Colin Jenkins
”Spider Webs for the Rich and Mighty”
A Libertarian-Socialist Critique of Criminal Law
January 11, 2016

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and its ”monopoly of violence” via the criminal justice system. As long as capitalism is used to shape the social relations that are to be monitored and controlled, the state remains as nothing more than a tool to be wielded by the wealth and land-owning minority. And as long as the state remains a coercive extension of these social relations, the notion of criminal law will remain nothing more than a camouflaged totalitarianism designed to keep its boot on the neck of the disenfranchised majority.

sity, to impose upon my free will. Laws! We know what they are, and what they are worth! Spider webs for the rich and mighty, steel chains for the weak and poor, fishing nets in the hands of the government."[17]

In the modern United States, Proudhon's vision plays out every day. Under capitalism, laws are created by millionaire legislators who are financially supported by billionaire interests, enforced by hired guns of the working class (police), and ruled on by wealthy elites in black robes who are largely detached from their subjects. As capitalism naturally leads to greater concentrations of wealth and power, along with greater numbers of dispossessed citizens, crime and punishment becomes solely directed at the most marginalized of these masses. In the US, this includes the poor, the working poor, and people of color.

This correlation has never been more evident than in the neoliberal era (roughly 1980 until now), which is widely recognized as an intensification of the capitalist system. Since 1980, the total adult correctional population (those in prison/jail and on probation/parole) has increased from two million to seven million.[18] During this time, the prison population itself has increased 470 percent (from 320,000 in 1980) to 1.5 million in 2013.[19] Those scooped up by ruling class "fishing nets" and placed in "steel chains" are disproportionately poor and black.[20]

This scenario that has developed over the course of centuries has delegitimized any attempt to establish state authority, coercion,

archist Library on November 12, 2015 @ http://theanarchistlibrary.org/library/michail-bakunin-what-is-authority

[17] Proudhon, Pierre-Joseph (1851), General Idea of the Revolution in the Nineteenth Century. Republished by Courier (2013)

[18] Bureau of Justice Statistics (BJS), US Office of Justice Programs (2014). Accessed online athttp://www.bjs.gov/content/pub/pdf/p13.pdf

[19] The Sentencing Project: Research for Advocacy and Reform (2014). Accessed online athttp://www.sentencingproject.org/template/page.cfm?id=107

[20] BJS (2014)

As human societies have developed over the course of history, so too have corollary systems of order. In the most basic sense, the often informal development of customs, norms and ethics become inevitable in spaces where groups of human beings come together to interact with another. However, as the scales of human interaction have grown - from tribes to communities to nation-states - these informal codes of conduct have become formal systems of rule and order which have taken on physical identities in the form of states and governments.

In his influential essay, *Politics as Vocation*, Max Weber provided one of the most important analyses regarding the sociological development of the state. Weber introduced the concept of rational-legal authority in his attempt to explain the rise and justification of the modern bureaucratic nation-state. As a self-described "bourgeois theorist," Weber provided a strong breakdown of the modern state, tended towards justifying its purpose, and recognized the inherently forceful nature of its existence:

"'Every state is founded on force,' said Trotsky at Brest-Litovsk. That is indeed right. If no social institutions existed which knew the use of violence, then the concept of 'state' would be eliminated, and a condition would emerge that could be designated as 'anarchy,' in the specific sense of this word."[1]

Perhaps most crucial was Weber's notion of a "monopoly of violence" for which he viewed as a legitimate power of the state:

"Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory. Note that 'territory' is one of the characteristics

[1] Weber, Max (1919), "Politics as a Vocation." Accessed online at

of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence."[2]

Weber's justification is predicated upon two important assumptions: (1) that a distinction between authority and coercion exists, and that authority becomes legitimate when "individuals accept and act upon orders that are given to them because they believe that to do so is right;"[3] and (2) that rational-legal authority itself is legitimized, via the political process, by the people under its rule. Despite the questionable nature of these assumptions, Weber's hierarchical structure has come to dominate our world. The formation of criminal law, while not just a modern phenomenon, has provided further justification for rational-legal authority. And the formidable development of modern criminal justice systems equipped with the means to carry out this "monopoly of violence" on a daily basis has assured the maintenance of Weber's state.

These legitimized systems of violence, authority and coercion have reached a point where they are accepted by most without hesitation: a common acceptance that begs to be questioned.

Law as Morality

"Nobody in the world, nobody in history, has ever gotten their freedom by appealing to the moral sense of the people who were oppressing them."

http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf

[2] Ibid

[3] Best, Shaun (2002), Introduction to Politics and Society (Sage Publications) Accessed online athttps://www.sagepub.com/sites/default/files/upm-binaries/9547_017533ch2.pdf

should come into question. Mikhail Bakunin perhaps explained this best in his treatise, *What is Authority*:

"Does it follow that I reject all authority? Far from me such a thought. In the matter of boots, I refer to the authority of the boot-maker; concerning houses, canals, or railroads, I consult that of the architect or the engineer. For such or such special knowledge I apply to such or such a savant. But I allow neither the boot-maker nor the architect nor savant to impose his authority upon me. I listen to them freely and with all the respect merited by their intelligence, their character, their knowledge, reserving always my incontestable right of criticism and censure. I do not content myself with consulting a single authority in any special branch; I consult several; I compare their opinions, and choose that which seems to me the soundest. But I recognize no infallible authority, even in special questions; consequently, whatever respect I may have for the honesty and the sincerity of such or such individual, I have no absolute faith in any person. Such a faith would be fatal to my reason, to my liberty, and even to the success of my undertakings; it would immediately transform me into a stupid slave, an instrument of the will and interests of others."[16]

Because they are constructed for the purpose of controlling the disenfranchised masses of people, modern laws represent authority of the illegitimate kind. Speaking of such laws, the anarchist Pierre-Joseph Proudhon famously proclaimed:

"I recognize none of them: I protest against every order which it may please some power, from pretended neces-

[16] Bakunin, Mikhail (1871), What is Authority? Accessed online at the An-

tured conflict stemming from the material conditions of a society's mode of production finds itself lacking legitimacy and justification.

In reality, capitalism creates widespread conflict by alienating the majority. Therefore, in such a system, "crime" (especially regarding that which is routinely enforced) represents the actions of people who have become dehumanized, dispossessed, stripped of human creativity, and left without the means to fulfill basic human needs.

Conclusion

> *"The master's tools will never dismantle the master's house."*
>
> – Audre Lorde

If human beings are in fact individuals with "different desires, needs, and wants," as described even by the dominant criminological paradigm, then we must question the existence of hierarchical societies based in authority and domination. Such societal arrangements persist and have been accepted as "common sense" despite the inherent contradictions they impose. Within these arrangements, written laws have been identified as "social controls" needed to "alleviate natural conflict" and settle such conflict "in a manner most advantageous to the group (society/community)." However, when applied to societies that have been shaped by flawed economic systems (like capitalism) and historical processes that have led to wealth and land-owning minorities "governing" disenfranchised majorities, laws have taken on a different identity, mainly one that serves as a weapon of unquestioned authority.

Authority, in itself, is not a wholly illegitimate concept. Authority as a measure of competence or expertise may be extremely useful when serving society. However, when it becomes a means of social control, of domination by one over another, its legitimacy

– Assata Shakur

There has been an ongoing, centuries-long societal experiment to equate written laws with morality. The historical development of human societies have made laws necessary for reasons that will be discussed below, and the need to house these laws in justifications centered within authority and domination (also discussed below) have relied on an institutional "rebranding" of these hierarchical relations. One of the main tools in this rebranding process has been the inclusion of morality-based conditioning, which exists everywhere from parenting to public education. This is not a new phenomenon, but yet persists as a main tool in shaping customs and norms which are amenable with living under systems of domination. In his 1886 classic, *Law and Authority*, Peter Kropotkin touches on this deep conditioning process used to create an obedient population:

> *"We are so perverted by an education which from infancy seeks to kill in us the spirit of revolt, and to develop that of submission to authority; we are so perverted by this existence under the ferule of a law, which regulates every event in life - our birth, our education, our development, our love, our friendship - that, if this state of things continues, we shall lose all initiative, all habit of thinking for ourselves.*
>
> *Indeed, for some thousands of years, those who govern us have done nothing but ring the changes upon "Respect for law, obedience to authority." This is the moral atmosphere in which parents bring up their children, and school only serves to confirm the impression. Cleverly assorted scraps of spurious science are inculcated upon the children to prove necessity of law; obedience to the law is made a religion; moral goodness and the law of the*

masters are fused into one and the same divinity. The historical hero of the schoolroom is the man who obeys the law, and defends it against rebels."[4]

This cultural conditioning seeks to establish widespread consent, or at least the appearance of such, through the construction of an artificial system of morality. As opposed to ethics and morals which are innate attributes of the human race - live and let live, treat others as you would expect to be treated, cooperate and coexist, etc - these artificial systems of morality have been designed to make "rights" synonymous with things like authority, order and obedience, and "wrongs" as being synonymous with any and all dissent from this established order.

Governments play a major role in this cultural process, and modern systems of liberal democracy aid in this construction. In *The Individual, Society, and the State*, Emma Goldman sheds light on this phenomenon:

> *"Political government and the State were a much later development, growing out of the desire of the stronger to take advantage of the weaker, of the few against the many. The State, ecclesiastical and secular, served to give an appearance of legality and right to the wrong done by the few to the many. That appearance of right was necessary the easier to rule the people, because no government can exist without the consent of the people, consent open, tacit or assumed. Constitutionalism and democracy are the modern forms of that alleged consent; the consent being inoculated and indoctrinated by what is called "education," at home, in the church, and in every other phase of life.*

[4] Kropotkin, Peter (1886), Law and Authority. Accessed online at the Anarchist Library on November 12, 2015 @ http://theanarchistlibrary.org/library/petr-kropotkin-law-and-authority

> *"This 'rugged individualism' has inevitably resulted in the greatest modern slavery, the crassest class distinctions, driving millions to the breadline. 'Rugged individualism' has meant all the 'individualism' for the masters, while the people are regimented into a slave caste to serve a handful of self-seeking 'supermen.' America is perhaps the best representative of this kind of individualism, in whose name political tyranny and social oppression are defended and held up as virtues; while every aspiration and attempt of man to gain freedom and social opportunity to live is denounced as 'unAmerican' and evil in the name of that same individualism."*[15]

This merger serves to not only fortify the justification for written laws as tools of authority and domination over the majority, but also the unquestioned consent of those (in this case, the alienated working-class majority) being controlled and oppressed by such laws.

In direct contrast to a common belief in the need for law to address "natural" conflict in human societies, it is crucial to recognize the manufactured conflicts created by capitalism. The justification presented in the dominant paradigm possesses two fundamental flaws in this regard: the first of which lies in the view that conflict is in fact "natural" within all human societies; and the second being in the exclusion of material conditions as a factor in creating conflict. In order to be legitimized, this justification must rely on basic assumptions related to material conditions, most specifically the presence of an economic system which allows for equal and broad access to basic necessities such as food, clothing, shelter, healthcare, etc. Much like the false assumptions in Weber's analysis of the modern state, any premise that fails to consider the manufac-

November 29, 2015 athttp://www.sociology.org.uk/

[15] Goldman (1940)

positions of those who commit crimes versus those who create and enforce laws. Basic tenets of this theory include:

- Deviance (as determined by the artificial morality described above) is partly the product of unequal power relations and inequality in general.
- Crime, as established by the ruling class (with their own interests in mind) is an understandable response to the situation of poverty and mass disenfranchisement.
- Crime is often the result of offering society demeaning work with little sense of creativity.
- The base (economic system) disenfranchises the working-class majority; the superstructure (government and law creation) serves the ruling-class minority.
- The capitalist class (minority) co-opts the capitalist government to create laws that seek to maintain its power through coercing and controlling the working-class majority.
- "The heart of the capitalist system is the protection of private property, which is, by definition, the cornerstone upon which capitalistic economies function." Thus, written law reflects this fundamental value of property and profit over people.[14]

In the United States, the dominant ideology that espouses "individualism" and "exceptionalism" has been successful in merging manufactured morality and consent to the economic "virtues" of capitalism and patriotism, which are also manufactured in the same ways. Goldman explains the cultural effects of this process:

Philosophy of Legal Order." Appeared in *Critical Criminology*, edited by Ian Taylor (Routledge)

[14] Covington, Jeanette (2000), Marxist Perspective on Crime. Accessed on

> *That consent is the belief in authority, in the necessity for it. At its base is the doctrine that man is evil, vicious, and too incompetent to know what is good for him. On this all government and oppression is built. God and the State exist and are supported by this dogma."*[5]

This artificial notion of morality, and the modern creation of "manufactured consent" via systems of "constitutionalism and democracy," is what Howard Zinn aptly referred to as *The Conspiracy of Law*. In transitioning the deliverance of authority from the "rule of men" to the "rule of law," according to Zinn, the power brokers have not only created their own sets of "Natural law," but have also made such laws nearly impossible to question:

> *"The modern era, presumably replacing the arbitrary rule of men with the objective, impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. What was done before - exploiting men and women, sending the young to war, putting troublesome people into dungeons - is still done, except that this no longer appears as the arbitrary action of the feudal lord or the king; it is now invested with the authority of neutral, impersonal law. Indeed, because of this impersonality, it becomes possible to do far more injustice to people, with a stronger sanction of legitimacy. The rule of law can be more onerous than the divine right of the king, because it was known that the king was really a man, and even in the Middle Ages it was accepted that the king could not violate natural law. (See Otto Gierke, Political Theories of the Middle Age, Notes 127-134.) A code of law is more easily defied than a flesh*

[5] Goldman, Emma (1940), The Individual, Society and the State. Accessed online at the Anarchist Library on November 12, 2015 @ http://theanarchistlibrary.org/library/emma-goldman-the-individual-society-and-the-state

and blood monarchy; in the modern era, the positive law takes on the character of natural law."[6]

The repackaging of authority into morality (written law as natural law), and the arbitrary nature of this new authority, also make it nearly impossible to target:

"Under the rule of men, the enemy was identifiable, and so peasant rebellions hunted out the lords, slaves killed plantation owners, and radicals assassinated monarchs. In the era of the corporation and the representative assembly, the enemy is elusive and unidentifiable; even to radicals the attempted assassination of the industrialist Frick by the anarchist Berkman seemed an aberration. In The Grapes of Wrath, the dispossessed farmer aims his gun confusedly at the tractor driver who is knocking down his house, learns that behind him is the banker in Oklahoma City and behind him a banker in New York, and cries out, 'Then who can I shoot?'"[7]

Law as Authority

"As long as some specialized class is in a position of authority, it is going to set policy in the special interests that it serves."

– Noam Chomsky

The need for written laws is something that is rarely, if ever, questioned. It is a common belief that such laws are necessary, and

[6] Zinn, Howard (1971), "The Conspiracy of Law." Appeared in *The Rule of Law*, edited by Robert Paul Wolff (New York: Simon and Schuster)

[7] Ibid

- The State is organized to serve the interests of the dominant economic class, the capitalist ruling class.
- Criminal law is an instrument of the State and ruling class to maintain and perpetuate the existing social and economic order.
- Crime control in capitalist society is accomplished through a variety of institutions and agencies established and administered by a government elite, representing ruling-class interests, for the purpose of establishing domestic order.
- The contradictions of advanced capitalism - the disjunction between existence and essence require that the subordinate classes remain oppressed by whatever means necessary, especially through the coercion and violence of the legal system.
- Only with the collapse of capitalist society and the creation of a new society, based on socialist principles, will there be a solution of the crime problem.[13]

The process of transforming laws into weapons of authority to be wielded by the wealth and land-owning minority over the disenfranchised majority, as touched on by Kropotkin, has reached its current stage via the promulgation of this "advanced capitalist economy" in the United States. This system, as an economic base, has allowed for the historical continuation of separating the masses from access to basic needs, while also fusing the law-making apparatus (the government) nearly completely with the wealth-owning elite (the former private sector).

When examining criminal justice systems found under capitalism, Marxist gatekeeper theory is invaluable. The most basic application of this Marxian analysis proves helpful in illustrating the

[13] Quinney, Richard (1975), "Crime Control in Capitalist Society: A Critical

superstition, and established in the interests of consumer, priest and rich exploiter, it must be utterly destroyed on the day when the people desire to break their chains."[12]

Criminal Law in a Capitalist System

"Ask for work. If they don't give you work, ask for bread. If they do not give you work or bread, then take bread."

– Emma Goldman

As with all societies, written laws become the primary mean of maintaining the status quo. The most fundamental purpose of such laws is to create and maintain a minimal degree of stability or at the very least a semblance of stability within certain areas of society. In the modern United States, the status quo has been shaped by a base economic system of capitalism that is characterized by multi-generational poverty, extreme inequality, and high concentrations of wealth and power. Therefore, when applied to this base, criminal laws are essentially statutes that are developed by legislators who either come from or are tied to those concentrations of wealth and power, and are placed upon the at-large population which has already been disenfranchised by the economic system. Because of this, a critical theory of criminal law becomes vital in deconstructing the nature and purpose of such laws.

In his essay *Crime Control in Capitalist Society*, Richard Quinney provides us with important assertions that must be understood before moving forward with this breakdown:

- American society is based on an advanced capitalist economy.

[12] Ibid

that "the need for law lies in the history of the human race."[8] In popular college textbooks like *Essentials of Criminal Law*, this common acceptance is housed in a rationality that can be summarized by the following: 1) People are individuals, and their desires, needs, and wants differ from those of others; 2) These differences cause conflict; 3) When people began to live in groups, communities, and societies, laws became necessary; and 4) Law became necessary as a means of social control, either to alleviate conflicts or to settle them in a manner most advantageous to the group.[9]

When viewed in this manner, laws are presented as a mechanism designed to serve the community for which they are applied. The assumptions for applying them under this rationale are numerous: for example, we must assume that all individuals within a given community/society are allowed equal access to basic necessities; we must assume that all individuals are treated equally under the law; and we must assume that material conditions (or the base economic system for which society rests) allow for free association among all members. Without this foundation, as summarized by these basic assumptions, the justification widely used in support of written laws becomes null and void.

Therefore, when applied to societies that are shaped by flawed economic systems - systems that disenfranchise members and fail to allow many to fulfill basic needs - laws no longer serve the community, but rather serve the most powerful members of that community. In this instance, laws are transformed from statutes designed to enhance the common good to statutes designed to control the disenfranchised members. When this transformation occurs, laws become weapons of authority, essentially losing their legitimacy within a given community or society. Kropotkin describes

[8] Chamelin, N. & Thomas, A. (2009) Essentials of Criminal Law, 11th edition (Prentice Hall)

[9] Ibid

this transformation which is based in the need to establish the domination of the minority over the majority:

> *"The desire to dominate others and impose one's own will upon them; the desire to seize upon the products of the labour of a neighbouring tribe; the desire to surround oneself with comforts without producing anything, whilst slaves provide their master with the means of procuring every sort of pleasure and luxury - these selfish, personal desires give rise to another current of habits and customs. The priest and the warrior, the charlatan who makes a profit out of superstition, and after freeing himself from the fear of the devil, cultivates it in others; and the bully, who procures the invasion and pillage of his neighbours, that he may return laden with booty, and followed by slaves; these two, hand in hand, have succeeded in imposing upon primitive society customs advantageous to both of them, but tending to perpetuate their domination of the masses. Profiting by the indolence, the fears, the inertia of the crowd, and thanks to the continual repetition of the same acts, they have permanently established customs which have become a solid basis for their own domination."*[10]

The establishment of authority and domination becomes necessary when a minority section of society decides that it is deserving of owning wealth and land far beyond the purpose of its own use. This development naturally leads to the disenfranchisement of a multitude of members whose size grows in a perpetual manner alongside the constant pursuit of more wealth and land by the elite. As this development continues, laws are reduced to serving this dominant minority. Kropotkin explains:

[10] Kropotkin (1886)

> *"But as society became more and more divided into two hostile classes, one seeking to establish its domination, the other struggling to escape, the strife began. Now the conqueror was in a hurry to secure the results of his actions in a permanent form, he tried to place them beyond question, to make them holy and venerable by every means in his power. Law made its appearance under the sanction of the priest, and the warrior's club was placed at its service. Its office was to render immutable such customs as were to the advantage of the dominant minority."*[11]

As time goes on, these laws become customs that are widely accepted even by the majority-population for which they are designed to control, and to prevent from accessing basic human needs, through violence and coercion. This gradual process has led to the modern justifications given above, all of which ignore the historical process of minority rule via the disenfranchisement of the majority, to the point where the legitimacy of such laws are no longer questioned. As Kropotkin concludes:

> *"Such was law; and it has maintained its two-fold character to this day. Its origin is the desire of the ruling class to give permanence to customs imposed by themselves for their own advantage. Its character is the skilful commingling of customs useful to society, customs which have no need of law to insure respect, with other customs useful only to rulers, injurious to the mass of the people, and maintained only by the fear of punishment.*
>
> *Like individual capital, which was born of fraud and violence, and developed under the auspices of authority, law has no title to the respect of men. Born of violence and*

[11] Ibid