

**Capitalism and the Rule of Law, from Deviance Theory to Marxism
by Bob Fine, Richard Kinsey, John Lea,
Sol Picciotto and Jack Young (eds)
for the National Deviancy Conference.**

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**Permissiveness and Control: The Fate of The Sixties Legislation
by the National Deviancy Conference (ed)**

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These books are creatures of their times, exemplifying the acute depression which has descended over the left during the late seventies and early eighties. As deepening economic crisis and repressive state policies failed to stimulate a marked response from an apparently demoralised working class, so has an active proletariat disappeared from radical theories and accounts of legal order. As the titles of both collections imply, their subject is the nature and process of domination rather than resistance and struggle. This is particularly so with *Capitalism and the Rule of Law*, in which papers by Fine, Kinsey, Picciotto, Lea and Melossi all focus on the apparently inescapable and irresistible logics of legal domination which derive from deep structures of bourgeois ideology and the relations of bourgeois exploitation. Most of this is a monotonous re-working of Pashukanis's commodity law thesis. A passage from Kinsey's paper will give an impression of the general idea:

The liberty of the individual to sell his labour-power in the contract of employment is set alongside the security of property as the maxim of the rule of law. Both become necessary conditions of capitalist appropriation. The commodity market and the exchange of abstract labour becomes the focus of legality. As Pashukanis so correctly noted, the legal person — the abstract subject of rights and duties — becomes the focal point of legality, and the

principle of the rule of law becomes the facilitation of commodity exchange between the formally free and equal. (p 56)

This is scarcely news. Korsch had criticised it from the left and Hart from the right before most of the contributors to this volume were born, and bourgeois legal historians such as Friedmann and Atiyah have documented not only the rise but also the *fall* of the commodity form. No doubt, a dose of history — even “bourgeois” history — would do these “radical” theorists a power of good. Abstraction, of course, is inescapable and essential, but abstraction which feeds only on itself leads readily to overgeneralised and unilluminating speculation.

Fortunately, while it shares in the general pessimism of this *oeuvre*, *Permissiveness and Control* is eminently and laudably historical in focus. The title of the book reflects the principal theme of a collection of essays on “the fate of the sixties legislation”, which dealt with homosexuality, divorce, race relations, drug use and so on. This theme concerns the double thrust of such law, namely a liberalisation of legal control over selected areas of a behaviour coupled with an increase in coercive regulation over the behaviour as a whole. This permissiveness-control duality is well illustrated in Lea’s essay on race relations legislation, in which the development of legal programs fostering racial integration occurred contemporaneously with a general tightening up of restrictions on coloured immigration. According to Lea, this dual thrust reflected a contradictory attempt to embrace within law conflicting objectives of maintaining a cheap (black) labour force and of achieving social harmony. Other articles in the collection examine this dual thrust in laws relating to a wide array of morally and legally proscribed behaviours. In conformity with the tone of *Capitalism and the Rule of Law*, the analysis of the sixties legislation in *Permissiveness and Control* is carried through without reference to the subjects of such law — except in their duly appointed capacities as inert or largely passive sheep to be herded by legislation. Thus the concluding words of the book suggest that:

Permissiveness and control became two sides of the same coin, for in not one case was normalisation an intention of the legislation; rather, interventionism created ghettos of “inadequates” surrounded by a ring of coercion . . . It is in such a climate that criminalisation and decriminalisation became a unity: two moments in the politics of interventionism. (p 174)

This seems like a rather severe judgment on the struggles of gay-lib groups, feminist activists, anti-abortion groups and the like who have continued their activities into the seventies and eighties and whose achievements appear, at least phenomenally, to represent something more than ghettos. It is this negative quality of both books which, perhaps, led an earlier reviewer to comment that the reader is posed crucial questions, only to be “coshed with an Althusserian answer, repulsive in its completeness and beguiling simplicity” (Ditton 1981: 131). However, this is an unfair criticism, at least of *Permissiveness and Control*. It is true that, as Stuart Hall avers in his excellent introduction to the book, there is an overall structuralist explanation for the sixties legislation. It was “one attempt to articulate a culture, a ‘civilisation’, a moral economy for an emergent state of capitalism”, and more precisely to “fix the limits to state intervention, to circumscribe the sphere of operation of the state: to define the state as junior partner in the state-capital alliance . . .” (pp 35-36). This program’s limited success was based on an alliance of

“Right progressives” and “Revisionists”, and its ultimate failure followed the breakup of this front as a result of shifting class alliances of the period. But these structural connections are nowhere seen as inevitable or unproblematic. Hall, especially, is only too clear about the complexities and pitfalls:

here we can find no fixed functions or correspondences; here everything depends on the conjuncture, on the shifting balance between contending forces . . . (p 38)

and elsewhere:

It [the programme of legislation] was submitted to and shaped by the forces, institutions and apparatuses, the philosophies and ideologies specific to this domain. These were often in opposition to, or cross cut and limited by, other tendencies and forces. The precise balance or “settlement” struck in this domain, as well as its subsequent disintegration and reformulation, fore-closes on any attempt to disinter, retrospectively, a determinist narrative to the story. (p 40)

This sense of historical and theoretical caution pervades *Permissiveness and Control* yet is markedly absent in *Capitalism and the Rule of Law*. Perhaps the difference is the fact that the former is dealing with a specific conjuncture, and that concrete history is a good deal more difficult to control than abstractions such as “the commodity form”. Not that the latter is in its nature ahistorical, for, as noted, bourgeois historians have paid considerable attention to it. Rather, it is the pitching of argument *solely* at a level of high abstraction which allows the hypertheorists a licence to *assert* universals. This luxury is denied to those who wrestle with what Hall terms the “theoretical gap between historical ‘logic’ and historical ‘process’ [which] threaten[s] the security of the most careful and tentative historical reconstruction” (pp 39-40). Perhaps a further effect of paying attention to history is to reintroduce not only the problematic status of theory but also the *negotiated* nature of that order which is the “rule of capital”. This is certainly an inference to be drawn from the one or two detailed historical papers which are rather uncomfortably inserted into *Capitalism and the Rule of Law*. After wading through something over a hundred pages of repetitive, over-general, ahistorical and abstracted theoreticist debate, the reader stumbles happily into Phil Cohen’s “Policing the Working Class City”. This is an analysis of how policing in North London has, over the past century, reflected structurally generated but contradictory practices required of police — those of maintaining order *and* legitimacy. This paper deals directly with such abstract considerations yet is also true to principles of historical specificity. Much of the article is taken up by detailed analysis of working class resistance to policing, and how this forced police to negotiate order. For example, Cohen takes as a central problem the explanation of how and why guerilla warfare between whole communities and the police during the nineteenth century died down, leaving young males on the front line of street confrontation with the law. Cohen’s answer is complex and sometimes annoyingly enigmatic, but reduced to its essentials, he attributes the shift to a working class drift away from street culture and toward privatisation and public propriety. This, in turn, opened up a sphere of concordance between the parental (or proprietorial) generation and the police, ratifying the institutions of patriarchy and public pro-

priety and outlawing "those practices of women and children which challenged the monopoly of those institutions over the working class city" (p 131).

The difference between these two books can easily be exaggerated, for they share an abiding pessimism and are produced by an overlapping and organisationally linked group of radical sociologists. However, the difference between the theoreticist mode of analysis of *Capitalism and the Rule of Law* and the historical materialism of *Permissiveness and Control* is crucial to contemporary Marxist analyses of law. The significance lies not in the polarisation of "theory" and "history", but in the contrast between ahistorical and highly abstract theorising and a theoretically informed history which explicitly and selfconsciously oscillates between different levels of abstraction. In the latter project lies the synthesis of history and theory which will be, perhaps, the only enduring legacy of that enormous growth industry of the 1970s: the structuralist analysis of law and the capitalist state.

Pat O'Malley.

References

Ditton, Book Review (1981) 15 *Sociology*, 130.