

BOOK REVIEW

LAW AND THE RISE OF CAPITALISM. By Michael E. Tigar with the assistance of Madeleine R. Levy. Monthly Review Press, 1977. Pp. xvi, 346. Price \$16.00.

David Kairys *

Traditional jurisprudence removes law from its historical and social context and function and portrays it as an objective, almost timeless science. The law and the state are commonly characterized as neutral, value-free arbiters, independent of underlying social relations and political forces.

For example, consider the jurisprudential underpinnings of a typical law school class studying the right to speak on a public street corner. Such topics as the application of the first amendment to the states and the role of federal courts concerning individual freedoms would be explored. These concepts and their development would be discussed as abstract legal questions, with some reference to equally abstract notions of how a society should deal with dissent. The courts would be depicted as grappling with these legal questions and arriving at the ultimate (present) wisdom by objectively analyzing and balancing rights and interests. Social and political forces and the ideological perspectives of judges would be considered irrelevant to this *legal* process. The early cases¹ on the right—in which it was flatly and unanimously denied on the basis of countervailing property rights—would be of little, if any, concern, nor would the fact that the right was first constitutionally protected² in the

* B.S., Cornell, 1965; LL.B., Columbia, 1968; LL.M., University of Pennsylvania, 1971. Member of the Pennsylvania and District of Columbia Bars. Member of the Philadelphia law firm Kairys, Rudovsky and Maguigan; Philadelphia counsel for the National Emergency Civil Liberties Committee.

¹ In *Davis v. Massachusetts*, 167 U.S. 43 (1897), a Jehovah's Witness minister was denied the right to speak and distribute a religious leaflet on Boston Commons, a public park, based on a city ordinance that prohibited "any public address" on public grounds without a permit from the mayor. The Supreme Judicial Court of Massachusetts, in an opinion by Justice Holmes, had upheld the ordinance based on the property rights of the city:

That such an ordinance is constitutional . . . does not appear to us open to doubt For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.

Commonwealth v. Davis, 162 Mass. 510, 511 (1895), *aff'd*, 167 U.S. 43 (1897). The Supreme Court of the United States unanimously affirmed, quoting Justice Holmes' analogy to a private house. 167 U.S. at 47.

² *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

context of a mass movement that demanded recognition of unions, collective bargaining and democratic rights of free speech and that posed a distinct threat to the existing order.³

Law and the Rise of Capitalism almost exclusively concerns western Europe in the period 1000 to 1804, but the authors have set out a Marxian jurisprudence and political perspective that provides a realistic basis for understanding our history and the role of the law in the United States. Relying on meticulous research, they examine the transformation from feudalism to capitalism in terms of changing material conditions and social relations and the groups and ideologies that competed for hegemony, with particular emphasis on the role of law and lawyers. They identify the evolving interests and ideologies of feudal lords, monarchs, clerics, peasants, workers, and the emerging and ultimately victorious merchant class, or bourgeoisie,⁴ and they explain 800 years of struggle—during which the feudal order was nudged, reformed, confronted and eventually crushed—in terms of those changing conditions and relations and competing interests and ideologies. The result is fascinating history and a jurisprudence that provides both a theoretical and practical understanding of the law.

I.

Law and the Rise of Capitalism is organized into six parts: an overview is presented in the first and conclusions in the last; the core of the book consists of four parts that concern the periods 1000 to 1200, 1200 to 1400, 1400 to 1600, and 1600 to 1804. The analysis “move[s] from specific events to general principles and trends”⁵ and is based on extensive historical research, including, for example, examination of the terms of early private contracts.

³ The treatment of this issue in two widely used constitutional law case books is illustrative. In E. BARRETT & P. BRUTON, CONSTITUTIONAL LAW, CASES AND MATERIALS (1973), *Hague* and *Lovell* as well as *Davis* are not even in the index of cases. There is a detailed history of freedom of speech and press in England starting with the Middle Ages, *id.* 1102-05, but no historical analysis of these rights in the United States. The authors state that “the Supreme Court, during the first 130 years of its life, had no occasion to interpret this guaranty [of freedom of speech and assembly].” *Id.* 1106. In G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS (9th ed. 1975), *Hague* and *Lovell* are reproduced at some length and *Davis* is mentioned in a footnote, *id.* 1146 n.^o, but there is no historical discussion or analysis, and these cases are not placed in their social and political contexts.

⁴ The term “bourgeois” first appeared in a French charter of 1007 and was soon used throughout Europe. M. TIGAR & M. LEVY, LAW AND THE RISE OF CAPITALISM 84 (1977) [hereinafter cited as TIGAR & LEVY].

⁵ *Id.* xiii.

In most modern western societies, successful merchants epitomize established respectability, but when they first appeared in western Europe, about 1000 A.D., they were derided and scorned. "Profit-taking was considered a form of usury, and the merchant's soul was thought to be in jeopardy."⁶ Frequently subject to violent attack, these early merchants were skilled at combat and often traveled in well-armed bands.

Though not yet organized or conscious of themselves as a social force, the emerging merchant class sought to create conditions conducive to trade and, later, to manufacture. These conditions included the right of all people⁷ to make enforceable contracts and to buy and sell goods, materials and labor; mechanisms for transmitting funds, credit and insurance; and guaranteed physical security.⁸

Such a system—containing the seeds of capitalism⁹—was irreconcilable with and directly challenged the feudal order, and the early merchants were considered rebels and criminals.¹⁰ The political and social ideology of feudalism was based on the duties and responsibilities that define the relationship between lords and vassals. The lord reigned supreme and owned everything in his territorial

⁶ *Id.* 4.

⁷ This did not include racial minorities or women, nor did it preclude slavery. Later, Montesquieu, whose philosophy of freedom is basic to American and all western thought, condemned slavery, but he had some exceptions. A shareholder in the India Company, Montesquieu observed that "[s]ugar would be too expensive if one did not use slave labor." TIGAR & LEVY, *supra* note 4, at 254. To distinguish exploitation of slave labor in the Third World, of which he approved, Montesquieu relied not on the need for goods or profits but on natural reason: "It must be said that slavery is against nature, though in certain countries it is founded upon natural reason. One must distinguish between such countries and those in which natural reasons reject it. One must therefore limit slavery to certain portions of the earth." *Id.* 253-54.

⁸ *Id.* 4.

⁹ Whether the mercantile activity of this period is "capitalism" depends largely on one's definition of the term. M. DOBB, *STUDIES IN THE DEVELOPMENT OF CAPITALISM* 1-32 (1947). Tigar and Levy do not attempt to define capitalism, but, in describing 11th and 12th century commerce, refer to the "growing power of a [merchant] class that possessed capital and the means to increase it," and acknowledge the phenomenon as "merchant capitalism." TIGAR & LEVY, *supra* note 4, at 66, 97. Such a view comports with those identifying capitalism loosely, as a calculating, systematic, acquisitive impulse to amass profit. See H. PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 163 (1936) ("[M]edieval sources place the existence of capitalism in the twelfth century beyond a doubt."); M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (T. PARSONS transl. 1930); I. W. SOMBART, *DER MODERNE KAPITALISMUS* 25 (1928). It departs from Marx's view of capitalism as an ordering of the relationship among people based on ownership of the means of production by a discrete class. See, e.g., I. K. MARX, *CAPITAL* 751, 756 (Int'l Publ. ed. 1967). Capitalism in this sense did not arise until the 16th century, M. DOBB, *supra*, at 18. Tigar and Levy recognize the distinction, TIGAR & LEVY, *supra* note 4, at 180, but capably demonstrate the singular role of law in both the earlier and later processes.

¹⁰ TIGAR & LEVY, *supra* note 4, at 4.

domain; he had a duty to provide for the necessities and safety of his charges. The vassal family was bound to the land, could not sell even most movable property or marry without the lord's permission, and had a duty to provide troops and provisions for the lord's army.

Feudal law, based on this social relationship and ideology, was characterized by two principles: personality of law and customary laws applied over a given territory.¹¹ The principle of personality of law, derived from Roman law, applied different bodies of law to persons of different statuses and from different places. This gave way to a system of uniform application to all within the lord's domain.

The struggle of the merchants, and whatever allies they could muster, and the competing interests and ideologies underlying feudalism and capitalism form the basis for understanding the history of western Europe from 1000 to 1804. In this struggle, attempts were made to "reform" the feudal system to accommodate the interests of the merchants. The legal ideologists—lawyers—of the merchant class first "sought to justify the place of trade in the symmetry of the feudal system. They . . . sought accommodation with, and weak spots in, feudal law."¹² For example, the personality of law tradition in feudal law was used as a lever for incorporating into the feudal legal system a law of commerce to be applied to merchants. Later, the merchants "discovered the points at which the legal system could no longer be bent to [their] will, accommodated at an affordable price, or evaded."¹³ They established alternative legal institutions and "zones of free commerce," and they developed an ideology that based freedom of action for businessmen on natural law and natural reason, much as feudal ideology used religion to justify and enforce feudal social relations. The long process of change moved from accommodation to often violent confrontation,¹⁴ and the victory of the merchant class was ultimately won by armed conflict. In this process,

Bourgeois ideas of contract and property in land did not spread over wider areas because they were necessarily better than other ideas; they spread from the urban nuclei of bourgeois power because they represented a system of economic relations uniquely adapted to the level of technology and learning of a certain time. Their implacable tend-

¹¹ *Id.* 25.

¹² *Id.* 5.

¹³ *Id.*

¹⁴ There was sporadic violence throughout the struggle, such as the beheading of a bishop in 1112 by 40 merchants because of the bishop's reneging on a grant of power to their cooperative enterprise. *Id.* 87.

ency was to dissolve old relations of production and exchange. As Marx also wrote: "Agriculture comes to be more and more merely a branch of industry and is completely dominated by capital Capital is the all-dominating power of bourgeois society."¹⁵

In the period 1000 to 1200, the early merchants, mainly urban dwellers from the lower levels of society, sought legal recognition within the feudal order and

demanded one major concession from the seigneur: a charter, drawn in accordance with the law of the place, setting out that there existed—as there had not existed before—the status of bourgeois, burgher, or burgess, and establishing that this status implied certain rights and duties.¹⁶

The Crusades, 1095 to 1291, played a crucial role in this struggle. Christian religious shrines and pilgrims were being treated with hostility in the east, and religious fervor was surely aroused. But there was also a growing demand for eastern goods, and the Crusades helped solve some domestic problems and furthered bourgeois interests.

Crusading combined two worthy objectives—making the Holy Land safe for merchants and for religious pilgrimage—with a worthy means of accomplishing them, namely, getting an increasingly restive, violent and socially unproductive class of soldiers, knights, and petty nobles out of the way.

. . . .

The crusading army was recruited from that portion of the feudal ruling class which was most actively battling with the merchants. The church and some of the more powerful seigneurs, aided by the nascent bourgeoisie, had already begun to struggle to curtail private feudal warfare, and the impediments to trade posed by feudal tolls, tariffs, and outright brigandage.¹⁷

¹⁵ *Id.* 312.

¹⁶ *Id.* 111. These charters gave legal sanction to establishment of "communes" or "custumals," which gained the right of a municipal assembly to make laws and hold court. They were cooperative in their operation, with the debts of each bourgeois assumed as a collective responsibility and competition among themselves prohibited. *Id.* 91-95.

¹⁷ *Id.* 58-59. Primogeniture, a creation of feudalism, led to a feudal identity crisis for the younger sons of nobles; the Crusades provided them a cause and a source of enrichment.

The need for large amounts of capital to finance the Crusades and the opening of trade routes provided a further impetus to recognition of mercantile interests.¹⁸

The authors are not the first¹⁹ to contest Weber's postulate of a unique correspondence between Protestantism and the capitalist spirit,²⁰ but their book marshalls a credible case for the pre-Reformation role of the Church in nurturing capitalism.²¹ The Church, at first hostile to the merchants, soon became the primary financial beneficiary of trade, and Church doctrine was overhauled. Itinerant merchants were protected as pilgrims, Church resources were devoted to the study of Roman and commercial law, and "[t]he concept of just price was turned on its head by canonical theorists to become 'that price prevailing in the market.'"²²

The mercantile law urged upon the feudal legal system was not presented as original. "Rather, the bourgeois sought old legal forms and principles, chiefly Roman, and invested them with a new commercial content."²³ The Twelfth Century Renaissance was not the result of some abstract development of legal theory, nor was it, or the development of commercial civilization, solely a western phenomenon.²⁴ The resurrection of Roman law, and other sources of commercial law, followed the change in material conditions and the

¹⁸ The Crusades represented, therefore, an economic opportunity, quite apart from which side was militarily victorious. The opportunity represented by the increase in Eastern trade could not, however, be exploited without legal and institutional forms to permit the pooling of capital to fund large sea and land enterprises, to assure a protected market for the merchants who did gather the necessary capital, and to provide for the distribution of goods from the East in exchange for those from the West.

Id. 62.

¹⁹ See M. DOBB, *supra* note 9, at 9 n.1 (collecting authorities).

²⁰ M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (T. Parsons transl. 1930).

²¹ TIGAR & LEVY, *supra* note 4, at 102-10.

²² *Id.* 107. The principle of just price, derived from Roman Law, previously meant "that price that would reflect the intrinsic worth of the article sold as well as a fair remuneration for the work." *Id.* 107.

²³ *Id.* 6.

²⁴ The voyagers East discovered a civilization—indeed, civilizations—far more advanced than their own. They discovered Arab science, including medical learning. They discovered, and we know that they brought back, a system of mathematics based upon nine numbers and zero, which replaced the cumbersome Roman numeral system. A bit later they brought back rudimentary entry bookkeeping. And St. Thomas Aquinas erected his neo-Aristotelian philosophical system upon an Arabic translation of that philosopher.

The traders who returned from the East brought Roman law, too, or at least a more systematic and commercially usable version of it than had survived anywhere in the West.

Id. 72-73.

ascendancy of bourgeois social relations. And about the time the Crusades were beginning, there appeared "a new group of professionals, identified principally with the large merchants"—lawyers.²⁵

From 1200 to 1400, the bourgeoisie, still seeking change within the feudal order (and attempting to be recognized as nobles themselves), sought the favor of royalty, and royal power and bourgeois influence grew in tandem. Royalty sought sovereignty, not just a seat at the head of the feudal hierarchy, and the extension of the royal power to legislate, control the judicial process and intervene in the affairs of the cities. Sovereignty held by a royalty favorable to trade meant that commerce could proceed without the conflicting jurisdictions and claims of the feudal lords. By supporting the bourgeoisie, who would later turn against them, the monarchs gained revenue from trade and important allies in their struggles against the feudal prerogatives of the lords.

In the period 1400 to 1600, manufacture and merchant investment in production emerged, and the bourgeoisie championed political forms most conducive to the production and free movement of goods.

[T]he medieval ideal of a town as the common possession of the inhabitants, descendants of those who had united upon their solemn oaths, was giving way. The "corporation" came to mean the town officials, the wealthiest and most powerful of the inhabitants, who treated the town's property as their own, selling it and pocketing the proceeds.

In order to accommodate the rationalization of production, fields had to be enclosed, guild privileges overridden in charters to companies of entrepreneurs and exporters, and land laws rewritten; the task required a powerful, centralized authority, and the bourgeoisie were early champions of a powerful state apparatus. Nation states like England and France, which managed to unite around a strong central power, survived and were strengthened by the economic turmoil.²⁶

²⁵ *Id.* 62. The formalities of the law, making the use of a lawyer an expensive necessity, led to early hostility towards lawyers, particularly by poor people. In the 13th century, the following was a popular poem about a lawyer who served the poor:

St. Ives is from Brittany
A lawyer but not a thief
Such a thing is beyond belief!

Id. 162.

²⁶ *Id.* 193. Tigar and Levy examine the life and work of Thomas More in explaining this process. *Id.* 187-95.

The law of real property was recast to reflect the bourgeois concepts of exclusive ownership of a thing (*res*) by a person (*persona*).²⁷ In England, Henry VIII, wielding state power with no pretence of neutrality,²⁸ seized monastic lands in what is often depicted as a personal dispute with the Pope. These lands, at first generally thought to be retained by the crown, were turned over to the bourgeoisie. “[T]he efficient exploitation of these properties for mercantile purposes meant drawing together the production of raw wool and the manufacture of cloth; this in turn entailed the enclosure of the commons and the conversion of the villagers to wage-laborers.”²⁹

The development of contract law in this period—often characterized as a *cause* of the change from feudalism to capitalism—followed from changing conditions and the ascendancy of the bourgeoisie and bourgeois ideology.

[B]ourgeois social relations will [not] come into being, regardless of material conditions, whenever the legal idea of free bargain is sufficiently developed. The law of contract did not burst into existence and become established on the basis of the self evident justice of its principles. The field in which contracts operate is limited by the system of economic relations and this system is in turn determined by the level of technology, the strength of the opposing classes, and in general, the state of development of the forces of production. Having access to a sophisticated theory of contract is no guarantee of the presence of the ensemble of forces needed to put it to work.³⁰

With the ascendancy of bourgeois legal ideology,

[n]o longer, as in the feudal period, could landed property, its exploitation and defense, mediate the legal relations between people. Property became the relationship of persona

²⁷ Feudal notions of land ownership and use were nonexclusive. “[L]and might be held in common, or a piece of land might be used at different seasons by different persons for the benefit of the community.” *Id.* 197.

²⁸ The eighteenth-century bourgeois notion of the laissez-faire state as neutral arbiter was nowhere in evidence in Tudor England; the state was concededly an instrument, shared by the Crown and its powerful allies, to smash resistance to a new system of social relations. The later legal ideology of property as a natural right was an ideology for those who already owned land or were in the process of acquiring it in the normal course of trade; it was another way of saying that whoever had managed to capture a portion of the earth in the previous hundred years’ troubles ought to be able to keep it.

Id. 208.

²⁹ *Id.* 205. See K. MARX, *supra* note 9, at ch. xxvii.

³⁰ TIGAR & LEVY, *supra* note 4, at 212.

and res. The contract—to work, to sell, even to live in marriage—took pride of place.³¹

Just after 1600, Coke declared that the law merchant was part of the common law; “common lawyers and common-law courts would thenceforth serve the interests of merchants.”³²

The period 1600-1804 saw bourgeois victory over the feudal lords and feudalism, and over the monarchs³³ and the newer allies of the bourgeoisie, workers and peasants. In France, the Third Estate, which included the wealthy bourgeoisie, professionals, craftsmen, artisans, wage-laborers and agricultural smallholders, was united and led by the bourgeoisie. In 1789 the French National Assembly abolished feudalism and promised a redistribution of land. The Code Napoleon, enacted in 1804,

is revolutionary, to be sure, for it enacts the bourgeois ideals of contract and property and recognizes them as generally applicable. As a code of private law, however, it is uniquely in the service of the bourgeoisie, and is a clear betrayal of the aspirations and interests of the workers and peasants who were shock troopers of the Revolution.³⁴

The French Revolution came to be depicted as a discontinuity rather than as the culmination of 800 years of struggle by the bourgeoisie.³⁵ In contrast, traditional English historians describe similar changes there as accomplished with such continuity that it is difficult to perceive them as changes. Tigar and Levy disagree:

[I]t would be wrong to say, as do some modern historians, that the distinctive feature of English law is its gradual, peaceable development in an unbroken line since Magna Carta, or even since 1066. There were, on the contrary, revolutionary changes between 1600 to 1800. If obstacles remained that could not be knocked over with a law, or surmounted with a writ, the English bourgeoisie was not unwilling to turn to overtly revolutionary tactics. There

³¹ *Id.* 211-12.

³² *Id.* 218. This “was accomplished without overt violence to the landed class, whose interests were nominally protected, left to be dealt with more harshly at some future date.” *Id.*

³³ The bourgeoisie bore no small responsibility for the creation of a monarchy with claims to absolute power, for its interests had been served by forceful Tudor policies. But having achieved a redistribution of land, and having profited from the breakup of village life, the bourgeoisie sought allies in a new struggle to restrain the power of the Crown to interfere with trade. The common lawyers proved ready to join such an alliance.

Id. 227.

³⁴ *Id.* 234.

³⁵ *Id.*

was at least an implicit connection between reason and violence. "I pray thee, in the bowels of Christ, think that ye may be mistaken," Cromwell implored. But, on that occasion, he had his army with him.⁸⁶

Although the methods were somewhat different, and the myths of extreme discontinuity in France and extreme continuity in England persist,

[I]n both England and France a victorious class imposed a new legal ideology by force, and because the interest of the bourgeoisie in both countries was virtually identical, the systems of private law in both turned out to be remarkably similar. Yet the bourgeois revolutions in these two countries had rather different histories and one can detect a difference in innovative technique and in the rhetoric by which social change was advocated. There is a profound difference between Diderot's image of old idols crashing, and Coke's metaphor of a new harvest from old fields. The common-law judges and writers in England and America have preserved Coke's approach. "In order to know what it [the law] is," wrote Mr. Justice Holmes in this century, "we must know what it has been and what it tends to become." The image is not of the legislator changing and building, but of judges and lawyers fashioning out of historic usage new institutions to meet new needs.⁸⁷

II.

With the exception of some generalizations, *Law and the Rise of Capitalism* does not address the workings of the American legal system. However, the implications of this book regarding law and jurisprudence in the United States are profound and deserve some elaboration.⁸⁸

⁸⁶ *Id.* 272. K. MARX, *supra* note 9, at 734-37, discusses some of the oppressive vagabond laws to which the expropriated farmers were subjected.

⁸⁷ TIGAR & LEVY, *supra* note 4, at 272-73.

⁸⁸ I should explain how I arrived at my conclusions, since they result more from my experience than from my reading the books, articles and cases cited in these footnotes. My conclusions are primarily the result of my involvement in and observations of our legal system during the 10 years I have practiced law, and of the social and historical context of that period. The ability of our leaders and the society as a whole to justify or accept extreme poverty in the midst of extreme affluence, racism and the slaughter and terror we visited on the peoples of Indochina led me to seek an explanation and understanding of our society that goes beyond established thinking, which could explain neither what our society was doing nor why it was so difficult to change. I have also been affected by my earlier training in natural science and engineering, which left me suspect of claims that one's actions or principles are the result of objective or scientific analysis, a claim that is at the root of traditional jurisprudence.

The basic tenet of a Marxian jurisprudence is that law reflects underlying social relations and expresses and enforces, with the use or threat of institutional violence, the social ideology of the dominant class in society.³⁹ As material conditions change and a new class with irreconcilable interests and ideology emerges and ascends, existing social relations will be challenged, and a new legal ideology will challenge the old.⁴⁰ When the dominant class is challenged, the law may reflect a power shift, in the form of changed notions of property, individual rights, and governmental power and organization; become steadfastly entrenched in its enforcement of the status quo (and thereby heighten the possibility of confrontation); compromise or avoid hard issues; or serve to control or contain such challenges.⁴¹ Usually none of these roles—nor the existence of the underlying conflict—are acknowledged; rather, the law justifies its actions, even where they constitute significant changes, in terms of the established ideological structure—be it god-given, natural law or scientific.

The dominant class in the United States today is comprised of the corporatized descendants of those rebels who overthrew the feudal order—the bourgeoisie—and bourgeois ideology is evident everywhere around us: at our workplaces, schools, churches, hospi-

³⁹ I was led by my studies to the conclusion that legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life. . . . The mode of production in material life determines the general character of the social, political, and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence that determines their consciousness. At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression of the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then comes the period of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed.

K. MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY*, reprinted in MARX & ENGELS, *SELECTED WORKS* 182-83 (New World Paperback 1968).

⁴⁰ As Tigar and Levy point out, the role of law and legal ideology in social change and everyday life is far more important in most western societies than in, for example, China or Cuba.

⁴¹ Sometimes the law can provide an impetus to change, as it did in *Brown v. Board of Education*, 347 U.S. 483 (1954). There were longstanding movements to establish the civil rights of minorities before *Brown*, but the decision clearly gave added life to those movements and their cause. See R. KLUGER, *SIMPLE JUSTICE* (Vintage ed. 1977). The *Brown* decision and civil rights movements did not challenge the dominant order; they extended the promise of equality within the established system to racial minorities.

tals, in our government, culture, family and intimate relations, communication media—and in our courtrooms and Constitution.⁴² Our Constitution and judicial system reflect and enforce bourgeois social relations, and our positive law and guiding precepts are based on and limited by bourgeois ideology. Even seemingly unadulterated constitutional principles, such as freedom, equality and justice, are defined in terms of bourgeois ideology. The courts will enforce my right to speak and hand out a leaflet on a street corner, a right advocated in the bourgeois struggle against feudalism; but I cannot obtain space in a newspaper unless I am able to buy it and unless the owner wants to print what I have to say. The courts will provide relief if the government or, in some situations, a private employer, refuses to hire people based on their race or sex, but there is no right to a job, which must be acquired by exercise of the fictional “freedom” to contract. There is a right to vote in federal and local elections, but no right to vote or require an election concerning the leadership and direction of the major corporations or businesses that have a significant impact on a community, unless one has a property interest in them. Some people live in abject poverty while others enjoy virtually unlimited affluence, yet the law provides no remedy, legal or equitable. This state of judicial affairs is not due to a failure of the courts to enforce the law or to do justice. Justice, freedom and equality have no meaning outside of a particular system of social relations. It is precisely because the law reflects and enforces underlying social relations that, without substantial social change, one cannot obtain legal relief concerning these matters and that to understand the law, one must examine and understand bourgeois ideology, the contradictions of advanced capitalism,⁴³ and the ideology and strength of movements challenging the existing order.

⁴² The basic social theory of the Constitution, rooted in Locke and Montesquieu, was based on the protection of private property, the establishment of a representative federal form of government, and the institution of a set of prohibitions upon the national government designed to preserve substantive and procedural guarantees of freedom. These guarantees were justified in terms of “natural justice,” but their origin was less recon-dite; they grew out of specific revolutionary and prerevolutionary events.

TIGAR & LEVY, *supra* note 4, at 281.

⁴³ We live in a society with unequalled resources and productive capacity that provides material comfort and relative luxury to many. Yet a substantial number of our people live on the edge of survival and most, in the middle and lower classes, are often barely able to stay afloat. Blacks, other minorities and women are subjected to discriminatory actions and institutions and expected to perform the lowest tasks for subsistence pay and to provide a ready labor pool. We need housing, medical care, schools, jobs, and the people of the world need food. Yet our resources and the work and creativity of our people are squandered on the

The two primary components of bourgeois legal ideology are as evident today as they were in 1804. First and foremost are the principles of property and contract that characterize the capitalist system. They identify freedom with the unhindered ability to buy and sell and enter into contracts. This notion of freedom is applied, for example, to the employment contract, where

the fiction of free choice masks the reality that the wage-laborer's lack of property compels him to hire out at wage-work. To put it another way, the notion that property is no more than a relationship between a person (*persona*) and a thing (*res*), and therefore involves no domination of person over person, is a fiction. Control of property—when property consists of means of production—is converted into control over persons through the medium of the contract to work; thus the idea of contract as free bargain is itself rendered illusory.⁴⁴

Second are the principles of personal freedom, democratic rights and fairness to individuals (particularly in the criminal process), that, although foremost to many allies of the bourgeoisie in the struggle against feudalism, were promoted by the bourgeoisie primarily as "essential to the political task of winning power."⁴⁵

Bourgeois principles of property and contract have been elaborated and accommodated to our centralized and monopolized form of capitalism and protected by the law and the state. However,

production and marketing of fictitiously differentiated products (for example, 50 models of what amounts to three or four different cars and countless brands of indistinguishable toothpaste) and useless and less than marginal appliances, goods and services. Bourgeois freedom and democracy were won at tremendous costs and have surely advanced the human condition in terms of productive capacity and the importance of individual freedom. But the promise of freedom and democracy cannot be realized when the most crucial decisions and principles that shape our society and our lives—concerning the use of our resources, the work of our people, control of the production process, which goods and services are produced, how they are produced, and how they are distributed and used—are removed from the democratic process and from "politics," leaving their resolution primarily to corporate executives, who need not stand for election and whose guiding principle is their own personal enrichment. State regulation and government economic activity are largely carried out by and for the same people who control the private sector, and they have protected and enhanced, not challenged, existing social relations. This contradiction, most visible in periods of economic turmoil, places the freedom of the capitalists and the freedom and democratic rights of working people, the vast majority, in direct conflict. Marx, analyzing the contradictions in capitalism, posited the emergence of socialist social relations and ideology and the ascendancy of socialist states in which the means of production would be controlled by and for working people. For a Marxist analysis of advanced capitalism in contemporary America, see H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974).

⁴⁴ TIGAR & LEVY, *supra* note 4, at 305.

⁴⁵ *Id.* 323.

bourgeois principles of individual freedom and fairness in the criminal process have been attacked by corporate leaders and government officials; their cause has been championed largely by movements seeking change, such as the labor, civil rights and antiwar movements. The periods of stringent protection and enlargement of civil rights and civil liberties correspond to the periods in which mass movements posing a credible challenge to the existing order have demanded such rights.⁴⁶

The Supreme Court's recent decisions concerning exercise of first amendment rights in privately owned shopping centers serve as a contemporary example. In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*,⁴⁷ the Court upheld the right of union members to picket a store in a shopping center concerning a labor dispute. The Court recognized the reality that a large portion of our urban population has moved from inner city areas to suburbs and that shopping centers have to a large extent replaced inner city business districts. To communicate with suburbanites concerning the problems of the city, the nation or the world, the best, and maybe only, place is shopping centers. The Court, citing *Marsh v. Alabama*,⁴⁸ in which first amendment freedoms were held applicable to a "company town," ruled that the interest in free speech outweighed the private property interest of the owner of the shopping center. However, in *Lloyd v. Tanner*,⁴⁹ the Court held that an antiwar activist had no right to distribute leaflets in a shopping center that regularly attracted political candidates with the claim that it provided the largest audience in the state. The majority opinion is largely devoted to a detailed, but unconvincing, distinction of *Logan Valley*, primarily on the ground that speech concerning a labor dispute is more related to the activities of a shopping center than is antiwar speech. Then, in *Hudgens v. NLRB*,⁵⁰ the Court announced that *Lloyd* had overruled *Logan Valley* (contrary to explicit language in *Lloyd*) and that to dis-

⁴⁶ The right to speak on a street corner was first legally protected in the context of the labor movement. *E.g.*, *Hague v. CIO*, 307 U.S. 496 (1938). In the 1960's and early 1970's, the civil rights and antiwar movements demanded expanded rights of speech, and first amendment rights were protected and expanded. *E.g.*, *Flower v. United States*, 407 U.S. 197 (1972); *Tinker v. Des Moines Community*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963). Recently, the Trilateral Commission, a private association dominated by the multinational corporations, of which President Carter was a member before his election, has called for limitations on personal liberties to promote economic stability.

⁴⁷ 391 U.S. 308 (1968).

⁴⁸ 326 U.S. 501 (1946).

⁴⁹ 407 U.S. 551 (1972).

⁵⁰ 424 U.S. 507 (1976).

tinguish labor from antiwar speech would be an improper content discrimination, which surely was not intended (although it was also explicitly stated). Having just rewritten *Lloyd*, the *Hudgens* Court then held that it was *bound* by *Lloyd* (as rewritten) and rejected the right of union members to picket in a shopping center concerning a labor dispute, stating: "Our institutional duty is to follow until changed the law as it now is, not as some members of the Court might wish it to be."⁵¹

The Court offered no explanation of what happened to this "institutional duty" in *Lloyd*, since the *Lloyd* Court would seem to have been bound by *Logan Valley* (which the *Hudgens* Court held had decided the same issue decided in *Lloyd*). Nor did the Court explain how its duty to "follow until changed the law as it now is" binds it in any real sense, since it can change the law or overrule, ignore or rewrite prior decisions (each of which it did in these cases). The Supreme Court is never bound by a precedent; the statement by a majority that it is bound means only that it has chosen to base its ruling on a prior decision. Finally, the majority opinion castigates the dissenting justices for deciding cases on the basis of what they "might wish [the law] to be," but there is no indication of how the majority's jurisprudence is different, except for the fact that the majority outnumbered the minority.

Unstated and lost in this mire of contradictory justifications and principles of decision—all of which can claim ample support in precedent and logic—was the central point: that none of these cases was or could be scientifically or objectively decided and that the various justifications and principles emphasized in the opinions mask little-discussed but unavoidable value judgments concerning the conflict between freedom of speech, on the one hand, and private property rights and the interest of suburbanites in isolation on the other. In 1968, a majority of the members of the Court resolved this conflict in favor of freedom of speech; in 1972, a majority retreated from that judgment; in 1976, a majority decided that property interests and the insulation of suburbanites would prevail. Any attempt to depict this change in terms of objectivity and continuity is illusory, as the majority opinions in these cases demonstrate. The changing social and political context and the changing personnel on the Court (which are, of course, related) led to a change in value judgment. The *Hudgens* opinion demonstrates a central deception of traditional jurisprudence: the majority claims for its value judgment not only the status of law, which it surely has, but also the

⁵¹ *Id.* 518.

legitimizing and mystifying attributes of objectivity and continuity, to which it has no valid claim.

Traditional jurisprudence largely ignores social and historical reality and masks the existence and effect of ideology with myths that identify bourgeois ideology with objectivity. The dominant system of values has been declared value-free; it then follows that all others suffer from bias.⁵² The positivist, natural law, realist and sociological schools of jurisprudence all identify bourgeois ideology with objectivity or some form of higher law and are therefore incapable of explaining the role of bourgeois ideology in the law.⁵³ Capitalism has no claim to kinship with nature, science or god, and the classless, non-ideological society is an illusion.⁵⁴ The values protected by our legal system are based on advanced capitalist social relations that developed from the struggle against feudalism in western Europe, and to the extent that this system of social relations cannot be maintained by the consent or acquiescence of the lower and middle classes, its enforcement rests on the state's mechanisms of institutional violence.

A realistic, understandable jurisprudence that explains the role and operation of the law must acknowledge the conflicts in society, the class basis of those conflicts and the dominance of a bourgeois

⁵² A good example of this thinking is to be found in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Professor Wechsler, once Director of the American Law Institute, questions the neutrality of any decision that places democratic rights above property rights or places considerable weight on the social and historical context, while repeatedly proclaiming his own political views irrelevant to what he is saying. For example, he questions *Brown v. Board of Education*, 347 U.S. 483 (1954), primarily on the ground that social and historical reality were given too much importance when the "human and constitutional dimensions [of state-enforced segregation] lie entirely elsewhere in the denial by the state of freedom to associate." *Id.* 34.

⁵³ Neither the sterile rigors of the positivists, nor the dreams of the natural-law enthusiasts, nor the restricted vision of the realists and the sociologists serves to describe, much less to explain, the means by which the bourgeoisie first accommodated, then openly confronted, then overthrew the legal ideology of feudalism. And none of these theories of law explains the sharpening contradictions now appearing in the legal systems of the West.

All of these schools either describe the legal system constructed by the victorious bourgeoisie as a static institution, or in some measure seek to justify it, or attempt to explain those of its inner workings that have to do with adjusting internal conflict. None is concerned with analyzing the revolutionary beginnings of legal ideology, or with identifying those social forces which may—also by revolutionary means—bring into being a newly dominant legal ideology based upon a different system of social relations.

TIGAR & LEVY, *supra* note 4, at 310.

⁵⁴ See C. ANDERSON, *THE POLITICAL ECONOMY OF SOCIAL CLASS* (1974); C.W. DOMHOFF, *WHO RULES AMERICA?* (1967); R. MILBAND, *THE STATE IN CAPITALIST SOCIETY* (1969); M. ZEITLIN, *AMERICAN SOCIETY, INC.* (1977).

ideology that is not natural, scientifically determined or objective. Further, the value content of rulings and the broad discretion available to judges, particularly at the higher levels, should be emphasized rather than masked. Our legal norms are broadly and vaguely stated; a wide variety of contradictory justifications are available; and judges have the authority and power explicitly or implicitly to ignore constitutional provisions, statutes, precedents and the best of legal arguments. The discretionary, legislative nature of court decisions, the importance of value judgments and the dominance of bourgeois ideology characterize our judicial process far better than any notions of objectivity or science.

However, the dominance of bourgeois ideology and the discretion available to judges do not mean that all rulings are made in favor of bourgeois interests, that judges are always conscious of the effect of ideology or the value content of rulings,⁵⁵ or that judges always apply their personal values and ideology. The effects of ideology, institutional norms and personal experience on value judgments and perceptions of fact situations, credibility and social reality are complex and should not be oversimplified. Moreover, bourgeois ideology, because it encompasses notions of freedom, justice and equality, often provides a nonrevolutionary basis for challenging bourgeois interests. There are limits on the dominant class and government, and although the government and bourgeois class usually have the power and often the inclination to exceed these limits, maintenance of bourgeois hegemony without frequent resort to force depends on widespread belief in the legitimacy of the law, which is undermined by such transgressions.⁵⁶ Finally, the law,

⁵⁵ For many, if not most, judges, and for most people, results are of primary importance and justifications are secondary. Even where a judge does not consciously decide based on a value judgment concerning the results, such judgments have an important, and usually determinative, effect. For example, all of the Justices of the Supreme Court have used precedent to justify their decisions, but they do not treat all precedents equally. In the shopping center cases discussed in text earlier, Justices who place a preeminent value on freedom of speech found *Marsh* and *Logan Valley* important precedents that should be followed, while Justices who found property interests more important placed considerable precedential value on *Lloyd*. The justifications for both sides were available from which to pick and choose; value judgments about the substance of the case guide such choices, even where they are not the explicit or conscious basis of decision.

⁵⁶ [The law] may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation. . . . [But if] the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity

while it is based on and enforces underlying social relations, has some autonomy and should not be seen as exclusively superstructural.⁵⁷

There are cases where the importance of the issues, the existence of discretion and the effect of ideology are clear, such as *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁸ Yet even where it is clear that bourgeois dominance is being seriously challenged, there is often disagreement among bourgeois leaders and ideologists, as well as among the leaders and ideologists of the forces making the challenge, as to the proper course and the best result. *Gompers v. Buck's Stove and Range Co.*⁵⁹ provides a valuable example.

In 1907, the American Federation of Labor (AFL) attempted to organize the workers at Buck's Stove, whose president, James Van Cleve, was also president of the National Association of Manufacturers (NAM).⁶⁰ The leaders of the AFL called for a national boycott of Buck's Stove products, and Van Cleve obtained an injunction prohibiting them from "publishing or otherwise making any statement that the Buck's Stove and Range Co. was, or had been, on the 'Unfair' or 'We Don't Patronize' lists."⁶¹ AFL leaders, including Samuel Gompers, were held in contempt of court and sentenced to jail terms for violating the injunction, and the Supreme Court heard their appeal.

Important bourgeois interests were clearly at stake, but bourgeois elements disagreed how they would best be served. The NAM, mainly representing small manufacturers, took a hard line, vehemently opposing all unions and union activity and advocating use of the repressive mechanisms of the state and private agencies wherever possible. However, many larger manufacturers and leaders in finance and international business, equally anti-union and involved in violent resistance to organizing drives themselves, saw the hard line as leading to revolution. These elements of the

[I]n history the law can be seen to mediate and to legitimize existent class relations. Its forms and procedures may crystalize those relations and mask ulterior injustice. But this mediation, through the forms of law, is something quite distinct from the exercise of unmediated force. The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.

E. P. THOMPSON, *WHIGS AND HUNTERS* 262-63, 266 (Pantheon ed. 1975).

⁵⁷ See note 69 *infra* & accompanying text.

⁵⁸ 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel mills).

⁵⁹ 221 U.S. 418 (1911).

⁶⁰ The facts presented here that are not contained in the Court's opinion are from J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968) and G.W. DOMHOFF, *HIGHER CIRCLES* (1970).

⁶¹ 221 U.S. at 436.

bourgeoisie, and their primary organization, the National Civic Federation, formulated an ideology called corporate liberalism by "revisionist" historians. The law and the state would recognize unions and regulate the conflict between labor and capital, the economic chaos of uncontrolled capitalism would be regulated and stabilized, the rise of conservative labor leaders would be promoted, and the explicitly pro-business slant of the law and other institutions would be made less blatant by use of notions of objectivity and a classless, pluralistic society.⁶² Andrew Carnegie, among the latter group, contributed to the legal expenses of Gompers and the other union leaders, and they were defended by Alton Parker, a prestigious business lawyer and former presidential candidate.⁶³

⁶² "Revisionist" historians have challenged the predominant progressive or liberal notion that, in the words of Arthur M. Schlesinger, Jr., "[l]iberalism in America has been ordinarily the movement on the part of the other sectors of society to restrain the power of the business community." A.M. SCHLESINGER, JR., *THE AGE OF JACKSON* 505 (1946). In the liberal or progressive view, regulatory legislation, such as the Sherman Antitrust Act and the Federal Trade Commission Act, represent victories in the struggle of workers, farmers, consumers and small businessmen against a wholly resistant big business. However, the revisionists have shown that these measures, though initiated and pushed by mass movements, were adopted with the eventual support of and largely formulated by the corporate liberals, the dominant sector of American big business, and that they tended to stabilize the economy and thereby to strengthen big business. See G.W. DOMHOFF, *supra* note 60; K. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. — (1978) (forthcoming); G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963); J. WEINSTEIN, *supra* note 60; W.A. WILLIAMS, *THE CONTOURS OF AMERICAN HISTORY* (1961); W.A. WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (1959). See also G. ADAMS, JR., *THE AGE OF INDUSTRIAL VIOLENCE* (1975); F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971). Some of these writings tend to overestimate the dominance of the corporate liberals and underestimate the power and effect of movements of working people, but the basic thesis has the support of extensive historical evidence, including the speeches, writings and letters of corporate liberal leaders.

⁶³ J. WEINSTEIN, *supra* note 60, at 49. Carnegie also provided the primary funding for the American Law Institute, which stated in its founding document:

There is today general dissatisfaction with the administration of justice. The feeling of dissatisfaction is not confined to that radical section of the community which would overthrow existing social, economic and political institutions. If it were, we as lawyers could afford to ignore it. But the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.

It is unnecessary to emphasize here the danger from this general dissatisfaction. It breeds disrespect for law, and disrespect for law is the corner-stone of revolution.

Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, ALI PROCEEDINGS 1 (1923). The ALI has served as a primary institution for the development and dissemination of corporate liberal legal ideology.

The Court, surely aware of the split within bourgeois circles as well as of the conflict between labor and capital, explicitly expressed its bourgeois ideological base and function: "The court's protective and restraining powers extend to *every* device whereby property is irreparably damaged or commerce is illegally restrained."⁶⁴ The defendants' free speech claim was rejected by the Court on the ground that speech had not been restrained but only what the Court called "verbal acts."⁶⁵ However, the Court did not sustain the imprisonment of Gompers and the other union leaders, which would have created a national uproar and perhaps become a rallying point for the movement of working people. At the conclusion of a detailed substantive ruling in favor of business interests, the Court decided that the contempt was moot since the underlying civil action had been settled.⁶⁶ In terms of traditional jurisprudence, the Court balanced rights and interests concerning several constitutional provisions and made rulings on contempts, boycotts, speech and mootness; in the real world, the Court reaffirmed its adherence to bourgeois ideology and the role of the law in furthering bourgeois interests, mediated a split among bourgeois elements and reached a very practical compromise that preserved bourgeois dominance without fomenting confrontation.

III.

Tigar and Levy reject the notion that "legal change, or changes in legal ideology, *caused* the transition from feudalism to capitalism."⁶⁷ The historical data they gather support their conclusion that legal change reflects changing material conditions and social relations⁶⁸ and that law "is a superstructure erected upon the base of power relationships."⁶⁹

⁶⁴ 221 U.S. at 439 (emphasis supplied).

⁶⁵ *Id.*

⁶⁶ *Id.* 451-52. The civil action was settled after the death of Van Cleave.

⁶⁷ TIGAR & LEVY, *supra* note 4, at xv (emphasis in original).

⁶⁸ One can also discern examples of the law as an arena of class struggle and the use of the law as an instrument of change. *E.g.*, *id.* 139 (use of legal devices to unite crown and bourgeoisie at expense of feudal lords; result was fostering of trade); *id.* 68 (twelfth century lawyers "working for the strong" use knowledge of Roman law to draft contracts favorable to commercial interests). Sometimes the intimate relation between legal and social development is obvious but the direction of cause-and-effect is unclear. *E.g.*, *id.* 164 ("alliance" between monarchs, commercial interests, and legal profession).

⁶⁹ *Id.* 279. The use of the terms "superstructure" and "base" could connote a view, held by some Marxists, that fails to recognize the complexity of the role and operation of the law discussed above. However, Tigar and Levy were not attempting in this book to describe or explain our judicial system in any detail,

Yet their discussion in the concluding chapters of the role of alternative legal ideology, or what they call the "jurisprudence of insurgency," in the bourgeois struggle against feudalism and in struggles against capitalism raises an apparent contradiction. Their emphasis on the revolutionary role of legal ideology and lawyers and the importance placed on the phrase "jurisprudence of insurgency" leave the impression that the autonomy of the law and its role as an arena of social change have been overstated in a way that conflicts with the major thesis of the book.⁷⁰

and their analysis of the judicial process in the change from feudalism to capitalism recognizes such complexity.

Little has been written about the existence, source or extent of the autonomy of the law or its effect on actual decisions by those who reject the traditional view of virtually complete autonomy and objectivity. The various views of the autonomy of the law can be placed on a continuum where the extreme of total autonomy is occupied by the traditional notion of the law as separate from social relations and political forces, and the extreme of no autonomy is occupied by the notion of the law as exclusively superstructural. Eugene Genovese writes:

[T]he fashionable relegation of the law to the rank of a superstructural and derivative phenomenon obscures the degree of autonomy it creates for itself. In modern societies at least, the theoretical and moral foundations of the legal order and the actual, specific history of its ideas and institutions influence, step by step, the wider social order and system of class rule, for no class in the modern Western world could rule for long without some ability to present itself as the guardian of the interests and sentiments of those being ruled.

E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25 (Vintage Books 1976). To the extent Genovese is saying only that the law appears to be and sometimes is "the guardian of the interests and sentiments of those being ruled," his analysis does not demonstrate the existence of autonomy since an effective superstructure would have that attribute (unless one limits the superstructure model to a monolithic system in which the dominant class always wins). An entirely superstructural legal system could recognize the need to appear to be and sometimes to be such a "guardian" in order to legitimize itself. However, Genovese and Thompson (quoted *supra* note 56) are saying more than this. The law, though integrally tied to underlying social relations and political forces, is not only an effect but also a cause, and, to some extent, it has an autonomous existence.

⁷⁰ For example, Tigar and Levy, discussing the role of progressive lawyers, say:

While the legal obligations of workers and owners are defined by the dominant ideology, lawyers attempt to change and adapt them, to adjust differences without disturbing the integrity of the ideological system as a whole. Real improvements in the lives of ordinary people come about through these changes: consumer credit legislation to prevent gouging and unfair practices; fair housing legislation; equal employment projects mandating compensatory treatment for blacks, Chicanos, and women. They come about because jurists penetrate the legal ideology and its norms and expose the interests they protect, thus clarifying and helping to justify the demand that public law be changed to curb the domain of the "freedom" of contract. In the battle for the freedoms of speech and association, and for due process of law, the lawyer demands that constitutional principle be honored and constitutional promises be kept.

TIGAR & LEVY, *supra* note 4, at 328-29. Just as the development of contract theory should not be seen as the cause of the transition from feudalism to capitalism, the development of an alternative to bourgeois legal ideology and the efforts of progressive lawyers should not be seen as the causes of social change in the present

This is, however, only a minimal distraction from the authors' excellent analysis of the relation of law to material conditions and social relations. The bourgeois struggle against feudalism and the formation and development of bourgeois social relations and ideology are crucial to a realistic understanding of the law and the state in the United States. *Law and the Rise of Capitalism* provides a vital link in the development and elaboration of a socially and historically contextual jurisprudence and should be read by all who study or want to understand law and jurisprudence.

period. Reforms concerning discrimination, housing, and consumer rights reflect shifting power relationships and, in some cases, the successes of mass movements. Vindication and enlargement of first amendment freedoms have been accomplished in the context of mass movements that demand democratic rights. Progressive lawyers have an important role in movements for change, but the development of alternative legal ideology and of arguments that expose and clarify contradictions, though necessary, will not create change.

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