coercion

The critical path alone is still open to us.

Immanuel Kant

Coercion has been much ignored in recent jurisprudential debate. Not surprisingly liberals, emphasizing rights, have tended to ignore this issue because it raises the spectre of a legitimation crisis. What is perturbing, however, is that there has been a tendency in recent radical arguments to underestimate the vital role which coercion plays in the maintenance of society as currently constituted. For example, the Frankfurt School, and in particular Herbert Marcuse, has argued that ideology has been so successful in smothering consciousness, that the class struggle no longer exists and that the working class has been accommodated in late capitalism, as

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unidimensional "happy robots." Similarly, the Critical Legal Studies movement in North America has latched onto the crucial ideological role which law plays in the structuring of society. However, in their commendable desire to escape the vulgar Marxist analysis of law as a malleable instrument, they have ignored almost completely its repressive aspects and have bent the stick too far in the other direction. Even Poulantzas is guilty of this faux pas (at least in his early works) due to his structuralist tendencies. These led him to separate completely the economic, political and ideological "regions," thereby allowing him to concentrate almost exclusively on the political region. Having narrowed his vision, he tended to see the hegemony of the political region as being almost complete, and this led him to ignore the extent of coercion inherent in modern society. With his later rejection of structuralism and realization of the interplay of the various regions, he ceased his preoccupation with hegemony and tried to redress the balance with an analysis of authoritarian statism. His efforts, as we shall see, were not wholly successful.

Gramsci, who first developed the concept of hegemony as an important factor in social reproduction, was not as seduced by this concept as some of his successors. Although it is true that he emphasized the vital position and role of hegemony throughout his work, he also made constant reference to coercion and domination. He continually stressed that there was a dialectical relationship between hegemony and coercion. For example, early in his theoretical development, he outlined a brief analysis of the totality of supremacy in a class society through what he described as the interplay of "Direction and Domination":

... [the] supremacy of a social group manifests itself in two ways, as domination, and as intellectual and moral leadership. A social group dominates antagonistic groups which it "tends to liquidate" or to subjugate even by armed force; it leads kindred and allied groups.

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53 P.P.S.C., supra, note 8.
54 S.P.S., supra, note 16 at part IV.
A social group can, and indeed must, already exercise leadership before winning governmental power ... it subsequently becomes dominant when it exercises power but even if it holds it firmly in its grasp it must continue to lead as well.\textsuperscript{56}

Two points are pertinent in this quotation: it implies that dominance is exerted over the enemy and direction is exercised over allies. Further, and more importantly, it implies that once power has been achieved, the two aspects of supremacy — direction and dominance — are continued.

Gramsci is clearly arguing that direction (which is hegemony in embryonic form) and domination are continually present in any class state. By counterposing these, he is presenting a dual perspective on how capitalist society reproduces itself, and by emphasizing the former he is simply attempting to redress the balance introduced by other more instrumentalist analyses. Gramsci believed that a state which relied solely upon domination could not last for long; but he also believed that in a class society there would be dissent, that direction would not be adequate and that to preserve its existence the state would have to resort to coercion. For him political relations must be perceived as having, "...two fundamental levels, corresponding to the dual nature of Machiavelli’s centaur-half animal, half human. They are the levels force and consent, authority and hegemony, violence and civilization..."\textsuperscript{57}

More specifically, he argues that with the occurrence of hegemonic crisis\textsuperscript{58} and the consequent threat to social order, there is resort to violence by those who have greatest influence in the state apparatuses:

This crisis creates situations which are dangerous in the short run...the traditional ruling class which has numerous trained cadres...reabsorbs the control which was slipping from its grasp...it retains power, reinforces it for the time being and uses it to crush its adversary and dispense his leading cadres who cannot be very numerous or highly trained.\textsuperscript{59}

\begin{enumerate}
\item \textsuperscript{56} Q. Hoare & G. Nowell Smith, Selections from Gramsci's Political Writings 1910-1920 (London: Lawrence and Wishart, 1977) at 57-58.
\item \textsuperscript{57} S.P.N., supra, note 30 at 169-70.
\item \textsuperscript{58} Ibid. at 210.
\item \textsuperscript{59} Ibid. at 210-11.
\end{enumerate}
In this way, Gramsci continues, "the old society resists and ensures itself breathing space by physically exterminating the elite of the rival class and terrorizing its mass reserves." Gramsci has, therefore, made it very clear that absolute hegemony is impossible and that when consensus is weak, coercion is always there to "save the day" and preserve current society.

However, there is an ambiguity in his work which he never clarifies. The argument outlined suggests that when hegemony is strong, coercion is weak (or even non-existent), but when hegemony is weak, coercion is strong. It implies that the nature of a particular capitalist society can be identified by its proximity to either of the extremes of the swing of a pendulum. It suggests a zero-sum approach, in which the coercive role only becomes important in situations of crisis. However, elsewhere in his work, he suggests that coercion is in continuous operation:

The apparatus of state coercive power [is one] which legally enforces discipline on those groups who do not "consent" either actively or passively. This apparatus is however constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed.

If this "simultaneous interpretation" of the relationship between coercion and hegemony is his ultimate viewpoint, then it fits with his vivid image of Machiavelli's centaur, in which the state is "both force and consent, authority and hegemony, violence and civilita."

The ambiguity of the nature of the relationship between hegemony and coercion is a major lacuna in Gramsci's theory of the state. It fails to inform us as to whether the liberal democratic state has as a constitutive element this necessity for coercion, or whether it needs only to resort to coercion in cataclysmic situations. It also fails to tell us whether a state which uses little coercion is different in kind from a state which is more prone to use coercion. Poulantzas has provided some answers to these questions.

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60 Ibid. at 185.

61 Ibid. at 12.

In *Fascism and Dictatorship* and *Crisis of the Dictatorships*, Poulantzas characterized fascism and military dictatorships as "exceptional states" in contradistinction to "normal states" because of their disregard for liberal institutions such as suffrage, liberty, and the Rule of Law and also for their tendency to rely on coercion and violence. In his last major work, *State Power and Socialism*, Poulantzas argued that the modern state is a new type of state, "an authoritarian state," which incorporates elements of both the normal state and the "exceptional state."

The implications of his argument are that a normal state is one where hegemony is strong and thus there is little need for coercion, whereas an exceptional state is one in which hegemony is weak and thus there is a greater need for coercion. This is unobjectionable. But the further implication is that the intermediate, authoritarian state is a novel form of the capitalist state, of very recent origins. This implies that the capitalist states of classical liberalism and democratic liberalism up to the 1950s (or perhaps ever later) which have never been fascist or governed by a military dictatorship are normal; that is, coercion has only played a very minor role in their continued existence. It implies that states such as Ireland, Great Britain, United States, Canada *et cetera* have been states in which coercion has played only a minimal role. This is false. Coercion is, and has been, at least as important as the hegemonic processes in achieving cohesion.

The source of Poulantzas' error lies in the structuralist origins of his theory. His original overconcentration on the political region led him to overestimate the capacity for the attainment of hegemony. His later work became increasingly conscious of this. He sought an explanation for the weakening of hegemony and the increased intervention by the state in economic relations. Such intervention, he argued, undermines the state's appearance of neutrality, causing greater dissent and disaffection, thereby

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65 *Supra*, note 16.
necessitating greater coercion to maintain stability. Thus, he explained the emergence of authoritarian statism as being due, in large part, to economic crises besetting the state.

There is undoubtedly much truth in this argument. But what it ignores is that there have been many other reasons, apart from economic factors, why consensus has never been achieved in a capitalist society. This section has argued that the alienation caused by the capitalist relations of production, (contradictory consciousness, the existence of pluriclassite social groups based on ethnicity, religion or gender, the inherent competition of the power bloc, necessitating alliances with subordinate groups, and the granting of democratic institutions), has exacerbated the contradictions and prevented the realization of integral hegemony. In the absence of such integral hegemony, the state must continue by resorting to coercion. Coercion and hegemony function simultaneously to cement liberal democratic societies together. The modern state is not the exceptional state, it is not fascist (as some on the left argue), but neither is it, nor has it ever been, the normal, non-coercive, state. The liberal democratic state is an authoritarian state in which coercion complements hegemony in a dialectical unity.

Within western liberal democratic society, hegemony and coercion are opposing sides of the one coin. The destabilizing factors are so great that coercion is essential in order to preserve the equilibrium. Coercion is not relevant solely in situations of crisis, apocalyptic or otherwise, but is continually present in the day-to-day flux of capitalist social relations. The reason why the liberal democratic state is so efficacious for capitalist interaction and why the capitalist state can manifest such "staying power" is due to its capacity to resist challenge through the fusion of hegemonic processes and coercion.

With this interpretation of the capitalist state, it is now possible to progress to an analysis of the nature and function of law in modern society. As we shall see, law is the apotheosis of Liberalism’s dialectical unity.
III. LAW

A. An Interactional Theory of Law

... and so the essence of legislation does not lie in Subject or Object, in rights, or in the idea of the domination of the collective will of the people ... but it lies in the fact that the people who wield organized violence have power to compel others to obey them ... so that the exact and irrefutable definition of legislation intelligible to all, is that: Laws are rules made by people who govern by means of organized violence, for non-compliance with which the non-complier is subjected to blows, to loss of liberty, or even to being murdered. This definition furnishes the reply to the question: What is it that renders it possible for people to make rules? The same thing that makes it possible to establish laws, as enforces obedience to them, namely, organized violence.

Leo Tolstoy

The foregoing analysis of the nature of the contemporary state is clearly very abstract with little discussion of the concrete relations involved. The ensuing discussion of law builds upon and adds flesh to this theoretical skeleton. Law, insofar as it plays a crucial role in the interaction of people, is to be studied not for its own sake but to further our knowledge of current society. Any other approach is simply fetishistic. Neither legal liberalism nor traditional radicalism sufficiently explains the multi-dimensionality of law in contemporary society. The former because it is idealistic and dishonest, and the latter because it is excessively deterministic, reductionist and unsophisticated.

To understand the nature and functions of law in contemporary society, we must approach it in the same way that we approach the state, recognizing that law is a complex set of social relations. Like society, the economy, state and ideology, law cannot be treated as a static monolith. Law is not a thing; it too is relational, part of the ensemble of social relations. It is a peculiar and particular response to human and social interaction; one that captures both the centrifugal and centripetal dynamics, the richness and the poverty, the simplicity and the complexity, the correlations and the contradictions of human interaction. Law is not merely reactive. As a powerful form of (ir)rationality in contemporary society law is an active agency, one which provides frameworks,

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guidelines and direction for the structuring of human and social relations. It is constitutive as much as it is reactive.68

A number of examples, drawn from the work of others, provide support for this argument. Let us begin with Britain. The Factory Act 1844 provides a useful illustration of the interactional theory of law. This piece of legislation can be best understood as a representative of several operative social forces at work in nineteenth century English society; it was the result of the fusion of contradictory processes and interests. The legislation came about for two main reasons. First, the working class played a crucial role in the achievement of the Factory Act through the activism of the Chartist movement, and in particular its demands that the excesses of child labour and overly long working hours be reduced. Second, there were serious conflicts between the various bourgeois factions. For example, manufacturers who had conformed with earlier laws on the same subject sought protection from competitors who were avoiding the constraints on child labour. Further, other manufacturers were seeking an alliance with the working classes in order to force a repeal of the Corn laws. Finally, landlords favoured increased wages because rent levels had become so low due to the progressive impoverishment of the working classes.69 The laws were a legal response to an ad hoc social problem and not merely the concretization of bourgeois economic desires, such as the need for a healthy work force. Neither were they a palliative designed to quell social discontent (as instrumentalists would argue); nor were they based upon considerations of justice, rights, or legal rationalism (the deontological liberal viewpoint). In brief, several factors coalesced into a movement to achieve a particular piece of legislation, whose purpose was to serve the divergent ends of disparate social groups and factions. Once enacted, however, these laws began, over time, to fulfill functions not foreseen in the

68 The term "constitutive" is simply another way of expressing my interactional theory of law. The idea first emerges in Klare's excellent article, "Law-making as Praxis" (1979) 40 Telos 123 at 128; and later in Tushnet's "Marxism as Metaphor" (1983) 68 Cornell L.R. 281 at 285-87. For a favourable response, see Alan Hunt, "The Theory of Critical Legal Studies" (1985) Oxford J. Leg. Stud. at 37-43, where he pithily comments, "law both constitutes and is constituted." Ibid. at 38.

circumstances of their creation: they contributed to the development of the capitalist mode of production in so far as they provided for the preservation of a healthy labour force, and helped the demise of antiquated manufacturing industries which could only survive in conditions of very cheap labour. With the benefit of hindsight we can now realize that the acts were both reactive and proactive.

Similarly, in Britain during the Great Depression of the 1930s, there was widespread social discontent and demands for government intervention. The logic of capitalism was to allow capital to locate wherever it wished, but political realism, in response to the threat to the established political and economic order, overruled the logic of capital and the *Special Area Acts* were passed in an attempt to create industry in depressed areas. To explain this, law must be analyzed as a response to conflict of social groups. These *Acts* were forced upon the ruling class by both the reality and threat of widespread disorder. They cannot be passed off as an ideological confidence trick because they did provide real benefits which eased the hardships of a difficult era. Proactively, they aided the preservation of capitalist social relations by defusing a crisis of confidence, and further, provided the tentative origins of a new social structure, the interventionist welfare state.70

Similar conclusions emerge from an analysis of various aspects of American law. Freedom of speech is eulogized by American jurisprudence, and Americans in general, as a fundamental right enshrined in the Constitution. Indeed, ethical liberalism counts freedom of speech as a crucial aspect of a rational life plan.71 However, an analysis of the history of this right demonstrates its historical contingency, inefficacy and ideological power. Its historical contingency is clear:


the primary periods of stringent enforcement and enlargement of speech rights by the courts in the 1930s corresponded to the periods in which popular movements demanded such expansion.\footnote{David Kairys, "Freedom of Speech" in \textit{The Politics of Law: A Progressive Critique} (New York: Pantheon Books, 1982) 140 at 141.}

The judges of the early and middle twentieth century America were reluctant to provide freedom of speech rights. Rather, their decisions to confer such rights were a legal response to very powerful labour activity which had demanded such rights and had gone so far as to threaten widespread disorder and challenge if their claims were not met. The inefficacy of the right is demonstrated by its absence with regard to communists and other dissident groups such as the Black Panther movement. Finally, its ideological power is evident in that once the right was conceded, many popular grievances receded, dissent was undercut and popular support for radicals ceased. The invocation of the rhetoric of freedom of speech tends to develop a sanctity so powerful that it ignores the inequalities of current social relations which, in effect, means that only very few have a freedom of speech right which is \textit{effective}. In America freedom of speech is a formal legal reality but one which only a few can effectively utilize. Access to the right arose out of popular demands but it induces social consciousness into a false sense of freedom.

Karl Klare's analysis of the Supreme Court's interpretation of the \textit{Wagner Act}\footnote{"Judicial Deradicalization of the \textit{Wagner Act}, and the Origins of Modern Legal Consciousness," (1978) 62 Minn. L. Rev. 265; see also R.A. Cloward & F.F. Piven, \textit{Poor People's Movements} (New York: Pantheon Books, 1977) at c. 3.} provides further support for the analysis of law as a constitutive human process. This \textit{Act} was forced upon the legislature by the very powerful activities of labour in the 1930s. The Act had massive radical potential in that many of its provisions could be interpreted in such a way as to strengthen the position of labour vis-a-vis the employers. The \textit{Act} was a response to social conflict, a victory for labour. Yet this short-term victory proved to be a long-term defeat, with the intervention of a third social force, the judges of the American Supreme Court. They interpreted the \textit{Act} in such a limited manner that they deradicalized it completely, turned it upside down (or for them, right side up) and used it as a
means of integrating collective labour into the American social order. The result was the cooption of labour leaders and the institutionalization of collective bargaining.

Interactionalism also provides us with a fruitful interpretation of the Canadian Constitution Act 1982 and the Canadian Charter of Rights and Freedoms.\textsuperscript{74} The motivating force behind this initiative was the unilateral action by Trudeau and the federal bureaucracy to further reinforce their conception of the Canadian identity. However, with provincial intervention the issue became the locus of power in Canadian society. What ensued was a sordid bartering and bargaining by the various social and political elites.\textsuperscript{75} This ended in stalemate. With the intervention of the Supreme Court of Canada, and its "bold statecraft based on questionable jurisprudence,"\textsuperscript{76} the disputants returned to the bargaining table and the result was a cabalistic compromise (at the expense of Quebec). This was followed by popular intervention by women's groups, the native peoples and the handicapped. Noticeably there was no movement to obtain substantive economic rights.\textsuperscript{77} Further we can ask where is the Charter and the Constitution going? For example, does it only apply to the public realm or does it extend to the private realm? Clear statements have been made by the Department of Justice stating that was only intended to apply to the public realm but recently arguments have been made that might also apply to the private realm.\textsuperscript{78} Similarly the Charter itself has now


\textsuperscript{75} Martin, supra, note 9.

\textsuperscript{76} Peter Russell, "Bold Statecraft based on Questionable Jurisprudence" in Russell et al., The Court and the Constitution (Kingston: Centre for Intergovernmental Relations, 1982) at 1.

\textsuperscript{77} Panitch & Schwartz, From Consent to Coercion (Toronto: Garamond Press, 1985) at 12.

become a socio-political battle ground in cases like *Operation Dismantle Inc. v. The Queen*[^79] and *Lavigne v. O.P.S.E.U.*[^80]

The thesis that I am presenting demands that we look at the prehistory of every piece of law; that we locate law in its social, political, economic, moral and gendered contexts; that we look closely at how it has been interpreted, applied, and developed; and that we critically analyze its ultimate effect. We have to recognize that it is we who make our own history and that law is both an effect of, and contributor to, social relations. Law is a material condensation of social relations in so far as it is an aspect of human interaction where competing interpretations, attitudes, and visions fuse, conflict, merge, coalesce and mutually modify each other and then reemerge as either rules or in the guise of legal personnel (for example, a judge, police officer or arbitrator) or through an institution such as the courts. Law is one arena in which people choose (or perhaps more commonly are forced to choose) to attempt to fulfill their nature as social beings.

This is not, however, a pluralist analysis of law which portrays law as a neutral arena which absorbs and digests all relative viewpoints, evaluating them objectively and spitting out a decision or announcing a role which its functionaries are to fulfill. Such an approach incorporates a reified view of law. The relationships involved are much more internal than this pluralist vision. The people interacting are sentient people who are in different social positions; some rich, some poor, some black, some white, some female, some male, some religious, some areligious, some educated, some uneducated, *et cetera*. These people express their interpretations, their desires, their fears and their visions through the law. Law itself must therefore be studied in terms of classes and class factions, political parties and political cliques, bureaucrats, pluriclassite and cultural movements and all their corresponding ideologies. Law is created by the interaction of all these social forces, and in turn helps create the way in which these social forces interact. Law is both created and creator. It is only by adopting

this interactional approach that we can sufficiently comprehend the contradictory reality of law. As Edward Thompson argues,

I found that law did not keep politely to a level but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced cotillion with religion, moralizing over the theatre at Tyburn; it was an arm of politics, politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and ruled; above all it afforded an arena for class struggle, within which alternative notions of law were fought out.  

The values inherent in law cannot be viewed as transcendental, rising above factional partisanship. On the contrary, law becomes another aspect of social relations where partisanship expresses itself; law is not distinct from politics but integral to politics. Law is incorrigibly subjective. Indeed, the manipulation of legality is one of the most important techniques employed by the capitalist state in its strategy of absorbing incipient conflict and eradicating dissent in such a way as to preserve the status quo. Law and politics are continually fused in law’s ideological, facilitative and violent roles. Within current social relations, law functions so as to contribute to the creation of hegemony and simultaneously attempts to monopolize the use of violence against dissent.

B. Consequences of Interactionalism

Human kind cannot bear very much reality.

T.S. Eliot

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81 Supra, note 28 at 288.


83 Maureen Cain, "Gramsci, The State and The Place of Law" in Sugarman, supra, note 70 at 95; and Mathieson, supra, note 33.

84 T.S. Eliot, Murder in the Cathedral (London: Faber and Faber, 1976) at 75.
If we accept the interactional theory of law, then several consequences automatically follow. First, the interactional theory of law argues that law does not derive from principles such as justice or rights but rather is a legal response to human interaction, whether that be consensual or conflictual. Law must be analyzed in terms of human relations, where people tend to structure their relationships in accordance with certain rules and institutions. However, these rules and institutions must not be perceived as having some transcendental quality which takes them above and beyond the relationships that create them. These rules do not have some immutable essence but rather are human creations developed out of situations of either consensus or conflict. The rules may continue after the demise of their creators and thereby delineate the life plans (styles) of other people, but that does not give them any sanctity. This realization can have an important therapeutic value.85

Once we recognize that rules have been created by people with particular interests, it encourages (and begins to empower) us to change those rules in accordance with our own particular interests. Legal rules are an expression of individuals' subjective interests not objective, rational standards by which to evaluate society. Legal rules are the creation of social beings, and the liberal ideal of the Rule of Law must therefore be rendered vulnerable to critical appraisal.

The same can be said of legal institutions. They are the creations of people who claim, or are attributed with, a legal title: a judge, a lawyer, or a police officer. The institutions are a composition of human beings who have an irrepressible social context and thus have individual backgrounds, attitudes, values and aspirations. In short, these institutions are peopled by human beings who have inevitably subjective values. Contingency, indeterminacy, relativism, and subjectivity are the manifestly unstable foundations of legal rules and legal institutions.

Second, it was argued earlier that because the state must be analyzed in terms of social relations its nature necessarily changes with distinct historical phases and, therefore, there can be no

85 For an interesting attempt to relate psycho-analytic therapy to cognitive and political emancipation, see Jurgen Habermas, Knowledge and Human Interests (Boston: Beacon Press, 1971) at Part III.
general theory of the state. An interactional theory of law reaches the same conclusion. The nature and functions of law change with the various historic-political conjunctures and the nature of social relations. If we accept that there can be no general theory of law, then our investigations must focus upon law’s specific place and function within the complex totality of social relations. A modern analysis must therefore attempt to discover how law contributes to the continued existence of modern capitalist social relations.

However, before returning to these questions, we must deal with the third consequence of the interactional theory, that is, the relationship between law, economics and politics. Put briefly they are relatively autonomous.

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86 This may appear to be a rather banal observation but it is one that appears to be unrecognized by both the traditional left and certain modern liberals. For example, Pashukanis offered a general theory of law which portrayed all law as bourgeois law which would ultimately wither away with the emergence of the dictatorship of the proletariat. *The General Theory of Law and Marxism* (1924) in Beirne & Sharlet, eds, *Pashukanis: Selected Writings* (Toronto: Academic Press, 1980). More recently, the Marxist Leninist jurist J.S. Jawitsch has once again offered us a *General Theory of Law* (Moscow: Progress Publications, 1981). Within the liberal camp we find deontological idealism which, in effect, offers general theories of law based upon transcendental, neo-Kantian imperatives of justice presumed to be valid for all persons at all times. See for example, Rawls, *supra*, note 71.


87 Relative autonomy is, without doubt, one of the most popular phrases in modern radical theory. Indeed it has become dangerously "trendy." The term can be traced as far back as Engels, but its most modern adaption has been in the work of French structuralism and, in particular, Louis Althusser. For structuralism relative autonomy is the way in which various "regions" (to use Poulantzas' phrase) interrelate. As such it is used as the connecting link between the "external blocks" of social forces. Each block interacts with the other block and they modify each other. They do not determine but rather are of mutual (though not necessarily co-equal) influence. The image created is that of a mathematical matrix. Structuralism has been justly criticized for its coldness, externalism and negation of purposive human action. However, I do find the term "relative autonomy" particularly felicitous since it does capture the essence of relationships which are interactional and mutually complementary. Therefore I propose to use the term in the sense slightly different from that of the structuralists and adopt the view that the various economic, political and legal aspects
The crude materialism (or economism) of traditional Marxism is rejected in so far as it argues that economic relations determine all other relations. Such determinism fails to comprehend the complexity of human relations. The relationship between law and economics, the legal and economic aspects of human relations, is best perceived in terms of the economic providing the basic trajectory of social relations within which the legal aspects take place. Put differently, legal relations function, generally, within the parameters set by economic relations. Within these limits law can fulfill a number of roles: provision of consumer protection, minimum wage and even welfare legislation. But as a rule, law must not challenge the essentials of the economic conditions of post–industrial society. Thus, law can have an important effect upon how capitalist social relations continue, but cannot challenge the fundamentals of economic relationships.

A specific example might help. Thomas Mathieson argues that during the development of oil drilling in the Ekofisk area of the North Sea, when the economic imperative was at its height in response to the world oil crises between 1966–1975, worker protection legislation was absent. Legal protection of workers against accident and health hazards, which might affect efficiency and the costs of research, only developed after economic necessities had been fulfilled, and the economy had been secured. This is not an isolated incident, in so far as Mathieson argues for the "precedence of materiality" throughout his second chapter and provides numerous other examples in the areas of penal law, financial law, children's protection law, forest protection law,

of social interaction all develop on their own dynamic but are integrally related each with the other. Thus, one's legal activities are affected by one's political activities which are affected by one's economic activities, and vice-versa. See also Paul Hirst, On Law and Ideology (London: MacMillan, 1979).


89 Supra, note 33 at c. 2. See also W. Carson, The Other Price Of Britain's Oil (London: Martin-Robinson, 1981).
working environment law, and company law.\(^90\) Furthermore, law has come to play an increasingly important role in the preservation of capitalist social relations, as society moves further into the era of late capitalism.\(^91\) Of particular relevance here is the regulatory role of law. Law can develop its own dynamic, protect rights, advance social reform and even curb excessive exploitation and abuse, so long as it does not challenge the fundamentals of capitalist economic relations. The degree of autonomy will depend upon the particulars of the situation.\(^92\)

Legal relations are also relatively autonomous from political relations. Contrary to the instrumentalist view, the political aspects do not dictate to the legal aspects of human interaction how they should develop; the political does not determine the legal. Each of these aspects develops out of the interaction, conflict, compromise and mutual adaptation of a variety of classes, social groups and sub-groups on a variety of issues. An institution or a rule exists as it does at a certain moment because of the relative strengths and weaknesses of the various competing social groups. Thus, the state and political relations may reflect the overall interests of one class or class faction (limited of course by other groups) while law and legal relations may reflect the overall interests of a different class or class faction (again limited by other groups). Law and state are two separate, though interconnected, regions where social conflict is fought out. Thus, one need not necessarily be exactly the same as the other. Indeed there may be even be trade offs between power in one arena for power in the other. Therefore "the legal" can be autonomous from "the political."

Legal autonomy derives from several sources. In part, it is a manifestation of the nature of the legal profession itself which claims to hold itself above political, economic or social calculation. Secondly, the profession attempts to resolve problems within the

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\(^{90}\) Ibid.


\(^{92}\) This regulatory role of law being a fairly new phenomenon also reinforces my previous argument with regards to the relativity and historical contingency of law.
limitations of its academic and professional constraints. Thus, in order to reach a decision, lawyers and judges rely on consistency, ratio decidendi, et cetera, in order that the decision "fit" within the relevant legal tradition. The autonomy also derives in part from the fact that lawyers have their own professional material interests at stake. They are part of the social conflict oriented towards the attainment of material goods. For example, recently there has been a conflict between the British legal profession and the Thatcher Administration in which the latter successfully terminated the former's monopoly on conveyancing. This material aspect (or jobs for the boys) has also been suggested by Dickson when he argues that the Marijuana Tax Act 1937 was pushed through in order to provide work for a branch of the legal profession (used in a wide sense); that is, the Narcotics Bureau, who were in danger of being made redundant. Similarly, the wave of collective paranoia about terrorism currently sweeping through most western states is providing a lucrative source of employment for the security services, both public and private.

Sometimes legal autonomy can become so strong that it can effectively block "essential" political action. An excellent example of this is the United States Supreme Court's resistance to the New Deal legislation in the 1930s. In view of the major social discontent kindled by the Depression, and the resultant sharp drops in income, production and employment, the Federal Government legislated for massive policies of social reform and assistance. This meant state intervention into traditionally "private" economic relations. The Federal Government claimed its capacity to do this in accordance with the "Commerce Clause" of the American Constitution. Several acts were passed by Congress and all were struck down by the Supreme Court on the basis that it was federal interference in

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93 For example, Karl Llewellyn in The Common Law Tradition (Boston: Little Brown, 1960) identifies some of the steadying factors operating upon judicial decision-making at the appellate court level: the common training and experience of the judges; their adherence to techniques of argument and legal analysis; the policy of group decision making; the use of collective judicial values; and their mutual expectations. See also Ronald Dworkin, supra, note 11 for an extended spirited, but ultimately futile, defence of legal autonomy.

spheres assigned to states by the Constitution. Political necessity required this reformist legislation, but narrow judicial legislation prohibited it. It does not matter whether the reason for this judicial intransigence was the stated desire to maintain legal precedent or whether it reflected the personal convictions of the judiciary that state interventionism was unacceptable policy. The point is that legal decisions effectively halted political policy essential to the continuance of capitalist social relations. The judges only complied when Roosevelt threatened to "pack" the court.

This example also demonstrates that legal autonomy is not absolute, but only relative. Ultimately, legal relations were brought into line with political and economic necessity. But the "relativity" goes deeper. As I have argued, the law is people in action; people who have their own values, opinions, desires and visions as to how society ought to develop. Legal personnel cannot act any more objectively than their peers; they also incorporate their own "political tilts" into their legal roles. In this way legal relations are influenced by the competing political aspirations of various social groups. Therefore the political is also inherent in the legal. A different social group may dominate legal relations than that which dominates political relations and this can lead to a conflict. However, it is not surprising to find that, generally, the political and legal aspects are in harmony in our current set of social relations, indeed, perhaps in "teeth gritting" harmony. The explanation is not difficult to find: often the people with the greatest influence in both

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97 An interesting example of legal actors manifesting their autonomy from the political elite in the Canadian context occurred during the prosecution of communists under s. 98 of the Criminal Code. At a pretrial stage, Rose J. discovered a flaw in the construction of the clause – there was an "and" where there should have been an "or" – and indicated that the evidence might not disclose a cause of action. Once again, however, the autonomy was short-lived for when the case came to trial, it was presided over by Wright J., who disregarded the significance of such interpretive niceties. See R.A. Adams, "The 1931 Arrest and Trial of the Leaders of the C.P.C." Fredericton, N.B., 1977.
these arenas are from similar backgrounds and have similar attitudes towards how society should develop. They share a common ideology. This in itself provides an explanation of the appropriateness of developing the concept of "juridico-political," since in the current politico-historical conjuncture there are very close connections between juridical and political relations.

With such an interpretation of relative autonomy it is impossible to provide a general answer to the question: "How autonomous is the law?" The answer will only become apparent on a specific analysis of every act passed, every decision reached, every rule enforced (or waived) and every conflict "resolved." Tushnet observes,

Thus we have to conceive of the legal order as relatively autonomous, responsive directly to social and economic needs at some times with respect to some matters, responsive indirectly at other times on other matters, and not responsive at all in still other instances.

C. The Functions of Law

We'll put a few union leaders in jail for three years and others will get the message. P.E. Trudeau

98 See J. E. Hodgetts who argues in his study of the pre-Confederation Canadian bureaucracy that the leading state personnel were mostly lawyers by profession. See Pioneer Public Service (Toronto: University of Toronto Press, 1955) at 67. Things have not changed all that much in over a century! However, lawyers may now be in the process of being displaced by the emergence of a new technological and commercial elite. See, for example, the composition of the Bourassa administration in Quebec. S. Brooks & A. Gagnon, Social Scientists and Politics in Canada (Kingston: McGill-Queen's Press, 1988) c. 3.

99 Poulantzas, supra, note 8 at 45.

100 Cotterrell, supra, note 32 at 123, 141-45; and Hunt, supra, note 68 at 28-32 demand such an answer.

101 One attempt to do this is Edelman's Ownership of the Image in relation to photography and censorship law in France, supra, note 18. My ensuing discussion of violence is another.

102 "Perspectives on the Development of American Law" (1977) Wisc. L. Rev. 81 at 84. It is not surprising that exactly the same questions were raised and answered in the Miliband-Poulantzas debate. See "Poulantzas and the Capitalist State" [1973] New Left Rev. 82 and S.P.S., supra, note 16 at 72.

103 Cited in Panitch & Schwartz, supra, note 77 at 34.
1989] Law's Centaur 255

On the basis of this interactional theory of law it is now possible to analyze some of the various functions which law fulfills within the current politico-historical conjuncture. Mark Tushnet and Karl Klare, drawing on the work of Gramsci and Althusser, have provided a useful methodology in suggesting that law can be analyzed in terms of its fulfillment of three functions: the facilitation of capitalist economic relations; the creation of a dominant ideology; and the repression of dissent. Despite some weaknesses in their respective works, the Tushnet/Klare approach is of great heuristic value and thus provides a basic framework of analysis for the remainder of this paper.

104 To discuss the functions of law is not necessarily to commit ourselves to Parsonian functionalism which gives precedence to "the system" while ignoring "the untidy data of history and the complexities of human motivation." Cotterrell, supra, note 32 at 98; see also Alan Hunt, "The Ideology of Law" (1985) 19 Law & Soc'y Rev. 101. More specifically, my preceding discussion of the alienation and contradictory consciousness of contemporary society and my ensuing analysis of violence clearly demonstrate that functionalism is incompatible with my thesis. I intend to use function in the widest sense possible - descriptively. This footnote is for Leo Panitch.

105 Tushnet, supra, note 102; and Klare, supra, note 68. See also Panitch, supra, note 13 at 8-9; and James O'Connor, The Fiscal Crisis of the State (New York: St. Martin's Press, 1973) and who suggests three functions of the state more generally: accumulation, legitimation and coercion.

106 It must be emphasized at the outset that this approach of separating into categories is artificial in that all law (social interaction) can be all of these at once ... and more! Tushnet is aware of this to some extent when he argues that the ideological function permeates all the others, but this is only a half/third truth. All law simultaneously fulfills all three roles; to emphasize one is to run the risk of under-emphasizing the others. See for example Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 Pol. Sci. Q. 476 which argues that facilitative law is highly coercive. There is a tendency within modern Anglo-American critical legal theory (of which Tushnet's work is only an example) to emphasize the ideological role of law in contradistinction to the Marxist-Leninist emphasis on the repressive aspect of law. This is a move in the right direction, but comes perilously close to going too far in that it often ignores both the extent of legal violence and, more importantly, the close connection between legal ideology and legal violence. Another problem with Tushnet's work is that although he emphasizes the ideological role of law, he neither offers an interpretation of what ideology is nor does he relate the concepts of ideology and hegemony. Perhaps most importantly, there is no attempt on the part of either Tushnet or Klare to relate the various functions which law fulfills to each other. This is a crucial aspect of my own argument. My criticisms of the Klare/Tushnet analysis are not negative; rather they are intended to be positive in that I believe that they have moved in the right (left) direction but have not gone far enough.
1. The Ideological Role Of Law\textsuperscript{107}

It will be necessary for the military to kill some of the mob before the trouble can be stayed. They have killed only six as yet. This is hardly enough to make an impression.

Judge Howard William Taft\textsuperscript{108}

Law, in its ideological role, contributes to the attempt to achieve hegemony. Law attempts to affect people's lives in such a way that they spontaneously consent to the current state of affairs. Earlier the concept of ideology as false consciousness (that is, instrumentalist theory applied to ideas) was rejected in favour of ideology as lived relations, an analysis that presents ideology as fulfilling a cohesive function, something which provides direction as to how people are to interact with each other. The ensuing discussion of the ideological role of law is informed by, and reinforces, such a conception of ideology.

Law in modern society fulfills what may be called a "directive" function in that it educates and adapts much of the population to the goals of civil society. Its function, in this regard, is to achieve an acceptable level of consensus, to create relative stability in order that existing social relations might continue. Law as ideology is formative. The ideological function of law is to generate "spontaneous consent" and "the will to conform,"\textsuperscript{109} those two attitudes which indicate that some class or class faction has attained hegemony. Gramsci explicitly recognized this role in one of his few passing references to law:

This problem contains in a nutshell the entire "juridical" problem, that is, the problem of assimilating the entire grouping into its most advanced fraction; it is the problem of education of the masses, and their "adaption" in accordance with the

\textsuperscript{107} For an early, non-critical discussion of law's ideological function, see Thurman W. Arnold, \textit{The Symbols of Government} (New Haven: Yale University Press, 1935).


\textsuperscript{109} Gramsci, \textit{supra}, note 30 at 195.
Modern law plays a norm creating role which justifies modern social relations. It fulfills this role by the dual movement of mystification and legitimation.\textsuperscript{111}

a) \textit{Mystification}

Ideologies are material practices in that, not only are they created, but they also create social relations. A useful example is employment relations. Law plays a crucial role in eclipsing the exploitation of labourers in so far as the wage contract appears to be the price of labour itself, that is, the price of the labour actually performed. In effect law is doing two things here. First, it obscures the fact that the employer sells the goods at a higher price than the cost of labour plus the cost of materials; in other words, that the employer makes a profit at the labourer's expense. Law therefore misrepresents the fact that the labourer is getting less than the value of her labour. Secondly, the wage contract assumes equality of bargaining power, and thus ignores the dominating nature of the employer/employee relationship, removing these actors from the pertinent economic and political context. "The employment contract appears in law as a consensual contract between equals, rather than what it really is, an expression of the conflicting interests of parties of unequal power."\textsuperscript{112} This legal interpretation of social relations is not false consciousness; rather, it is the "real" relationship which is widely accepted as the norm. The world relates to this accepted interpretation as if it were the inevitable way of dealing with labour relations. No other alternative can or will be contemplated. The legal framework of rules, doctrines, and personnel achieves "a

\textsuperscript{110} Ib.\textsuperscript{d}

\textsuperscript{111} Although I have split my discussion of the efficacy of law as ideology into two phases as if they operate in temporal sequence, I wish to point out that this approach is only to facilitate analysis and that, in effect, the ideological role of law is a \textit{simultaneous} dual movement striving to attain a hegemonic condition.

\textsuperscript{112} Alan Hunt, "Law, State and Class Struggle" (1976) 20 Marxism Today.
comprehensive interpretation and evaluation of social relationships and events" which are in accordance with the preservation of social relations as currently constituted. Take, for example, the case of dismissal from employment. In order to challenge a dismissal, a person must first accept that it is a legitimate right of the owners of capital to determine security of employment. The right can be challenged, often successfully, but only on the basis of accepting it as a right in the first place. This is not simply an abstract idea; it is a way in which people interact with each other, a framework of presuppositions upon which people build their relationships.

Let us stay in the arena of labour relations as this provides a paradigm example of the power of "law as ideology" in glossing over the class nature of current society. Karl Klare's analysis of the Supreme Court's interpretation of the Wagner Act provides another incisive account of the power of legal ideology. The justices' structuring of the Act enabled them to interpret collective bargaining in such a way as to integrate the trade union movement into American social relations, thereby removing their radical potential and, in effect, making them into a junior partner in the process of reproducing capitalist social relations. "In shaping the nation's labour law the Court embraced those aims of the act most consistent with the assumptions of liberal capitalism, and foreclosed those potential paths most threatening to the established order."\(^{113}\) Law, through the institution of the Supreme Court, constructed social relations in such a way that labour lost much of its potential as a radical force. Collective bargaining and limitations on "legitimate" trade union activity effectively meant state administration of the class struggle.

Another example of legal personnel structuring social relations in ways that redefine the basic nature of social interaction is the American Public Defender System. It has been argued that the purpose of this system is to "process" as many people as quickly as possible through the courts in order to make the system operate

\(^{113}\) Beirne & Quinney eds, Marxism and Law, (New York: Wiley, 1982) at 149. In the Canadian context, see Panitch, supra, note 77 at 28-29 and footnotes therein.
as efficiently as possible.\textsuperscript{114} The clients are rarely taken into consideration and the relevant social and economic conditions are ignored. Yet justice is said to prevail because everybody has the benefit of legal representation. The law cultivates a sense of acquiescence in its "victims," in so far as it decontextualizes their crimes and induces them to believe that they have had a "fair deal." The whole approach ignores the class relativity of crime control.\textsuperscript{115} Further, if we look at Packer's two paradigm's of "crime control" and "due process" we get the impression that due process is less authoritarian than crime control.\textsuperscript{116} However, recent research on the effects of the process model suggests that it is even more controlling than the control model!\textsuperscript{117}

These brief examples demonstrate the efficacy of legal ideology in reconstructing social relations. Greater rigor is required, and the remainder of this section is oriented towards explaining just how law can be so efficacious.

Once again the work of Nicolas Poulantzas is particularly enlightening. He argues that, through the "effect of isolation," juridico-political relations have a crucial impact upon social relations because they set up ("interpellate") the members of society as individual juridical subjects, thereby depriving them of both their economic position and class/group membership. There is no doubt in Poulantzas' mind that it is law (legal ideology) which creates such decontextualized relationships:

\[\text{The effect of isolation is the privileged product of juridico-political ideology ... setting up "political" "individual persons," "subjects of law," who are "free" and}\]


\textsuperscript{115} Lefcourt goes on to argue that class conflict is defused and reduced to an administrative process. This is obviously based on the assumption that crime is part of the class struggle. This is a difficult question which goes beyond the scope of this paper. My own argument, however, is narrower than that of Lefcourt in that I do not argue that crime is part of the class struggle but rather that it is a vital arena of potential dissent that is deradicalized by the power of legal ideology. Such an argument does not require a class reductionist perspective.

\textsuperscript{116} \textit{The Limits of the Criminal Sanction} (New York: Oxford University Press, 1968).

"equal" one to the other; this allows the functioning of those juridico-political structures which permit the labour contract ... capitalist private property ... the generalization of exchange, competition, et cetera.... [T]his effect of isolation is the very basis which masks from the agent the real structures of the economic, its dominance in the [capitalist mode of production], class structure, et cetera....

Therefore economic actors do not experience capitalist relations as class relations but as relations of competition amongst the mutually isolated individuals and/or fragmented groups of workers and capitalists. As we shall see in a moment, the ideological role of law does not stop here but simultaneously operates to achieve "a remarkable socialization."119

Poulantzas develops a similar argument with respect to the political aspect of human interaction. Law, through constitutions, legislation, judicial decisions, court procedures, and the various institutions, operates as if it were in a world where every person is perfectly free and perfectly equal. Institutions are established on the basis of the universality of equal individualism, for example, Parliament and the right to vote. Every person is given equal rights and equality before the law. What is ignored, however, is whether these persons can ever have an opportunity to effectively exercise these rights, or the reason why certain people are in court at all. On the political level, since we all have a say in how our society is run, the law has come to play a major role in the shaping of social relations because, by operating on the principle of equal individuality, it simply denies or obfuscates the extent of deprivation, inequality, exploitation and mutual antagonism which is inherent in capitalist social relations.120 Legal ideology has been so effective that it becomes almost impossible to adopt an alternative vision of social relations, so that what we have now appears to be natural, or at least inevitable.

118 P.P.S.C., supra, note 8 at 213-14.
119 Ibid. at 278.
b) *Legitimation*

This is the second aspect of legal ideology's dual movement, the complement to mystification.

Within the Poulantzian analysis the vital counterpart to "the effect of isolation" is the "effect of unification," one cannot be perceived without the other, they are two sides of the one coin. In the earlier discussion of the state as a factor of cohesion it was argued that one of the state's manifest purposes was to maintain the political disorganization of the non-power bloc social groups. The process of "social atomization," as outlined above, explains how this is achieved. But simultaneously this is complemented by the "unifying effect" which, in order to avoid anomie, presents the state as a unity of these estranged monads in the form of the sovereign people/nation. Unification takes root in, and develops out of, a vision of isolation:

The specialization and centralization of the capitalist state, its hierarchical bureaucratic functioning and its elective institutions all involve the atomization of the body-politic into what are called individuals, that is, juridical political persons who are subjects of certain freedoms. The centralized bureaucratinized state installs this atomization, and as a representative state laying claim to national sovereignty and popular will, it represents the unity of a body that is split into formally equivalent monads. The materiality of the state and its apparatuses is here constituted as having to exercise a hold over a divided social body, one which is homogenous in its division, uniform in the isolation of its elements, and continuous in its atomization.\(^{121}\)

Thus, organic, communitarian and constitutive social relations are replaced by politico-ideological artifacts commonly contained within the term "state." The "effect of unification" presents itself as a strictly political (that is, non-economic) public unity of the people/nation considered as an abstract sum of recollectivized, formally free and equal subjects. In other words, the capitalist state sets itself up as a unifying element among the individuals, the foundation which holds society together. It derives its legitimacy from its claim to be a "neutral arbitrator." The capitalist state becomes the people/nation which, through institutions such as representative democracy,

\(^{121}\) *S.P.S.*, *supra*, note 16 at 63.
cements everything together. The state appears to be the neutral subject above and beyond the social conflict:

... in this way the capitalist state constantly appears as a strictly political unity of the economic struggle which is a sign of this isolation. It presents itself as the representative of the "general interest" of competing divergent economic interests which conceal the class character from the agents who experience them.... [It] systematically conceals its political class character at the level of its political institutions ... it presents itself as the incarnation of the popular will of the people nation.122

It is juridical ideology which effects this dual movement; the juridical representation of the state as a source of unity in the midst of isolation is directly related to the isolation for which it is itself responsible. Law has become a major ideological force in capitalist social relations because through law the capitalist state is presented as embodying the general interests of the whole society. For example, the Canadian Charter of Rights and Freedoms trumpets the populist ideal of being "made in Canada, by Canadians, for Canadians" when in fact it was no more than the product of power struggle between various political and economic elites.

In turn, law's own role in society is reinforced because,

the state's unity is found ... in the modern juridical system: the specific normative ensemble made up of legal subjects modelled according to the image of the citizen, presents a systematic unity of the highest degree, in that it regulates the unity of these subjects by means of laws.123

Law itself, in terms of institutions and personnel, has a specific role in the current system of social relations, since it is particularly suited to such formal rational inter-relations.124 Law fulfills the role of creator of cohesion amongst antagonistic social relations, an antagonism for which it is at least partially responsible. Law is eulogized as the great civilizing force in society, without which society could not exist. Law is counterposed to barbarism, violence and terrorism. Not only is this fetishistic and narcissistic, it makes it impossible for us to conceive of a society without law. Thus the

122 P.P.S.C., supra, note 8 at 130.
123 Ibid. at 278.
world is turned upside-down. Law is presented as the creator of society, when the reverse is more accurate; it is people who create law to regulate their own social relations.\textsuperscript{125}

More examples illustrate such a claim. The dominance of juridico-political ideology is so pervasive that even during periods of crisis, when there is widespread dissatisfaction with the current nature of social relations, oppressed groups often challenge authority within the parameters permitted by law. Civil disobedients appeal to concepts such as justice and rights; they limit their actions to "constitutional dissent," non-violent protests, long marches, \textit{et cetera}. They operate within the confines of legitimacy outlined by those who effectively dominate social relations. As civil disobedients, they accept as legitimate the punishments inflicted upon them by the police and judiciary.\textsuperscript{126} They play the game within the rules set by their manifestly stronger opponents. In doing so, they may gain some victories, even real victories, but the rules are tilted in such a way they can never threaten the essentials of contemporary social relations. If the rules do provide a threat, then they will be changed.\textsuperscript{127} In short, such is law's capacity to act as social cement and control social discourse, that most people live their revolt within the bounds of juridico-political ideology.

It is possible to be more specific in analyzing the ways in which law legitimates oppression, discrimination and violence. Douglas Hay\textsuperscript{128} argues that law assumed pre-eminence in the course of the eighteenth century, replacing religion as the dominant ideology, and contributing to the hegemony of the bourgeoisie.

\textsuperscript{125} Chief Justice Dickson has recently provided us with a classic example of reification and reiteration of the old shibboleths in "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association, Dalhousie University, August 1985).

\textsuperscript{126} Rex Martin, "Civil Disobedience" (1970) 80 Ethics 123.

\textsuperscript{127} For example, see the response of the British government when constituents of Fermanagh-South Tyrone chose the hunger striker Bobby Sands as their Member of Parliament. Between his election and his death three weeks later the rules with regard to the eligibility to be an M.P. were changed as to prevent other "convicted terrorists" from representing the electorate.

\textsuperscript{128} "Property, Authority and the Criminal Law" in D. Hay, ed., \textit{Albions Fatal Tree} (New York: Pantheon Books, 1975) at 3.
Through a subtle mixture of justice, majesty and mercy, law carried out a crucial ideological role by "encouraging" a respect for property owners. The majesty of law addressed the public by providing both moral leadership and guidelines as to how people ought to behave. This is an excellent example of "direction," a crucial link in the attainment of hegemony. The appeal to justice was not quite so successful, but the attempt was made so that not only was it sometimes done, but it was also seen to be done. The example which Hay provides is the "carnival" execution of Lord Ferrers in an attempt to bolster the people's belief in the impartiality of law. Finally, mercy proved to be a powerful device in the gaining of popular loyalty since it encouraged deference, obedience and gratitude on the part of the masses and thus reinforced the "bond of obligation." Thus, for Hay, law is not only an instrument of authority, but also a "breeder of values," playing a crucial role in organizing the social fabric.

A further example of how law influences social attitudes and takes on the role of moral guidance can be found in an analysis of the effects of the United States Supreme Court's decisions on discrimination against Blacks. David Freeman argues that,

as surely as the law has outlawed racial discrimination, it has affirmed that black Americans can be without jobs, have their children in all black poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of anti-discrimination law.\textsuperscript{129}

The law, through the institution of the Supreme Court, provides an evolving statement of acceptable public morality. Supreme Court decisions do prohibit certain activities that are discriminatory, but what they do not prohibit becomes, in the popular perception, not just legal, but morally, acceptable. Law is outlining acceptable levels of discrimination and, as such, it tacitly legitimates such oppression. "The law is a denial of our collective experience of illegitimacy ... the function of law is legitimation."\textsuperscript{130} The law often pacifies any sense (contradictory consciousness) we might have that current social


relations are not quite as acceptable as the law (and other ideological forces)\textsuperscript{131} would have us believe.

The close connection, indeed identification, of legality and legitimacy is particularly relevant in the sphere of criminal law. Criminal law not only decontextualizes, it also dehumanizes; criminal labels lead to a rejection and reification of persons, insidiously undermining our solidarity and common humanity so that punishment is generally perceived as legitimate. This is a point I shall return to later. All I wish to suggest here is that the violent aspects of law, such as arrest, interrogation and imprisonment, are closely connected with ideology and legitimacy.

To conclude, it is clear that law as ideology is a crucial method by which the hegemonic condition is sought; legal ideology is a leading factor of cohesion in the present politico-historical conjuncture. However, it is important to avoid over-emphasizing the role of ideology; it is only one of at least three functions which modern law fulfills. This is a danger to which E. P. Thompson may have succumbed. He argues, correctly in my opinion, that in order to attain legitimacy, the promises which law makes must themselves be (partially) fulfilled. Ideology is not falsehood; rather it is an attainer of social support and consensus, and as such it must live up to its promises. However, Thompson goes on to argue that,

\begin{quote}
the rulers are inhibited by their own rules of law against the exercise of direct unmediated force (arbitrary imprisonment, employment of troops against a crowd, torture...).\textsuperscript{132}
\end{quote}

His argument is in danger of ignoring \textit{realpolitik}. Ideology is mediated by the other functions of law (facilitative and repressive) and the law must always be, first and foremost, oriented toward the

\textsuperscript{131} This is an important point. This paper concentrates on law as performing a crucial ideological role within current social relations. But it is not the only ideologue. Of particular importance are education and the media which, in many ways, may be more influential than law in creating a popular \textit{weltanschauung}. There also vital links between these various ideological forces: for example, the image of law and legal personnel presented in the media (see Stuart Hall, \textit{Policing the Crisis} (New York: Holmes and Meier, 1978)); and the respect for law and order which is inculcated through the educational process. It is also suggested that a strong argument could be made that law is rapidly losing its position of ideological pre-eminence to technocratic terms which are considered even less personal/subjective than law, and more compelling in a post-industrialist society.

\textsuperscript{132} \textit{Supra}, note 28 at 265.
maintenance of social order. The ideological restraints and limitations on the abuse of power are contingent upon the level of cohesion within society and, as such, have never provided an effective barrier against legal violence.

2. The Facilitative Role of Law

A second manner in which law contributes in a vital way to the maintenance and continuation of capitalist social relations can be characterized as facilitative. In one sense, all law which fulfills a cohesive function can be said to be facilitative, in that by smoothing out contradictions it makes the continuation of modern society easier. Facilitative, in the sense used here, is narrower because it deals with those aspects of legal relations which relate more directly to the economic side of human interactions. For example, facilitative laws are those such as property law, company law, trusts, etc.\textsuperscript{133}

The discussion of this function of law will be brief since, although it is voluminous and accounts for the vast majority of legal activity (and thus provides employment for lawyers and judges), its relevance to this article can be dealt with quickly. The facilitative role of law, like the ideological role, is oriented towards the attainment of a hegemonic condition. It can be characterized as:

A set of rules which organizes capitalist exchange and provides a real framework of cohesion in which commercial encounters can take place.\textsuperscript{134}

Law in this sense is fulfilling the role which Gramsci describes as "organizer," it keeps things moving. As such, within the ruling power bloc and the various alliances, law irons out conflict in the best interests of the bloc as a whole. Although this may mean that

\textsuperscript{133} It is crucial to bear in mind, however, that the categorization is somewhat arbitrary, and that it is possible to consider this facilitative function as a subfunction of the ideological role of law, if ideology is taken to express itself in material forms through social relations, as I have argued. The reason for dealing with facilitative law as a distinct category is that its origins lie in, and have greatest impact upon, relations between various factions of the bourgeoisie. Essentially, facilitative law is intraclass although, due to the pervasiveness of law, it also has important effects on interclass relations.

\textsuperscript{134} P.P.S.C., supra, note 16 at 53.
certain individuals or factions may suffer disadvantage, in the long run it maintains the unity of the dominant social groups.\textsuperscript{135} Law prevents the inherent conflicts between the different bourgeois factions from becoming so great that the parties competing for what might be called the "hegemonic woolsack" threaten the relative stability of the social whole.

Property law provides a useful example of facilitative law. Not only is it based upon the inequality of modern society, it also reinforces that inequality in so far as it allows the owners of property to use their property as capital. The complex of legal rules relating to mortgages, leases, trusts, \textit{et cetera}, all function to enable the property to be used as capital. Company law and commercial law exist solely to give effect to the mechanisms and needs of the market, as modified by state intervention.

Contract law requires more extended analysis. Contract law was an integral part of, and is essential to, the (continued) development of the capitalist social formation, because business persons require(d) a predictable form of social interaction on which to create profits.\textsuperscript{136} To regulate human interaction through contractual agreement appears to be both natural, and more importantly, efficacious. Contract law is a human creation, which provides a framework for the massive and complex interrelations of modern society. Although its origins lie in bourgeois interaction, its utility has been so great that it has spread from intraclass relations to interclass relations. It is accurate to claim that modern society would not exist, at least as we now know it, without contract law. Such an argument also reinforces the close relationships between facilitative and ideological roles of law. Contract law fulfills a vital ideological role in that it portrays (interpellates) all the participants

\textsuperscript{135} This also points to the close connection between the facilitative role of law and its repressive role. The sanctions of law are essential to the facilitative role in that maverick bourgeoisie, or even traditional bourgeoisie, can be brought into line. The sanctions are required to curb the maverick who may take too many risks which threaten social stability and to bring the traditional into line with contemporary economic imperatives.

\textsuperscript{136} This is not a deterministic interpretation, since my suggestion is that the regulation of economic interaction through legal relations is an example of humankind making its own history.
as "free and equal" actors while simultaneously ignoring the oppressive and inherently unequal nature of the market.

Although facilitative law plays an essential role in stabilizing the inherent disequilibrium of a power bloc's interrelations, it simultaneously runs the risk of exacerbating social antagonisms. When the legal aspects of human inter-relations are applied to economic problems, then those legal relations will be operating to the advantage of a particular class or class fraction, which risks the legitimacy of law in the eyes of those who are disadvantaged. As Western societies have moved further into late capitalism, which requires greater intervention of state apparatuses into all aspects of social life, the neutrality which law has claimed for itself becomes increasingly fragile. When legal methods of regulating social interaction are adopted to regulate economic relations, the contingency of law becomes obvious. Facilitative law, in attempting to fulfil its cohesive function, risks the legitimizing aspects of law and so also takes on a destabilizing role. Social consensus is shaken, and hegemony becomes that much more elusive. Poulantzas has argued that the increased economic role of the state apparatuses has created a crisis for the state (a crisis of legitimacy); that it has entailed a change in the very nature of the state, from "normal" to "authoritarian statism." He may overstate his case, but the basic thrust of his argument is undoubtedly correct: that the ideological and facilitative roles are inadequate to achieve complete hegemony for the dominant social faction. The contradictions are too great. The need to reproduce exploitation, domination and oppression always leads to dissent, and law is one of the crucial arenas through which dissent must be controlled. Social order must be maintained, and this is achieved, in part, by recourse to legal violence.

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137 An early example of this in the Canadian context was the nationalization of private power companies by the Conservative government of Ontario at the beginning of this century, thereby favouring one capitalist faction at the expense of another in order to create a rationalized power grid system as part of the industrial infrastructure. Reg Whittaker, "Images of the State in Canada" in Panitch, supra, note 13 at 54; and V. Nelles, The Politics of Development (Toronto: University of Toronto Press, 1974).
3. The Violent Role of Law

Both Klare and Tushnet categorize the third function of law as repressive. Although this serves as a useful guide, it is too wide and too abstract to be of heuristic value for this aspect of legal relations. A more precise analysis can be developed on the basis of the term violence, in the sense of physical injury or harm.

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138 To talk about violence is to open a veritable Pandora's Box. As Hobsbawm suggests, "Of all the vague words of the the late 1960s, violence is very nearly the trendiest and most meaningless. Everybody talks about it; nobody thinks about it." E. Hobsbawm, Revolutionaries: The Rules of Violence (London: Weidenfield and Nicholoson, 1973) at 209. There is no single correct definition of violence. It is a term which is defined differently by different political actors, and sometimes differently by the same political actors, depending upon their aims, the context, and most importantly, their relations with established political authority. The alternative interpretations of violence generally correlate with alternative political philosophies and ideologies.

The dominant ideology of modern society, liberalism, has been particularly successful in keeping violence unidimensional; that is, most people have a narrow perception of what can be considered violent. The popular interpretation of violence is blinkered in that most people believe violence is perpetrated only by criminals, deviants, and rebels, and never by state-sanctioned personnel, except as an aberration. Language plays a vital role in developing and supporting ideology. What Marcuse says about one-dimensional language applies perfectly to the word "violence":

The word becomes a cliche, and as a cliche governs speech or writing; the communication thus precludes genuine development of meaning.... The noun governs the sentence in an authoritarian and totalitarian fashion, and the sentence becomes a declaration to be accepted - it repels demonstration, qualification, negation of its codified meaning.... This language which constantly imposes images militates against the development and expression of concepts. In its immediacy and directness it impedes conceptual thinking, thus it impedes thinking.


139 Following on from the work of Weinstein & Grundy, The Ideologies of Violence (Ohio: Merril Publishing, 1974), I suggest that the competing interpretations of violence can be arranged on a conceptual and political continuum from narrow to broad as follows:

Narrow: Those uses of physical force which are prohibited by the normative order presumed to be legitimate;

Intermediate: Any use of physical force;

Broad: All deprivations or violations of asserted human rights.

See also Charles Tilley, From Mobilization to Revolution (Reading, Mass: Addison-Wesley, 1978).

The narrow interpretation is the one which is usually put forward by those who support current social relations, whether they be liberal or conservative. Its distinctive characteristic is the juxtaposition of law and violence, "The binary opposite of violence is not peace, love or restitution; it is the Law." S. Hall, supra note 131 at 302. This position has been held by such diverse people as John Hobbes; John Dewey, "Force, Violence and Coercion" 26 Int'l J. of Ethics at 35; Leslie McFarlane, Violence and the State (London:
Nelson, 1974); and Ruben Gotesky "Social Force, Social Power and Social Violence" in S.S. Stange, ed., Reason and Violence (Totowa, N.J.: Rowman and Littlefield, 1975) at 45. These arguments share two common assumptions. Firstly, they portray violence as an aberration, an unexpected interruption in the normal consensual course of events. Secondly, they interpret violence as the illegal use of force, thereby allowing the defender of established institutions to claim that use of force by state-sanctioned officials is justified and legitimate, while the use of force by others is unjustified and illegitimate.

This approach has several inherent weaknesses. First, such claims are assertions which, for their validity, depend on the narrowness of the interpretation. Second, as Marcuse has argued, to claim that violence is by definition wrong is an example of political (and hence evaluative) linguistics, utilized as a weapon by established society; it is a mere question begging equivocation which fails to provide an understanding of violence. (New York Times Magazine, October 23, 1968, at 90). Third, in liberal democratic society there is a tendency to perceive legality and legitimacy as synonymous. The narrow approach adopts this tendency to its own advantage since it avoids the problem of the validity of the counter-positioning of law and violence, doing so simply by definition. This is inadequate, because law itself cannot presume to be sacrosanct; law too is part of social relations and as such must be both analyzed and critically evaluated. Finally, the approach manifests a non-too-subtle legerdemain, for it intentionally confuses the question of what violence is, with the very different question of whether the state and legal authorities ought to have a monopoly on the use of violence. This approach is therefore vitiated by a litany of weaknesses. Worse still, it smacks of superficiality and dishonesty which, as part of the dominant ideology, turns out to be a very successful attempt at the deliberate construction of social myopia.

At the other end of the continuum is the broad approach, the radical critique, the analysis which would, at first blush, appear to correlate with the tone of my argument. There are two variations of this radical conception of violence, which are mutually complementary. The first variation emphasizes the violational aspects of violence: violence is anything which violates asserted human rights or dignity. This is an "expansive and ethical interpretation" (Grundy and Weinstein, at 9) which in emphasizing the violation of human dignity, expands the term to its widest reaches, subsuming a number of acts and conditions deemed immoral, and heretofore not regarded as violence. See, for example, Ted Honderich, Violence for Equality (London: Penguin, 1980); Newton Garver, "What Violence Is" (The Nation, June 24th 1968 at 817-22); and Martin Luther King's famous aphorism, "Poverty is Violence." The basic thrust of this argument is that the very structure of modern Western society is so unequal, patriarchal, discriminatory, racist, etc. that it violates human dignity and is therefore violent. The second variation is not quite so expansive. It also refers to the nature of modern society, but refers to death and injuries which result from everyday work or travel; violence is associated with the excesses inherent in the capitalist mode of production. This is basically a Marxist interpretation of violence. John Harris, "The Marxist Conception of Violence" (1973-1976) Philosophy and Public Affairs 192. Despite the attractiveness of the arguments involved here, I have decided for strategic and practical reasons not to adopt this approach. My argument can be made on much narrower grounds.
That law fulfills this role is not simply a description of the law in action, but rather, it is an imperative of legal activity within contemporary society.

There are several reasons why it is vital to emphasize the violent aspect of law. First, it is important that we be honest with ourselves, that we realize that violence can be used by any person or group within society; by both those who defend existing social relations, and those who challenge them. Second, it is important to make clear that when legal personnel, in particular the police, do use violence, often it is not merely individual excess, the "unfortunate" act carried out in the heat of the moment. Violence is endemic to the legal relations of modern society. Third, violence is prima facie immoral; it is wrong to physically injure or immobilize another person.

Any analysis of the functions of modern law must be underpinned by a sense of political realism. Existing society seeks to preserve itself in its established, known form; those groups who benefit from a particular configuration of social relations strive to preserve that situation. The State, as a material condensation of...
social relations, also functions to preserve the status quo; specifically, through its cohesive role. But the contradictions are too great, and since modern society is in continual flux, forces desiring social change continually emerge. When radical demands become threatening to the status quo, "accommodation" is replaced by coercion. Law is a vital part of these social relations. Through its ideological and facilitative roles, it strives to attain the hegemonic condition. However, "contradictory consciousness" has always developed, awareness of exploitation, domination and inequality break through, and consensus weakens.

There may be a widespread respect for the Rule of Law in Western liberal-democratic society, but at the same time there is often dissent which manifests itself as a challenge to social stability. Though not necessarily oriented towards a revolutionary change in social relations, dissent does pose a threat to the social order. Law plays a crucial role in terminating this threat. "The legal system is first and foremost a means of exercising political control."\textsuperscript{140}

Let us take, for example, Isaac Balbus' empirical study of the response of legal institutions to the Black riots of the late 1960s in the United States. He argues that there were three major influences operating on legal personnel at the time: the desire to maintain law and order; the desire to maintain the legitimacy of law and thus popular respect (and deference); and the desire to keep the system functioning. When the riots began, the latter two desiderata went into abeyance and the imperative for the police and courts focused on stopping the riots and ending the "revolts." Precedence was given to maintaining current social relations; once the territory had been secured and the danger stopped, the tasks of legitimation and administration could recommence. But first and foremost the role of law was to preserve order.\textsuperscript{141}

This "imperative of the preservation of stability," as it might be called, is not a novel role which "authoritarian statist law" has taken on, as some commentators have suggested. Rather, it is an

\textsuperscript{140} Colin Sumner, Reading Ideologies (Toronto: Academic Press, 1979) at 277.

\textsuperscript{141} The Dialectics of Legal Repression (New York: Russell Sage, 1973) at c. 5. Chambliss and Seidman, Law, Order and Power, 2d ed. (Don Mills: Addison Wesley, 1982) offer similar analyses of many other aspects of American law.
endemic feature of modern law. Even a brief review of modern legal history provides ample evidence.

Legal violence was closely related to the instability of social relations in England between 1815 and 1848. First, there was breakdown of social relations in the agricultural counties of the Southeast due to the casualization of the agricultural proletariat. The instability which this caused led to an increase in both pauperism and crime, greater use of the *Vagrancy Acts* and the Swing Riots of 1830. Second, London was an arena of major social conflict. The initial legal response to the anti-Corn Law Riots of 1815, the Spa Field disturbances of 1816 and the riots attendant upon Queen Caroline's trial was to terminate them all via the local constabulary. This proved unsuccessful. Recourse was then had to more efficient violence — the soldiery — who clumsily, brutally, but successfully, brought the situation "under control." The resort to military violence both risked and damaged the legitimacy of the ruling classes, but there was no alternative if existing social relations were to be preserved. Third, there was widespread dissent in the new northern industrial towns, where regional labour markets (which were tied to single industries) were vulnerable to cycles of demand in the international market. When the spectre of the breakdown of social order raised its head, the legal response was always the imperative of restoring stability. This was achieved through the violent control of riots, the killing of dissenters by the military, or mass imprisonment. In the longer term, there developed a more effective (and legitimate) response, with capacity for equivalent legal violence: the creation of a Metropolitan Police Force in 1829 by Robert Peel and the subsequent diffusion of paid constabularies throughout the agricultural counties and industrial towns. There was never any attempt made by the law to understand or resolve the problems which caused the social disorder in the first place. The immediate focus of legal intervention has always been "the social order problem."\(^{142}\)

This analysis can be expanded to the whole of nineteenth and early twentieth century Britain:

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At every crucial turning point - the struggle against the unreformed parliament, the formation of the unions, the disturbances of the 1820s, the Chartist agitation, the great popular reform demonstrations of the 1860s, the unemployment agitations of the 1880s, the unrest accompanying the new unionism at the end of the 1890s and the high-tide of militancy just before and after the first world war - the law played the crucial role of preserving social order and valiantly putting down any effective challenge to social relations.\textsuperscript{143}

The massive increase in State sanctioned violence under the current Thatcher administration need not be discussed in this paper except to point out that over 20,000 people were arrested, several pickets were killed and many more injured during the course of the miners' strike.\textsuperscript{144} English history demonstrates that legal institutions, rules, and personnel were, and are, oriented towards the preservation of the \textit{status quo}.

A remarkably similar analysis can be made of American legal history. Even from its earliest days, American law has staunchly opposed dissident and non-conformist persons or groups. American law has sanctioned violence in two ways: directly, through legal personnel, and indirectly by "turning a blind eye" to extensive violence against certain groups. For example, pacifist Quakers had their services banned and were often imprisoned while those who subjected them to mob violence were not punished. Rather, such actions were either ignored or acquiesced in.\textsuperscript{145} Law failed to take any action against those who murdered John Smith and other Mormons. Irish Catholics, in view of their nationality, religion and immigrant status, were often prosecuted for vagrancy or breach of the peace - at least until they worked their way into the American legal hierarchy. The courts rigidly enforced the statutes which

\textsuperscript{143} Stuart Hall, \textit{supra}, note 131 at 193.


\textsuperscript{145} Chambliss & Seidman, \textit{supra}, note 141 at 200; and Kairys, \textit{supra}, note 72 at 145-46.
forbade any speech or writing that was critical of slavery.\textsuperscript{146} There is, of course, no need to document the involvement of legal personnel with the Ku Klux Klan, and more importantly, how law ignored their murderous activities. No prosecutions were ever brought as a result of the massacre at Attica prison.

Of particular relevance is the thoroughness of American legal violence towards labour movements, which have proven to be one of the most potent radical (destabilizing) forces in the history of America. Legal violence was essential to curb the threat they posed. In the early 1800s, the courts punished both strikes and unions as being criminal conspiracies and imposed very harsh sentences.\textsuperscript{147} Between 1873 and 1879, peaceful labour demonstrations were regularly and violently broken up by the police. The fate of the "Wobblies" at the hands of the police and vigilante violence is (I hope) well known.

As we move into the 1980s, the American State has managed to become even more efficient in its use of violence. On May 13, 1985, the Philadelphia police fired over 10,000 rounds of ammunition and dropped explosives from a helicopter onto the headquarters of a radical Black organization called MOVE resulting in a fire which killed 11 people, five of them children, and destroying 61 other houses.\textsuperscript{148} The "city of brotherly love" somehow failed to live up to its reputation.

And what of Canada?

Historically, Canadians have perceived themselves and their nation as docile, moderate, compromising, conciliatory and tolerant. In particular, they have counterposed themselves with their American neighbours, whose revolutionary history, genocidal policies against the native peoples, vigilantism, individualism and intolerance

\textsuperscript{146} Kairys, ibid. at 146-48.

\textsuperscript{147} Ibid. See also Mark Kelman, "The Origins of Crime and Criminal Violence" in Kairys, supra, note 72 at 214, 218.

stands in stark contrast to the northern "peaceable kingdom." 149 Critical historical research, however, suggests that this self perception is more myth than reality and that legal violence in Canada has been anything but uncommon.

Pre-Confederation Canada had more than its fair share of violence, particularly that of the State variety. Recent research indicates that the Nova Scotia of the mid to late eighteenth century was a veritable police state. 150 The rather pathetic rebellion of 1814 invoked a harsh response from the authorities leading to mass arrests, imprisonment or banishment, and the eventual execution of at least eight of the participants during the "Ancaster Bloody Assize." 151 Three others died of goal fever in the ensuing winter. 152

One can also be skeptical about the peaceful nature of post Confederation Canada. The Northwest Rebellion of 1885, the second Riel rising (again, a rather pathetic affair), was confronted with a military response of nearly 8,000 troops under the command of General Middleton. Although there is some confusion about the

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150 Louise Anderson, "Crowd Activity in Nova Scotia During the American Revolution" (M.A. Thesis, Dept. of History, Queen's University, Kingston, 1986) [unpublished].


152 Historical evidence on this era of Canadian history is sparse and Wright, in particular, has done an excellent research job in putting together this unattractive side of Canadian legal history. It almost appears that there has been a conscious desire to forget these blemishes on Canada's virginal history. Kenneth McNaught, in discussing the treason trials, argues that the legal system was lenient, benign and merciful to the traitors. "Political Trials and the Canadian Political Tradition" in M. Friedland, ed., Courts and Trials (Toronto, University of Toronto Press, 1975) at 137. But once again, it should be noticed that the merciful response came after the fact, once the threat (if there was one) had passed. As Wright persuasively argues, with regards to the 1838 trials, "the prosecutions and punishments were carefully calculated to maximize the deterrent effect, and show symbolic public display of justice and the legitimacy of authority in politically unstable situations." Ibid. at 64. The socio-political effect of punishment was the primary concern of officialdom. Ibid. at 69-84. Wright does appear to admit that there was a subtle interplay of both repress and mercy at work; but he also recognizes, although he fails to emphasize it sufficiently, that mercy could only ride on the back of successful repression after the most important lesson had been taught. The story is familiar: the importance of the preservation of order and the restoration of stability; ruthless deterrence reinforced by mercy; and ultimately self-fulfilling legitimation.
death toll\textsuperscript{153} it is clear that the vast majority were rebels who were killed either in battle or through judicial execution. Eight Metis were hung for murder, and Riel was executed for high treason.\textsuperscript{154} Many others were imprisoned.

Other dissident groups have also felt the "iron heel" of the Canadian State. When the citizens of Quebec City protested against conscription and the \textit{Military Service Act} during the Easter weekend of 1918, several hundred troops from Toronto were moved into the city, once again, to restore order. Their tactics included cavalry charges (with swords drawn) and the use of rifles and machine guns, resulting in the death of four civilians and seriously injuring many more — at least 70 required treatment by doctors. A further sixty-two were arrested.\textsuperscript{155} Elsewhere, conscientious objectors were subjected to violence while being held in Minto Prison.\textsuperscript{156} The emerging Communist Party of Canada was subjected to widespread harassment and violence during the 1920s and 1930s.\textsuperscript{157} Over 100 prominent communists were interned during the Second World War.\textsuperscript{158} One might be tempted to believe that state violence is past


\textsuperscript{154} Torrance, \textit{ibid.} at 21.


\textsuperscript{156} Martin Robin, \textit{Radical Politics and Canadian Labour, 1890-1930} (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1968) at 156.


\textsuperscript{158} Ryan, \textit{ibid.}
history and that "things are getting better." This would be a mistake, as Toronto's homosexual community can attest.\textsuperscript{159}

In view of the immigrant nature of Canadian society, deportation has proved to be a very useful (and cheap) technique for dealing with social dissidents. It was first widely used after the Winnipeg General Strike when a bill amending the \textit{Immigration Act} (allowing for the deportation of British subjects who had not been born in Canada) was passed through in the House of Commons in twenty minutes and within one hour had been accepted by the Senate and given Royal Assent.\textsuperscript{160} Ryan has estimated that between 1931 and 1933, 10,000 foreign born and British workers were deported.\textsuperscript{161} The period can be characterized as one of deportation delirium. Similarly, at least 12,000 people of Japanese origin were moved from British Columbia to inland concentration camps during the Second World War.\textsuperscript{162} Furthermore, the Doukhobors, and their militant Sons of Freedom faction, despite their consciously limited attacks on property, have been subjected to the mass imprisonment of men, women and children, deportation, and physical violence.\textsuperscript{163} More recently, one elderly woman activist has died on a prison hunger strike. Violence is a way of life in the ever-swelling Canadian prison system.\textsuperscript{164}

When no more than one hundred members of the F.I.L.Q. took the cause of French Canadians beyond the pale of

\textsuperscript{159} Gerald Hannon documents that in the course of the raids on Toronto bath houses not only were 337 arrests made but also there were widespread complaints of brutality. When the raids were followed by public demonstrations by the gay community the police responded with both direct violence and acquiescence in "queer bashing." "Raids, Rage and Bawdy Houses" in Jackson & Persky eds, \textit{Flaunting It!} (Vancouver: New Star Books, 1982).

\textsuperscript{160} See Martin Robin, \textit{supra}, note 156 at 181.

\textsuperscript{161} \textit{Supra}, note 157 at 160.

\textsuperscript{162} For a classic example of the judiciary reinforcing and legitimizing state violence by taking refuge in legal technicalities, see \textit{Japanese Reference}, [1947] A.C. 87 (J.C.P.C.).


\textsuperscript{164} Michael Jackson, \textit{Prisoners of Isolation} (Toronto: University of Toronto Press, 1983).
acceptability, the government's response was swift and determined.\textsuperscript{165} Under the auspices of the rapidly resurrected \textit{War Measures Act}, 500 people were arrested, 450 of whom were subsequently released without charge, and 7,500 troops were mobilized into the province.\textsuperscript{166} Pierre Trudeau provided a purely Hobbesian defence of the invocation of the Act. He argued:

I think society must take every means at its disposal to defend itself against everyone of a parallel power which defies the elected power of this country, and I think this goes to any distance.\textsuperscript{167}

Life is confrontation and vigilance and a fierce struggle against any threat of intrusion or death. We are unworthy of our ideal if we are not ready to defend, as you would life itself, the only roads to change that respect the human person. We are equally unworthy if we are not able to harden ourselves temporarily, but for as long that may be necessary – however repugnant it may be to do so – in order to safeguard and strengthen our democratic institutions and our highly evolved society.\textsuperscript{168}

Once again, however, it is labour relations which provide the litmus test for determining the limited tolerance of Canadian liberal society. Challenging conventional wisdom, Jamieson argues:

Canada, during this century, has been a country having a record of labour unrest and industrial conflict with legal and violent overtones second only to the U.S. and far greater than that of most Western European countries.\textsuperscript{169}

State violence has been widespread in industrial relations. Robin has estimated that between 1876 and 1914 there were at least 33 interventions and strikes by the military exclusively on behalf of the employers.\textsuperscript{170} One particularly vivid example is the response of

\textsuperscript{165} Once again, it should be remembered that they tended to restrict the vast majority of their activity to the destruction of property.

\textsuperscript{166} It is to be noted that Pierre Laporte was not killed until the day \textit{after} the \textit{War Measures Act} had been invoked.

\textsuperscript{167} \textit{Toronto Daily Star} (14 October 1970).

\textsuperscript{168} For an in-depth critique of the Trudeau-Bourassa defence, see Dennis Smith, \textit{Bleeding Hearts, Bleeding Country: Canada and the Quebec Crisis} (Edmonton: M.G. Hurtig, 1971) at c. 5.

\textsuperscript{169} \textit{Supra}, note 108 at 4.

\textsuperscript{170} \textit{Supra}, note 156; see also Jamieson, \textit{supra}, note 108 for a detailed discussion of a plethora of incidents.
government to the steel workers strike in Sydney, Nova Scotia in 1923. Not only did the strikers have to deal with 400 "goons" who had been hired by the management, they had to deal with 2,000 uniformed soldiers and policemen who charged and rode into 1,000 strikers. For symbolic and educational purposes, leaders of the strike were given particularly harsh prison sentences.\textsuperscript{171} State violence was decisive at both Winnipeg 1919\textsuperscript{172} and Regina 1935.\textsuperscript{173} Throughout recent Canadian history picket line violence (reinforced by a partial judiciary) has been constant. To mention just a few incidents: Fort William 1909, Brockville 1910, Estevan 1931, Corbin 1935, Vancouver 1935, Oshawa 1937, Windsor 1945, Asbestos 1949, Louisville 1952, Murdochville 1957, Quebec 1968, Montreal 1972, Newfoundland 1986, and the Gainer's Strike 1986.\textsuperscript{174} Furthermore, responsibility for such violence lies not with the labour movement but with the state — labour has been doubly victimized:

On numerous occasions in Canadian history the enactment of specially punitive legislation or the use of police or military forces in anticipation of threatened actions by organized labour have been the cause of, or at least the occasion for, overt conflict. That is to say, aggressive or violent action by various labour groups

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\textsuperscript{172} Walter D. Young, \textit{Democracy and Discontent} (Toronto: Ryerson Press, 1969) at 17-21; and D.C. Masters \textit{The Winnipeg General Strike} (Toronto: University of Toronto Press, 1950) recognizes the short-term effect of the suppression of the strike: [It] continued for a short-time longer in an atmosphere of gathering doom. Most of the leaders, although on bail, had undertaken to resume activity. Those who had not been arrested were afraid that the blow would fall ... Reduced to a state of terror the Trades and Labour Council capitulated and ordered the end of the strike....

\textit{Ibid.} at 110.

Jamieson, with the benefit of hindsight, has observed the long-term paralysing effect of the Government's response as "mark[ing] the beginning of a long decline in the size effectiveness and militancy of organized labour in Canada." \textsuperscript{Supra}, note 108 at 186.


\textsuperscript{174} Jamieson, \textit{supra}, note 108 is the most comprehensive source. But see also Irving Abella, ed., \textit{On Strike} (Toronto: Lorimer, 1975). With regards to Quebec see Coté, Latouche at Loomis, \textit{"Violence dans les Conflits ouvriers" (1968)} and Carla Linsin Mumme, \textit{"The Web}
has often been provoked by resentment against the use of armed forces or the discriminatory and one sided support provided by governments to employers.\textsuperscript{175}

Nor should we seek refuge in the proposition that these are historical aberrations, unfortunate deviations in an otherwise laudable political evolution. Such strategies of confession and denial only serve to perpetuate the legitimization of domination. Consider the current question of the position of Canada’s First Nations. In their quest for self-determination and equality, the Native peoples pose what is, perhaps, one of the most serious challenges to the legitimacy of the political and military elites of Canadian society. From Labrador to the Queen Charlotte Islands, from Cape Breton to Northern Alberta, from Southern Quebec to Northern Ontario, Native peoples have challenged the military, political and economic interests of those in power. On each and every occasion the response has been unequivocal: the invocation of the violent power of the state, via mass arrests. Yet the vast majority of non-Native Canadians seem unperturbed by this almost daily repression of a quest for survival. Less obvious — and perhaps the more damning for that — are the statistics that reveal the vastly disproportionate over-representation of Native people in what we euphemistically call our criminal justice system.\textsuperscript{176} Could anyone seriously contend that this blatantly excessive incarceration is not related to factors such as native non-conformity with the dominant culture and class position? Thus, the peaceable kingdom is a chimera, a historical fiction, which only exists because of a collectively self-imposed myopia, the will not to know.

As the forgoing discussion demonstrates, challenges to the interests of the power bloc — both real and perceived — are always portrayed as a threat to law and order. The capacity of Law to perform this ideological feat in turn presents legal violence as a legitimate resolution of the problem. Criminalization of the people and the acts threatening the \textit{status quo} legitimates the violence which is used against them. This is not instrumentalism. It is not law as a tool in the hands of the bourgeoisie; rather it is law, the

\textsuperscript{175} Jamieson, \textit{supra}, note 108 at 19.

people, the principles, and the rules, as part of the process of human interaction. The people who make and enforce the rules are social beings who have a position in the flux of human interrelations. They see their society threatened by disruptive elements: the poor, the Blacks, the lazy, the spongers, the recalcitrant or drunken Native, the anarchists or the commies. They perceive a cloud of chaos shadowing their lives. Contrary to some instrumentalist critiques, their motivations do not arise out of a bad faith, or conscious bias, but rather out of fear. It is not a great conspiracy that leads to the resort to legal violence; rather, it is people living their lives in accordance with their ideology, their sense of reality, who see their world menaced. They will fight to preserve that world, that reality. The institutions, the personnel and the rules of law exist for this reason: to protect the status quo. Violence is as endemic to modern law as either ideology or facilitation.

The arsenal of legal violence is expansive. First, there are the visibly obvious acts of violence involved in public demonstrations: foot charges and cavalry charges, baton charges and even sword charges, and the use of anti-personnel gases. Physical combat between individual police officers and individual demonstrators is common, as are violent arrests and the use of dogs against protestors. There are also less visible police activities: the more normal arrests, in particular dawn raids, or the police killing of suspects who have tried to "escape arrest." Lead,

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178 Dogs proved particularly useful to the police during the miners strike in Britain.

179 D. Chappell & L. Graham, *Police Use of Deadly Force* (Toronto: Centre of Criminology, 1985). This excellent, and controversial, report documents that between 1970 and 1981, one hundred and twenty five people have been killed by the police in Canada. As the authors point out, this demonstrates a contradiction in Canadian politico-legal psyche; on
plastic, and rubber bullets have proved to be particularly cost effective. Deaths in custody appear to be more frequent than we would like to admit.\(^{180}\) The military, usually with much less subtlety, carry out similar activities (plus many other covert actions) when called upon to support the police in the preservation of order.\(^{181}\)

The judiciary also participate in legal violence. Judges often acquiesce in the prosecution’s use of the safety net charge of conspiracy.\(^{182}\) They have recourse to "contempt of court" for those who refuse to recognize the majesty of the law. They set bail at such high levels that defendants cannot possibly comply and thus they put into effect a version of preventative detention.\(^{183}\) They utilize legislation, such as emergency legislation, which is designed to destroy dissident groups. They reinterpret a host of non-political crimes against delicts in order to "keep them out of circulation." When the Black Panther movement overtly challenged the American system, the courts were able to use at least 57 offences, most of which were "non-political," to convict the Panthers.\(^{184}\) The courts imprison strikers and picketers, particularly through the use of injunctions.\(^{185}\) Indeed, Winnipeg, during the general strike, was known as Injunction City. Legislation is adapted in order to convict

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\(^{181}\) We may also be witnessing the emergence of a new intermediate paramilitary police force. In England, it takes the form of the S.P.G.’s; in Canada it goes by the name of S.E.R.T.


\(^{183}\) Balbus, supra, note 141; and Millar & Fine, supra, note 144.


\(^{185}\) Millar & Fine, supra, note 144; Panitch & Schwartz, supra, note 77.
Finally, the legislature, the seat of democracy, is acutely conscious that "the decisive means of politics is violence." Thus, harassment, process and public order laws are frequently passed. More overtly, resort may be had to emergency legislation, which still carries the aura of legitimacy, since it supposedly derives from the sovereign will of the people. There are also the overtly political laws and overtly political trials.

D. The Genius of Law

Your law always does more harm than the crime, and your morality is a form of violence.

Edward Bond

[the prince] ought to be both feared and loved, but as it is difficult for the two to go together, it is much safer to be feared than loved, if one of the two has to be wanting.

Machiavelli

It would be possible to continue ad nauseam with the documentation of instances and types of legal violence. I hope that I have said enough to refute the counter-positioning of law and violence and to demonstrate both the reality and pervasiveness of legal violence in contemporary western liberal-democratic society. Though useful, my argument does not make much progress on either a theoretical or practical level. I have not said enough about the relationship between the various legal functions. Specifically, my argument has a fundamental weakness, it indulges in setting up

186 For example, it was the American Supreme Court which used the Sherman Anti-trust legislation to convict Eugene Debs, the I.W.W. leader.


188 Some of the more obvious Canadian examples are laws against obstructing the police, assaulting the police, resisting arrest, escaping lawful custody, obstructing justice, causing a disturbance and breach of the peace. Nor should we forget Canada's infamous s.98.

189 See, for example, Otto Kircheimer, Political Justice (Princeton: Princeton University Press, 1961); and Peter Hain, Political Trials in Britain (London: Penguin, 1985).

190 Lear speaking in Edward Bond, Lear, supra, note 1 at 85.

dichotomies. It works on the premise of the couplet "consent or coercion," an approach which is inadequate. The relationship between law as ideology (which also includes the facilitative role of law) and law as violence cannot be grasped by their mere conjunction or addition. In brief, an analysis which only goes so far as to argue that law can be either ideological or violent, or ideological and violent, does not do enough.

Both Gramsci and Lenin recognized as much. Lenin was not as instrumentalist as his *State and Revolution*\(^\text{192}\) might suggest. Indeed, he has clearly specified an approach which incorporates both hegemonic and coercive aspects:

> "The worldwide experience of bourgeois and landowner governments has evolved two methods of keeping people in subjection. The first is violence, with which the Tsars demonstrated to the Russian people the maximum of what can and cannot be done. But there is another method, best developed by British and French bourgeoisie ... the method of deception, flattery, fine phrases, promises by the million, petty sops and concessions of the unessential, while retaining the essential.\(^\text{193}\)"

Gramsci was also very aware that law fulfilled both educative and coercive functions:

> "If every state tends to create and maintain a certain type of civilization ... and to eliminate certain customs and certain attitudes, and to disseminate others, then the law will be its instrument for this purpose.\(^\text{194}\)"

This either/or analysis was rather cryptically (re)introduced to left jurisprudence in the late 1960s by Louis Althusser when he suggested that,

> "Very subtle, explicit or tacit combinations may be woven from the interplay of Repressive State Apparatuses and the Ideological State Apparatuses?\(^\text{195}\)"

This "combinatory approach" is made most explicit by Stuart Hall, *et al.* who followed through the logic of the argument. Drawing on

\(^{192}\) (Peking: Foreign Language Press, 1976).

\(^{193}\) *Collected Works*, Vol. 24 at 63-64.

\(^{194}\) *S.P.N.*, *supra*, note 30 at 246.

various Gramscian concepts, they argue that if hegemony is complete or nearly complete, law plays a strong ideological role, but if hegemony is weak, law plays a coercive role. They develop a temporal sequence, suggesting a transition from moments of constraint to moments of consent, back to moments of constraint. The metaphor they develop is that of a pendulum movement or a hydraulic piston; when consensus breaks down, there is a greater reliance on legal coercion.

The analysis is moving in a correct direction, but is problematic. The methodology looks at the quantity (extent) of hegemonic leadership or direction, and quantity (extent) of coercion or violence. It implies that the greater the violence, the less the spontaneous consent; it implies that the two are variables that mutually adjust in automatic response. It is a zero-sum approach; as one increases, the other necessarily decreases. This approach fails, in my opinion, to capture the genius of law.

Law does many things in modern society: it creates a world which obscures the harshness of social relations and legitimates oppression. It diffuses potential dissent and creates an acceptable level of exploitation. It even provides real benefits for most members of society, even though these do not accrue equally. Law, by removing some of the excesses of exploitation, by mediating the disadvantages of current society, contributes, in the long run, to the continuance of the inherent inequality since it smooths out the jagged edges, and encourages acquiescence. Yet its genius lies in none of these. Law's genius lies in its ability to make two acts, which are essentially the same, morally different. Law makes legal violence legitimate, and illegal violence illegitimate; violence which is legal becomes acceptable in the popular psyche, even when used against those whose dissent is peaceful. Because there must be dissent within a capitalist social formation, there must always be a need for social control. Ideology is inherently incapable of transcending the factors of disequilibrium; instability will surface, and "when in doubt" those who have been threatened by social instability will "lash out." Legal relations are carried out by such people. Law has a very human face with very human instincts. Law is people in

196 Policing the Crisis, supra, note 131 at 209. The phrase is theirs.
action, but more important, it is legal people in action, thus its action appears to be legitimate. The genius of law stems from its capacity for legal and legitimate violence. Law constitutionalizes violence.

Stuart Hall et al., as representatives of the combinatory analysis, cannot appreciate the genius of law. Their approach underestimates the extent to which violence is endemic to all law in the capitalist conjuncture. The crucial implication of their work is that violence is only present when hegemony is weak, whereas I have argued that violence is continually present in the law, even though it may be rarely used. Legal violence and legal ideology coexist in a permanent, mutually reinforcing unity.

Violence is continually present in the law, whether it is used frequently or infrequently. Violence in the law is not just oriented towards revolutionaries, potential rebels or malcontents, rather it is directed towards all of us. Legal violence stalks in the guise of criminal law, the law against "normal crime." Once we recognize this metamorphosis, the integral relationship between violence and ideology becomes manifest because of the power of the threat of legal violence. Few people are unaware of the extent of the arsenal of legal violence. One is continually made conscious, through the police on the beat, through the media, through the courts, (by policies such as "deterrent" sentencing), and finally through personal experience, of the effectiveness of legal violence. The act and threat of violence has a double effect: first, it removes either temporarily or permanently, certain individuals; second, and more importantly, it modifies the conduct of other people. In brief, law, through legal violence, effectively used and even more effectively publicized, terrorizes us all into acquiescence. Few of us are willing to give up our lives, livelihoods or reputations or a counter-cultural political cause.

Contrary to what both Hall and Poulantzas argue, this is neither "an exceptional moment" nor "new authoritarian statism." Rather it is a constant aspect of modern social relations. At best, it is "permanent exceptionalism."\(^{197}\) The point is that violence and threats of violence are perceived as legitimate because of the

\(^{197}\) Panitch & Swartz, supra, note 77 at c. 3.
ideological function of law is operating simultaneously. "Repression never comes unpackaged." Legal violence is perceived as legitimate violence, necessary for the preservation of "our shared experience of democracy." The victims of legal violence, having been criminalized, are then presented as disruptive elements or troublemakers, thereby leading the rest of society to have little solidarity with them. Legal violence is rarely widespread, since that would create too much dissent and threaten the myth of consensus; rather legal violence is usually selective and precise, bolstered simultaneously by legal ideology. The zero-sum, hydraulic piston image does not adequately catch this reality; the temporal approach cannot be adequate as a critical theory because it fails to understand the relation between the ideological and violent aspects of law. From the point of view of the victims of legal violence, any theoretical distinction between the authoritarian and normal state may be irrelevant; violence is violence.

There is another way in which we can understand the nature of the relationship between violence and ideology. Althusser and Poulantzas have drawn an important distinction between that which is dominant and that which is determinative. Dominant can be understood as a quantitative concept while determinative can be understood as a qualitative concept. "Dominance" suggests that certain factors or concepts stand out as being the most significant criteria. When this is applied to law the most significant (dominant) thing about it is its claim to legitimacy. Law is, within current social relations, a major arbiter of the limits of acceptability. This is what makes law so effective in liberal democratic society and gives importance to juridico-political ideology. However, this dominance of the ideological aspect of law is not immune from social relations; on the contrary, law as ideology is dominant only because of the nature of current social relations. The analysis I have offered of these relations is that they are overdetermined by (they have as their fundamental priority) the imperative to reproduce the relations of production, that is, to maintain the current social order. I have

198 Millar & Fine, supra, note 144 at 10.

199 "On Contradiction and Overdetermination" in For Marx (New York: Pantheon Books, 1976); and Poulantzas, S.P.S., supra, note 16 at 79.
argued that the alienation, reification and exploitation engendered by such an order necessarily fosters dissent, dissatisfaction and protest. The priority is to preserve the status quo and when confronted with discordance and heterodoxy, this can be achieved only through resort to coercion and violence. In brief, the capacity for violence, in particular legal violence, is what ultimately keeps current society as it is. When "the chips are down," contemporary society is based upon the capacity of violence to preserve things as they are. Violence is determinative. Without the capacity to revert to overt violence the current system of exploitation and domination would crumble, for the simple reason that contradictory consciousness would break through, changing the nature of social interaction, and nothing could stop it.

This, however, cannot be any old violence; it must be legal violence since it carries with it the requisite aura of legitimacy. There has to be violence for the very same reason there has to be consent: because of the universality and primacy of struggles based on exploitation. Legal violence is continually present; it is a foundation upon which social relations are built in a capitalist social formation. As Poulantzas suggests,

State monopolized physical violence permanently underlies the techniques of power and mechanisms of consent; it is inscribed in the web of disciplinary and ideological devices; and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear.200

Ideology may be the dominant role of law, and must therefore merit great attention, but this ought not to obscure the fact that, at least within the present politico-historical conjuncture, violence is essential to maintain society and to control those who challenge the social order. Law is that moment, that specific set of social relations which has as its distinctive feature the capacity for supreme yet legitimate overt violence. Ironically, James Fitzjames

200 Poulantzas, *ibid.* at 81. Indeed, even Douglas Hay, in an essay justly celebrated for articulating the ideological role of law, is acutely conscious of the determinative role of legal (legitimated) violence.

... when patronage failed force could be invoked, but when coercion inflamed men's minds, at the crucial moment mercy could calm them. The sanction of the state is force, but it is force that is legitimised however imperfectly, and therefore the state also deals in ideologies.

*Supra,* note 128 at 62.
Stephen is a great deal more honest than his apologist liberal successors in admitting quite frankly that the criminal law is the process by which "men (sic) rightfully, deliberately and in cold blood, kill, enslave, and otherwise torment, their fellow creatures." Apart from the word "rightfully" I would suggest that Stephen has correctly described the lamentable truth of the end-game situation.

IV. IN GUISÉ OF A CONCLUSION

The real political task in a society such as ours is to criticize the workings of institutions which appear to be both neutral and independent; to criticize and attack them in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that one can fight against them.

Noam Chomsky & Michel Foucault

In my beginning is my end.

T.S. Eliot

This essay has been an attempt to "view (law) on a different scale" from that accepted by conventional legal wisdom. In positing the integral relationship between law, power and violence I have attempted to introduce some clarity and honesty into our thinking about law and legal practice. Interactionalism, in spite of — indeed because of — its critical nature, is therapeutic and liberating; it stimulates both consciousness and conscience. It informs us that Liberalism has failed us as a community because its response to humankind's fundamental dilemma — the antinomies of mutual longing and mutual jeopardy, mutual need and mutual fear — has not been through the transcendence of coercion, but rather

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201 G. Parker, "James Fitzjames Stephen: Some of his Correspondence" [1982] Now and Then 63 at 85-86.


the rationalization, institutionalization and constitutionalization of violence. Therefore in order to escape the crushing weight of the legitimized repression, to get from here to there, we must look elsewhere, beyond the limits of liberalism.

That is the challenge.

But today I am pessimistic. My pessimism operates on two levels.

First, I suggest that law fulfills another function not yet discussed in this essay, what might be called an expressive or communicative function. Law tells us something about both ourselves and our society. Our addict-like dependency upon an intrinsically violent criminal law demonstrates the psychotic nature of contemporary Canadian society. The criminal law is constitutively incapable of resolving problems which are primarily social, political and economic, yet because of a collectivized legal fetishism we continually turn to this distraction in the hope that it will provide a panacea. Recourse to criminal remedies demonstrates just how myopic our vision is, how disempowered, paralysed and unimaginative we have become. Any enlargement of the criminal law cannot be for our benefit unless we see our redemption in increased authoritarianism.

Second, I am pessimistic about our capacity to effectively move from theory to praxis. What if we do recognize the alienation and poverty of contemporary society and attempt to move beyond critical legal theory towards practical, counter-hegemonic, transformative action? My fear is that once any such move (if we could even imagine it) becomes threatening, once it grows beyond conceptual or embryonic form, once it manifests itself as concrete action, then the activists involved become vulnerable to the dialectic of hegemony and violence which, as I have argued, can be devastatingly effective.

Yet pessimism is not nihilism. A critical skepticism should not be confused with a fatalistic cynicism that would hurl us to the

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207 Ibid. at 49.
politico-philosophical roots of liberalism with its necessitarian belief that life and community must, inexorably, be "solitary, poor, nasty, brutish and short." 208

On the contrary, the critique, if fundamental enough, can identify and begin to unpack some of our most deeply entrenched assumptions, and most importantly, to interrogate whether such assumptions must inevitably hold true. Or might it be that such assumptions are in reality formative elements of a certain worldview — a pervasive and hegemonic one perhaps, but still a worldview — and therefore contingent, partial, 209 and most importantly, replaceable?

In two further articles, I attempt to push the critique developed in this essay to its pessimistic nadir, and in so doing to tentatively suggest that critical reflection on law only remains pessimistic while working within the assumptions of the contemporary paradigm. If, however, we begin to work beyond the parameters of conventional wisdom, while at the same time nurturing the plurality of deviations that render such conventionalism unstable, we may just be able to conceive of another legal system, one that refuses to accept violence as determinative of the nature of law.

In these articles — one reviewing Unger's most recent work, 210 the other an analysis of recent feminist jurisprudential debates 211 — I begin to trace out the viability and potential generative sources of a reconstructed legality that neither assumes the permanence of liberalism nor accepts the totality of androcentrism. I suggest that by disconnecting modern legal theory and law from what, on reflection, are essentially very traditional

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208 John Hobbes, 

209 Following Martha Minow, I use "partial" in at least two of its senses: partisan and incomplete. See Minow, "Partial Justice" [unpublished].


211 "Nemos and Thanatos: Feminism as Jurisgenerative Transformation or Resistance Through Partial Incorporation" [forthcoming 12 Dalhousie L.J.].
assumptions — liberal individualism and malestream\textsuperscript{212} ideology — we may be able to achieve a triple accomplishment: a dramatic opening up of jurisprudential discourse; an avoidance of legal repression through a transformation of the terms of the discourse and the nature of the challenge; and, ultimately, the uncoupling of law from violence. Although in neither instance has the reconstructive effort been completely successful,\textsuperscript{213} important practical, experiential and theoretical developments have taken place that allow some scope for cautious but critical optimism. The alternative to such an endeavour is the cynically fatalistic strategy of confession and avoidance that, for centuries, has legitimized repression: an admission that the horizon of our community wisdom is punishment and violence, hastily justified by a pseudo-essentialist cop-out that blames it all on the impoverishment of our human creativity.

The contradictory virtue of a critical consciousness of the violence of law is that it refuses to allow us to acquiesce such authoritarian apologetics ... and, in generating such resistance, it inspires a politics of hope.


\textsuperscript{213} One should not expect quick and easy solutions, given the oppressive tenacity of liberalism and the patriarchal pervasiveness of androcentrism. See, in particular, C. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 Signs 515; and "Feminism, Marxism: Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635.