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Introduction

In most cultures, the mention of "the law" conjures notions of a powerful, almost mystical force which establishes barriers of conduct for individuals within a society. Traditional liberal ideology views the law as a fair, objective set of rules which attempts to ensure that human beings can be "effective purposive agents, able to pursue their chosen goals, and participate in society" through the even handed ladling of justice to all members of a given community (Green and Ward, 2004, p.7). While this understanding of the meaning of law has dominated western thought for centuries, the Law and Society movement has challenged this rather simplistic interpretation. Specifically, British Marxists have called into question the neutrality, and subsequent equality, of the law by maintaining that "the law serves the interests of the ruling class" (Trubeck and Esser, 1989:26). Through assuming an unstated allegiance to the privileged, the law essentially negates the possibility of social progression toward equality, with the effect of maintaining the status quo.

The purpose of this paper is to explore ways to integrate into the classroom the Marxist perspective of law, specifically at the college and senior high school level. The paper discusses ways to apply these tenets to areas of contemporary social debate; namely, the economic, racial, and gender inequalities of the American legal system and the institution of university speech codes for the purpose of exploring these issues in the classroom, particularly with regard to legal apparatuses as tools of oppression. While some argue that the perpetuation of capitalism has rendered many aspects of the Marxist philosophical tradition null and void, we maintain that the apparent existence of its ideological underpinnings in these cultural phenomenon serve to buttress legal sociological claims that it is not only alive and well, but serving to preserve the existing social order at the expense of marginalized groups in society.

Power and Law in the Classroom

We argue that it is necessary to help students question their ideology with regard to such purportedly neutral institutions such as the law. Indeed, by opening discussions with students that identify the ways law works to benefit some at the expense of others, students become better tuned in to structures of dominance. It is through discussion of specific examples such as those provided in this article that students begin to learn how to recognize systemic power structures that privilege some members of our society and disenfranchise others. Through careful teaching, students can become more conscious of the power relations that are embedded in one of the most trusted and authoritative of American institutions: the law. Beyond that, this kind of pedagogy empowers students to generate their own critical perspectives on how power relations are produced and maintained.

We will argue that Marxism is prevalent in today's society, specifically in the American legal system and racial dominance on campus perpetuated through speech that is not effectively curtailed by legal institutions. What may be taken from this article is an understanding of the problems associated with the power structure and the law, and how discussion of these problems may be incorporated into the classroom. It is important for students to challenge their assumptions about the neutrality of law and to think critically about the power relations that are created and maintained through law. We identify three themes necessary to support the development of critical thinking about law and power structures: 1) learning to identify individual and institutional racism, sexism, and classism; 2) learning the social causes behind racial, economic, and gendered oppression, and 3) student empowerment.

A fundamental point in this article is that the American legal system plays a key role in perpetuating dominance over the marginalized classes. We will show how this has been done in specific instances, either through biased laws and justifications based on victim/offender characteristics, or by using the alleged neutrality of law, to legitimate oppressive speech on university campuses. The goal of the educator is to incorporate this article into a larger understanding of how the institutional oppression of the American legal system seeps into the individual mindset of the oppressive agents.

A Foundation in British Marxism

In his book Explorations in Law and Society, Alan Hunt (1993) argues that law is instrumental in maintaining existing social relations in that it acts as a form of "ideological domination"...which he defines as "those processes that produce and reaffirm the existing social order and thereby legitimize class domination" (1993:17). Hunt develops his argument based on the assertion that law is the vehicle through which norms and values are transmitted and accepted in society. Hence, rules of law which recognize the existence of senior/subordinate relationships

(i.e. landlord/tenant, employer/employee) serve to legitimize the existence of a dominant class, while effectually maintaining the permanence of those living under their oppression. Additionally, the law grants certain rights of authority to those in power (i.e. eviction, hiring and firing), thus reinforcing their dominant stance at the expense of those who must acquiesce to their will.

Hunt (1993) then progresses to assert that the law attempts to maintain an air of neutrality by basing its legitimacy on the contract, which presupposes that two parties have entered into an agreement of their own free will and that bargaining has led to a mutually agreed upon, binding arrangement. He discredits this capitalist notion of contractual law as a fair assessment of the condition of society, in that its assumptions of "freedom and equality" (1993:28) are simply not consistent with social reality. Those who live in a state of oppression are not in the position to negotiate and dicker over the terms of their employment, residency or relative deprivation. Rather, their social (and, it can be argued, physical) survival is often contingent upon accepting the mandates of the dominant class without question. Again, this state of affairs only serves to negate any possible elevation in class standing and reaffirms the position of dominance assumed by the privileged few.

Obviously, Hunt's discussion of "Law, State and Class Struggle" (1993:17) is much more involved than the synopsis offered in this paper, but for the purpose of the analysis at hand, the preceding arguments are useful in understanding how the law itself participates in the subjugation and oppression of certain segments of society, with the effect of maintaining the status quo. We provide four examples that we believe are useful for generating classroom discussion about power, politics and pedagogy.

Example One: Gamesmanship in The American Legal System

Marc Galanter (1974) offers an insightful analysis of the American legal system, which he sees as comprised of four distinct elements; rules, courts, lawyers and parties. Parties are categorically defined dichotomously, as "one shotters…those claimants who have only occasional recourse to the courts" and "repeat players…(those) engaged in many similar litigations" (1974:97). While some variation is evident, repeat players are generally defined as the "larger, richer and more powerful" (1974:103) segments of society. Conversely, one shotters are those classes which do not have access to the same resources as repeat players. Galanter (1974) then goes on to provide a litany of reasons why repeat players hold a distinct advantage over one shotters, to include familiarity with the complex workings of the legal system, access to attorneys who are the best and brightest in their given specialty, friendships with relevant institutional actors, and the interest and monetary resources to prolong and delay litigation until a favorable settlement is reached.

Similarly, lawyers, courts and the rules are all mechanisms which tend to ensure that those parties in a position of power will win out in the end. Attorneys who provide services to one

shotters are, in general, not the cream of the legal profession and cannot compete with the overwhelming skill and assets categorized by repeat player representation. The courts are burdened with ridiculously overloaded dockets; this causes delay (thereby increasing party costs) and places informal pressure on parties to settle quickly, rather than seek full adjudication. Lastly, the rules of the American legal system "tend to favor older, culturally dominant interests" (Galanter, 1974:123) because those who hold power in society have tailored their legal approach to ensure that laws which promote their interests receive inordinate attention in a system marked by limited time and focus (Galanter, 1974).

By giving students Galanter's framework, educators create a platform to enable students to teach themselves something about oppression. Students can meet in groups to develop their own examples of instances where the very structure of court proceedings may work to the advantage of some at the expense of others. For example, questions can be raised in class about a private citizen (one-shotter) who sues a major corporation (repeat player). What would the citizen need to have to be successful? What about the corporation? What kinds of differences in resources become meaningful to the outcome of our imagined law suit, or the probability of a lawsuit even being initiated? How do differences in, say, the income of the private citizen versus the revenue stream of the corporation orient the parties differently with regard to the desired speed of the lawsuit? That is, how does the need to resolve a lawsuit quickly become a major disadvantage in a supposedly neutral system? Ask students to explore real life situations and provide them with specific cases to illustrate this dynamic. To make a more structured conversation, it can be centered on a film that the teacher provides, such as *Erin Brockovich*.

Example 2: Blacks, Crack and the two Legal Tracks: Cocaine Sentencing Laws

Aside from the established litigant class described by Galanter, research has indicated biases in the American legal system driven by offender and victim race, class, and gender. For example, according to the American Civil Liberties Union, (2003, p. 1), "whites outnumber blacks five to one, and both groups use and sell drugs at similar rates, [yet] African-Americans comprise 35% of those arrested for drug possession; 55% of those convicted for drug possession; and 74% of those imprisoned for drug possession." Furthermore, "one in three black men between the ages of 20 and 29 are currently either on probation, parole, or in prison. One in five black men have been convicted of a felony" (ibid, p. 1). The "war on drugs" alone has had a tremendous impact on the black community as a whole, and black men in general. According to Sabol and West (2008), "of the 253,300 state prison inmates serving time for drug offenses at yearend 2005, 113,500 (44.8%) were black … and 72,300 (28.5%) were white" (p. 21)

Perhaps one of the most overt evidence of Marxism in the criminal justice system is the mandatory minimum sentencing laws against crack cocaine. According to the United States

Sentencing Commission (2002),

> In establishing the mandatory minimum penalties for cocaine, Congress differentiated between powder cocaine and crack cocaine – and singled out crack cocaine for significantly higher punishment. As a result of the 1986 Act, 21 U.S.C. § 841(b)(1) requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the '100-to-1 drug quantity ratio' (pp. 2-3).

By 2001, over 80% of federal crack defendants were black, thereby emphasizing the idiom "crack is black" (Human Rights Watch, 1997). While at least three different pieces of legislation have been proposed that would reduce or eliminate the disparity, a disparity remains.

While exposing students to these numbers is important, when teaching this material, we follow up with some discussion of whether the disparity actually reflects the impartiality of law. After all, if whites were caught with crack, wouldn't their sentence be the same as for black defendants, therefore emphasizing the ultimate fairness and impartiality of the law? One exercise one of us has tried involved asking one group of students to use the worldwide web to determine the pharmacological differences between crack and cocaine. Another group of students was instructed to research the rates of drug use in racial patterns using sets of government statistics (see, for example, the statistics gathered by the National Institute on Drug Abuse at www.nida.gov). Then, each group discussed with the class what they had uncovered in their research. Students found that there are almost no pharmacological differences between crack and cocaine, which led to a discussion questioning the sentencing disparity between crack and powdered cocaine. Other students found that although disproportionately use crack within their racial population, statistically, Whites make up the majority of crack users overall. In other words, looking at the numbers of who uses crack and who is being prosecuted under the crack sentencing guidelines, the actual rate of arrests and prosecution illustrate a pattern of racial discrimination against Black defendants. This class activity illustrated the point that although laws are written in a racially neutral manner, the actual imposition of law is racially biased.

Aside from students conducting research to emphasize the point of racial disparities in drug laws, we also recommend a number of readings which have proved to be beneficial to initiating discussion. These readings include: Jamie Fellner's *Punishment and Prejudice: Racial Disparities in the War on Drugs* (Human Rights Watch, 2000), Katherine Beckett, et.al's *Race, Drugs,*

and Policing: Understanding Drug Disparities in Drug Delivery Arrests (Criminology, 44:1, 2006), and Katheryn Russell-Brown's *The Color of Crime* (2009). Each of these readings offers a critical look at the relationship between race, crime, and the law, specifically the relationship between race and the War on Drugs. We have found that offering current readings alongside the student's assigned research provides a theoretical and scholastic foundation to the discussion of race, crime, and law.

Example 3: Crime and Punishment: Streets and Suites

Evidence of Marxist attributes in the American legal system is also evidenced in the disparities between punishments for white-collar crimes and punishments for street crimes. Although there is no currently agreed upon definition of white-collar crime, "the term today generally encompasses a variety of nonviolent crimes usually committed in commercial situations for financial gain" (Cornell Law School, accessed 2008). The type of offender is usually of a high socioeconomic class. White-collar crime is more costly and is more widespread than street crime. "The FBI estimates, that burglary and robbery – street crimes – costs the nation $3.8 billion a year" (Mokhiber, 2007, p.1). On the other hand, experts have found that the cost of white-collar crime is somewhere around $420 billion a year (Reiman, 2007). The National White Collar Crime Center found that between January and April, 1999, "one in three American households had been the victim of white-collar crime" (Quoted in Reiman, 2007, p. 123).

Despite the costs and prevalence of white-collar crime, only a handful of offenders are arrested, and those who are convicted face lenient sentences. Consider the following federal sentencing statistics. In 2001, an average of 87% of those arrested for robbery, burglary, and auto-theft (crimes of the poor) were sentenced to prison and served an average of 33 months. In the same year, of those arrested for fraud, tax law violation, and embezzlement (crimes of the elite), 60% were sentenced to prison serving an average term of 14 months (See Reiman, 2007). According to Reiman, "the criminal justice system…refuses to define as 'crimes' or as serious crimes the dangerous and predatory acts of the well-to-do…Instead the system focuses its attention on those crimes likely to be committed by members of the lower classes" (ibid, p. 154).

In our experience, giving students statistics about the risks of being harmed by street crime versus the risks of being harmed by white collar crime is in itself profoundly thought provoking. Many of these are elaborately documented in Jeffrey Reiman's book, *The Rich Get Richer and the Poor Get Prison*, now in its 8th edition (2007). Moreover, students can be challenged to think about why it is the case that we punish relatively few corporate criminals and relatively many street offenders. In looking at the numbers and training of various types of police investigators and the corporate system of self-policing, some of the answers are revealed. We have also met with considerable success in asking students to consider how our punishment system is created, who stands to benefit and why or how. In addition the Reiman text provides a rich discussion about what kind of political clout would be required to change the system, pointing out that those who

are negatively impacted have the least power to change the law.

Example 4: Sexual Assault Prosecution

Another example that is useful in revealing the lack of neutrality in our legal system can be found in the prosecution of rapists and some other sexual offenders. Systematic oppression based on gender in the American legal system is specifically found in the treatment of sexual assault victims in the prosecutorial arena. In 1991, Lisa Frohman conducted a study which examined the justifications for prosecutorial decision making in accepting or rejecting sexual assault cases. Frohman examined the way in which sexual assault victims are devalued if their role as the victim does not fit the stereotypical norm. After a thorough quantitative investigation, Frohman found that prosecutors are most likely to discredit victims if there are discrepancies in the victim's account of the assault, if the victim's behavior is not typical, and if it is believed that the victim has ulterior motives. Prosecutors were basing their decision to accept or reject cases on victim characteristics, which led Frohman to conclude that "prosecutors rely on assumptions about relationships, gender, and sexuality…in complainant filing of sexual assault cases. They also make evident how the processes of distinguishing truths from untruths and the practical concerns of trying cases are central to these decisions" (1991, p. 224). In other words, Frohman found that if the victim was not the stereotypically defined woman who was deemed sympathetic by the larger society, her account of sexual assault was discredited and she as a victim was devalued.

In 2001, Cassia Spohn and her colleagues replicated Frohman's study to uncover whether after 10 years, the justifications of prosecutorial decision making for sexual assault cases had changed. Spohn and her colleagues concluded that "prosecutors' charging decisions…are guided by a set of 'focal concerns'" (2001, p. 232). The focal concerns that guided prosecutors in sexual assault cases, however, were different than those of general criminal cases. According to Spohn and her colleagues:

> Prosecutors use a set of victim characteristics to create an image, not of a *typical* rape victim, but of a *genuine* rape victim. Complainants whose backgrounds and behavior conform to this image will be taken more seriously and their allegations treated more seriously than complainants whose backgrounds and behaviors are at odds with this image. The results of [the] study, which highlight the pivotal role of victim credibility and demonstrate that cases involving questions about the victim's moral character and behavior at the time of the incident are more likely to be rejected, indicate that prosecutors' focal concerns in sexual assault cases incorporate these stereotypes (italics in original, p. 233).

A typical rape victim, according to legal stereotypes, is one who was kidnapped by an unknown

assailant, who was a "good girl" who did not go out late alone, who dressed "appropriately," and who reported the rape immediately. Any woman who does not fit that norm is not considered credible, and therefore a prosecutorial justification in case rejection.

The result of both Frohman's and Spohn's studies indicate that women are victimized socially, sexually, and legally. According to the National Center for Victims of Crime (accessed, 2009), law enforcement agencies across the country received 90,491 reports of forcible rape in 2001. Factoring in unreported rapes, about 5% - one out of twenty - of rapists will ever spend a day in jail. In other words, due to the stereotypical assumptions of the "proper victim" that guides prosecutors in deciding whether to accept or reject a case, approximately 19 out of 20 rapists will walk free.

We have much spent time in the classroom talking about "deserving" victims, and students have demonstrated a great sensitivity to this issue. By beginning with a general discussion of rape and teaching about the more statistically likely characteristics of sexual assaults (where they happen, the relationship between attacker and victim, etc.), we create a discussion about rape in general. Then, we talk more specifically about the role of a woman/victim in the assault event. Once this discussion is underway, the conversation can be diverted to one about how mugging victims "deserved" to be mugged. The contrast between these two lines of thinking demonstrates some underlying assumptions about women as sexual assault victims and what (in some students' imaginations) distinguishes them from other kinds of victims. From there, the connections to prosecutorial discretion and the inherent injustice done to sexual assault victims should be very accessible.

Example 5: Laws of Speech Speak of Partiality

In our final example, there is an opportunity to discuss not only another platform for considering the lack of neutrality in law, but also to examine the law's role in creating an environment for education that is equally inviting to all. The institution of speech codes at American universities was the result of students and faculty seeking to decrease the incidence of any form of prejudice and bigotry on campus and increase sensitivity to such issues as racism and sexism. Accordingly, they have actively lobbied university officials to institute speech and behavior codes which establish standards and limits certain types of expression. In many cases, universities have complied with their wishes and introduced and actively enforced such codes (Strossen, 1992).

Yet the institution of speech codes on campus has met with a great deal of resistance by groups who have decried these actions as a violation of their constitutional right to free speech (Anderson, 1992). In many cases, detractors of speech codes have been largely successful in defending their position in the legal arena. A typical example of the fate met by many university speech codes was seen at the University of Wisconsin, which amended its student code in 1989 to

include provisions for:

> a comment, epithet, or other expressive behavior. . . directed at a individual [which] demeans the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual [and] create an intimidating, hostile, or demeaning environment for education, university related work, or other university authorized activity (Wis. Admin. Code, UWS 17. 06, June, 1989).

After the policy was put into effect, several students were punished for various offenses deemed to be in violation of the code. The offenses ran the gamut of racial to sexual slurs, including such incidence as one student calling another Shakazulu, telling a minority student "it's people like you that's the reason this country is screwed up," calling a staff member a "piece of shit nigger," telling a faculty member of middle eastern descent to "die Islamic scumbags," and yelling at a female co-ed that "she [has] nice tits" (Anderson, 1992:205). All violators were disciplined for their transgressions, with punishments ranging from formal apologies to suspension (Liby, 1992).

The students sued the university on the grounds that the code was an unconstitutional infringement on their First Amendment guarantee of free speech. The University argued that the code, and hence the punishable offenses, were constitutional and protected under the fighting words exception to free speech (Anderson, 1992). The court ruled in favor of the plaintiffs, declaring that the code was unconstitutionally broad and vague. While recognizing that the offenses were socially unpleasant the court stated that:

> the problems of bigotry and discrimination sought to be addressed here are real and corrosive of the educational environment. But freedom of speech is almost absolute in our land. . . Prohibitions such as that in the [University rule] simply cannot survive the screening which our Constitution demands. (UWM Post, Inc., 774 F. Supp at 1176).

One aspect of the issue of the legitimacy of speech codes and acts protected under the First Amendment is thoughtfully considered by Charles Lawrence III (1993), who argues that the element of racism is a crucial, defining point which must be given special attention. In his essay, If He Hollers Let Him Go, Lawrence condemns not only racist speech, but also racist acts as he contends that the latter are, indeed, a form of speech which conveys a very simple message; white supremacy. In essence, Lawrence (1993) argues that racial slurs and actions serve to send a ringing message to minority victims. That message is: By virtue of your race, you will always be considered inferior and not worthy of the respect and status offered your white counterpart.

The argument presented by Lawrence seems to incorporate an element of the Marxist perspective, in that he recognizes that a formal denunciation of regulations which attempt to

alleviate racial dominance on campus represent de facto support and acceptance of oppressive conditions. By hiding behind First Amendment protections of free speech, Lawrence contends "we have advanced the cause of racial oppression and placed the bigot on the moral high ground" (1993:57). Here, the rights of the perpetrator are considered to have greater value than the rights of the victim. Not surprisingly, the perpetrator just happens to be a member of the dominant class. Protecting the right to hurl racial epithets on campus at the psychological and emotional expense of minorities who are simply trying to achieve social progression through education is a clear example of law as a form of ideological domination. In the end, the interests of the dominant class are served and their vision of societal order is preserved.

We envision two discussions that might arise from this example. One discussion might ask students to imagine a Supreme Court made of 5 African American justices and two white justices. How would that panel hear the case? What kinds of considerations might we imagine to weigh into the decision? Would the decision be likely to change or stay the same? Another related discussion has to do with the value of creating an educational environment that is uniformly inviting. What advantage is there to a diverse educational environment? If the law were to discourage identity difference on school campuses, what would be the result? Would there be a certain advantage to any particular social group? Would that advantage come at the expense of another social group? What if the law promoted identity difference? What does the law do—promote or discourage identity difference in this case?

Conclusion

Interestingly, it would appear that the American legal system exhibits many of the characteristics Hunt (1993) articulates in his discussion of Marxism. Although Galanter (1974) chooses to splinter the various forms of oppression into relevant categories, they clearly fall under the rubric of what Hunt describes as the ideological domination of law. The prevalence of a powerful, established litigant class whose authority is legitimized by attorneys, courts and rules is evidence of system which caters to those with societal standing and subordinates the interests of those with limited means. In terms of victim and offender characteristics, the racist war on drugs has systematically oppressed black men, while the leniency for white collar criminals further emphasizes and legitimizes criminal wrongdoings of the upper class. Finally, the American legal system perpetuates women as victims as it undermines and devalues women who do not fit the classist, heterosexist, and racist gender norm. With these few examples, it is arguably certain that our system is not one which promotes fairness and equality, but rather uses the law to protect the privileged class and perpetuate social injustice.

The examples offered in this paper illustrate the prevalence and legitimacy of the Marxist perspective, and how the issues of power and law may be incorporated into the classroom. If elements of that socio-legal position are present in such diverse phenomenon as the American legal

system and university conduct, then it most certainly can be argued that issues of domination and oppression permeate many of our presumed neutral cultural institutions. The law can act surprisingly to render the powerless with little recourse, while at the same time ensuring that the interests of those with social standing are maintained and upheld. In many instances, the law is a mechanism of maintenance, not reform. Until this subtle yet omnipotent condition is exposed and radically restructured, society will not progress far beyond a simple dichotomy of oppressors and the oppressed. Although the oppression may become obscured behind a belief in the Rule of Law, examples are widely available to highlight the race, class and gender biases of law. Indeed these examples provide the opportunity to teach students to recognize such biases, to understand their social and historical context, and to empower students to think critically about their own social institutions, including law.

By helping students understand the reinforced relationship between social institutions and individual actions, we help them become better at identifying the institutional component of recreated power structures. In particular, the first

Uncovering the Social Causes Behind Racial, Economic, and Gendered Oppression

As has been addressed throughout this paper, racial, economic, and gendered oppression have been institutionalized in the American society both in speech and law. The purpose of this exercise is to uncover the social environment that has led to the legitimization of the upper class and the oppression of marginalized people. Students and educators should discuss the historical circumstances that have led to the maintenance of a dichotomy of the oppressors and the oppressed. This exercise may be accomplished by examining the history of law and analyzing the biases that exist behind the cloak of neutrality. Students should also critically analyze the constitutional rights and discuss if there should be limitations to these rights. The goal of the educator is to deliver the important message that the current system of oppression illustrated in Marxist thought is not on a radical fringe of modern society, but rather deeply embedded in the historical foundations of this country.

Student Empowerment

After examining the system of oppression so relevant in the American society, educators should turn the discussion to self empowerment as a mechanism of overcoming oppression. With this exercise, students should take the time for self evaluation. How are they viewed by the larger society? How do they view themselves? Students should critically evaluate the legal and power structures outlined in this article, and place the individual at the forefront of change. The goal of the educator is to give the student a voice. In turn, the student should use his or her voice not only to highlight the positive aspects of him or herself, but also to resist against oppression whenever it is observed. Educators should reaffirm that a single voice spoken out against oppression is more

powerful than silent dissatisfaction with the system. Through this exercise, students should feel empowered as they realize their strength to stand up against the Marxist system of oppression.

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