

Review

Sociology of Law: The Unasked Questions

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Law and the Behavioral Sciences. Edited by Lawrence M. Friedman and Stewart Macaulay. Indianapolis: Bobbs-Merrill, 1969. Pp. 1059. \$14.50.

Society and the Legal Order; Cases and Materials in the Sociology of Law. Edited by Richard D. Schwartz and Jerome H. Skolnick. New York: Basic Books, 1970. Pp. 652. \$15.00.

The sociology of law, as these two substantial books demonstrate, is by now an important and well-established enterprise. The sheer quantity of material in these readers testifies to the range of issues and concerns that have emerged in recent years. The books themselves are both very solid collections, and they cover the field comprehensively and intelligently.

At the same time, there are things going on in American society that I find difficult to relate to the materials in these collections of readings. There is a sense of crisis in American justice. The criminal courts have become racial and political battlegrounds. Resistance and rebellion in the jails and prisons have become commonplace. The systematic suspension of due process in the arrests of thousands of anti-war demonstrators is applauded at the highest levels of government. Names like George Jackson, Angela Davis, and Bobby Seale suggest the seriousness and urgency of the need to examine the structures of American justice at their root. I am not sure that the contemporary sociology of law can tell us much about these things or provide the framework in which that kind of examination could take place.

Not everyone will agree that the sociology of law *should* be able to throw light on these questions. It is sometimes held that the goal of social science should be to develop concepts and generalizations

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that, like those of the physical sciences, are universal, or nearly so, in their applicability. Friedman and Macaulay suggest, for example, that

The ideal for the social sciences is the situation of the physical sciences; what is true of falling bodies in New York today is true of them in Brisbane tomorrow and Nairobi yesterday. Needless to say, the social sciences are years away from the level of "science" that physics and biochemistry have achieved.¹

But social science concepts that are applicable to both Nairobi and New York may serve mainly to obscure whatever is most distinct and humanly important about each. There may be a limited case for spending time and effort on issues like "the relation between law and other social subsystems" or "the impact of law on society,"² though I am inclined to be skeptical. At any rate, to *concentrate* on that kind of issue while ignoring more substantive social analysis would be merely irresponsible. Friedman and Macaulay also suggest that the study of law and legal institutions needs to become both more empirical and more "relevant."³ But the problem is not that too little effort is spent on empirical work; indeed, if anything, the sociology of law is probably over-concerned with "research," in the sense of a rather abstracted accumulation of more and more "data." And there is no lack of attention to the problem of "relevance"; both of these readers contain several selections dealing with such potent issues as black militancy and the Vietnam war. What is missing is not the desire to illuminate important social issues, but the theoretical foundation that could make real understanding possible.

A short piece by Richard Schwartz in the Schwartz and Skolnick volume illustrates this failing.⁴ In the face of ghetto violence, writes Schwartz, official and scholarly explanations have been less than satisfactory; they have increased "in diversity, intensity, and futility." Law itself has played an ambiguous role in the racial situation, sometimes assisting, sometimes hindering the struggle for racial equality. Clearly something more needs to be done, but Schwartz seems totally at a loss as to what it might be. "Given the unsatisfactory nature of our present handling of the problem . . .," he writes, "we seem to need some

1. LAW AND THE BEHAVIORAL SCIENCES 915-16 (L. Friedman & S. Macaulay eds. 1969) [hereinafter cited as FRIEDMAN].

2. Friedman and Macaulay tend, in particular, to structure their materials in terms of these kinds of conceptual issues.

3. FRIEDMAN viii.

4. Schwartz, *Law, Violence, and Civil Rights*, in SOCIETY AND THE LEGAL ORDER 510-12 (R. Schwartz & J. Skolnick eds. 1970) [the latter hereinafter cited as SCHWARTZ].

alternatives. Perhaps the law can help if its functions and possible techniques are more broadly considered than usual. At any rate, we need to think of something."⁵

These remarks reflect a more general state of confusion and uncertainty. Confronted with pervasive and deeply rooted social conflict, the sociology of law—like much of academic social science—has tended to throw up its hands, declare itself bankrupt of useful ideas, and helplessly affirm the need "to think of something."

What is the source of this confusion? Is it that there is nothing in the various traditions of social science that could contribute to a better understanding of conflict and crisis in the society and in the legal order? Or is it that students of law and society have, for whatever reasons, failed to make full use of all that is available in social science?

I think the latter is true. The inability to deal with the current crisis is one manifestation of a more general problem. The sociology of law suffers because it has drawn to an excessive extent on those social science traditions and methods that are least able to deal with large scale social conflict, least able to provide a critical perspective on contemporary institutions and their evolution, and least able to generate alternative conceptions of law and legal institutions.

I

A glance at either of these collections confirms that, for the most part, the sociology of law has been guided by only some of the major traditions in social theory. In the introduction to *Society and the Legal Order*, the editors, discussing formative influences on the sociology of law, mention Durkheim, Weber, Simmel, and Maine. Marx is conspicuously absent, not to mention Engels and Lenin. *The Division of Labor in Society*⁶ is regarded as a classic in the field, yet *The Origin of the Family, Private Property, and the State*⁷ is not mentioned. Why is this? Why are Engels' insights of no use to serious modern sociologists, while Durkheim's are?

Friedman and Macaulay's volume also lacks examples of classical Marxian scholarship, although it includes an excerpt from a Stalinist discussion of legal philosophy, a brief selection from C. Wright Mills' *The Power Elite*, and a short radical leaflet from the Berkeley Free

5. *Id.* at 512.

6. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (2d ed. G. Simpson transl. 1933).

7. F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* (1942).

Speech Movement. These are grouped in a general section dealing with "The Impact of Public Opinion on Law," and are thoroughly overwhelmed in the mass of material in the book.⁸ They are clearly not presented as a serious alternative to the dominant model of law and society underlying much of contemporary legal sociology.

This dominant model, although nowhere explicit, is a pluralist and meliorist interpretation of American society and the American legal system, intellectually rooted in classical bourgeois sociology and in liberal jurisprudence. Within this model there is a fairly wide range of issues and points of view, so that the sociology of law often appears to encompass a bewildering variety of perspectives. But, in fact, the prevailing discussion takes place within boundaries that are quite limiting. Indeed, one of the most striking features of the sociology of law today is the relative absence of real controversy. There are innumerable research topics and themes of interest, but there are very few important clashes over burning issues. Does this mean that law is not the kind of subject that can inspire controversy? Hardly. I think it means that most people who study legal institutions, whether lawyers or social scientists, share so many common assumptions that serious theoretical conflict is unlikely to occur.

What constitutes serious controversy is of course a matter of opinion. The question is whether the disagreements expressed in the legal sociological literature ever rise to a level at which they can provide structure and focus for important research and thinking. An example may help to illustrate what I have in mind. In the study of social stratification, the issue of whether the traditional concept of social class is still useful in the analysis of advanced industrial societies has provided a focus for much important research. But this focus has arisen as a result of the clash of competing theoretical traditions—Marxian and liberal—one stressing the continuing centrality of class relations in modern social life, the other stressing the increasing irrelevance of economic factors and the blurring of class distinctions in the "post-industrial" societies. Similar kinds of issues have not been confronted in the sociology of law, not because such issues do not exist, but because the liberal-pluralist model of law and society has dominated the field by default. Not only are there very few Marxian analyses in the academic sociology of law, but the non-Marxian varieties of

8. FRIEDMAN 575-89. There is also a selection from G. KOLKO, *RAILROADS AND REGULATION* (1965) in FRIEDMAN 458-62.

"conflict" theory represented by Mills or Dahrendorf, for example, are strikingly under-represented.⁹

This results in an under-emphasis on law as an instrument of power and/or of class rule. It is not news, for example, that social class enters importantly into the question of the uses to which legal talent is put in the United States. Yet Professor Erwin O. Smigel, whose study of Wall Street lawyers is excerpted in Schwartz and Skolnick,¹⁰ views this fact with amazing complacency. He concludes that although Wall Street gets a disproportionate share of legal talent, this should not bother us. The Wall Street lawyer's skillful and flexible maintenance of the corporate status quo, he argues, helps "give our society continuity," thus providing "the liberal with time and opportunity to seek change in a relatively stable society" and thwarting "the revolutionary" because "the keepers of the status quo do not allow the seeds of deep discontent to flower."¹¹ This degree of acceptance is unusual. But despite the fact that many sociologists of law would recognize and perhaps deplore this general situation, there is no attempt at a *theory* of law as an instrument of class domination in contemporary capitalist society. Without such a theory, the tendency is to drift into the assumption that these class biases are peripheral, rather than central, to the American system of justice.

Another result of the failure of the more critical traditions in social theory to penetrate legal sociology is that the values of the American legal system tend to become the outer limits of analysis. Many of the best studies in the sociology of law focus on the failure of some legal agency to live up to the values which it supposedly serves.¹² There are good analyses of the ways in which bureaucratic pressures divert the police from democratic law enforcement, of the social processes that inhibit the goal of rehabilitation in prisons, and so on.¹³ But we have few studies that look more critically at the goals of "democratic" policing or rehabilitation themselves, within the American social context of class, racial, and sexual subordination. This does not mean, of course, that sociologists of law are uncritical of abuses and inc-

9. C. WRIGHT MILLS, *THE POWER ELITE* (1956); R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* (1959).

10. Smigel, *Realities and Possibilities*, in SCHWARTZ 269-70.

11. *Id.* at 270.

12. See A. BLUMBERG, *CRIMINAL JUSTICE* (1967); L. MAYHEW, *LAW AND EQUAL OPPORTUNITY* (1968); Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office*, 12 *Social Problems* 255 (1965), excerpted in SCHWARTZ 389-413.

13. See J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); G. SYKES, *THE SOCIETY OF CAPTIVES* (1958).

qualities within the legal system. It does mean that these phenomena are usually studied and criticized as deviations from legal values that are not themselves considered problematic. Yet American law is largely the product of a world-view and a social system whose overall viability and integrity can no longer be taken for granted.

II

In the absence of opposing perspectives, much work in the sociology of law is guided and shaped by the dominant model in almost unconscious ways. Consider a study of the rise and decline of the "fellow-servant rule" in industry—*Social Change and the Law of Industrial Accidents* by Ladinsky and Friedman.¹⁴ The authors conclude that their analysis "utilizes and supports a view of social change as a complex chain of group bargains." They claim to have shown that in the "struggle over industrial accident legislation" no single group dominated in the sense of having won a "total victory." Indeed, while "[t]heoretically . . . total victory by one competing interest and total defeat of another is possible . . . in a functioning democratic society, total victories and defeats are uncommon."¹⁵ The implication is not only that the decline of the "fellow-servant rule" and the rise of workmen's compensation represented such a pluralistic bargaining process, but that the United States, on the basis of this and other evidence, is "a functioning democratic society."

Does the empirical evidence presented by Ladinsky and Friedman support these contentions? A close reading suggests otherwise. Their own evidence, in fact, indicates quite strongly that it was in the interest of the business community to promote workmen's compensation laws, and that without the recognition of that interest on the part of business the laws would not have come into existence. This does not necessarily mean that workmen's compensation was a "total victory" for business, but neither does it suggest a process of bargaining and compromise among competing social interests. What it most clearly suggests is that in capitalist society business holds what amounts to a veto power over legal change. In this case, as Ladinsky and Friedman point out, business discovered that direct compensation to injured employees was less cumbersome and not significantly more costly than

14. Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, in FRIEDMAN 525-45. For a different interpretation of these issues, see particularly J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968).

15. FRIEDMAN 543.

having to litigate over and over again individual cases. Business therefore supported workmen's compensation in the interest of rationalization and predictability.¹⁶ Nowhere is it suggested that labor (or anyone else) possessed a similar power over the adoption or rejection of social reform measures. Fitting this analysis into the "bargaining" model of social change seems a rather Procrustean exercise. The theory seems tacked on to the data, an article of faith more than anything else.

Something similar happens in Robert Dahl's analysis of the Supreme Court's role in the American political system.¹⁷ Dahl assembles empirical evidence suggesting that the Court most often operates within the policy framework provided by the dominant political alliance in the United States at the time. Dahl argues, moreover, that it is "somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."¹⁸ He notes further that where the Court has gone against the dominant alliance, it has often done so "to preserve the rights and liberties of a relatively privileged group at the expense of the rights and liberties of a submerged group: chiefly slaveholders at the expense of slaves, white people at the expense of colored people, and property holders at the expense of wage earners and other groups."¹⁹ In other instances of apparent disagreement, the Court and the dominant lawmakers "were not very far apart" and, in any event, "it is doubtful that the fundamental conditions of liberty in this country have been altered by more than a hair's breadth as a result of these decisions."²⁰

In his conclusion, however, Dahl tells us that the Court, despite its somewhat blemished record, must be understood as an institution which "operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy."²¹ Somehow, after all that rather disturbing evidence, the Court comes out, so to speak, smelling like a rose. So does the American political system generally, which Dahl is careful to characterize as that of a "stable democracy."²²

16. *Id.* at 535-37.

17. Dahl, *The Supreme Court as a National Policy-Maker*, in SCHWARTZ 236-49.

18. *Id.* at 244-45.

19. *Id.* at 245.

20. *Id.*

21. *Id.* at 247.

22. *Id.* at 246.

A discussion of judicial review by Alexander Bickel in the same volume also celebrates the Court's democratic role.²³ This time the argument is not superimposed on a body of recalcitrant evidence. Instead, Bickel develops a theoretical argument in which he distinguishes between the more immediate, practical effects of government actions and their long-range impact on the more enduring principles and values on which democracy rests. The Court often acts "undemocratically" in that its decisions may go against the immediate aims of majorities, but the Court's longer-range function is to affirm the legitimacy of basic legal values and institutions and to symbolize the continuity and "moral unity" of American society; in this deeper sense, it is in accord with democratic theory.²⁴

This is all very well, but the entire discussion rests on an identification of American legal values with democratic ones, and also on the assumption that there is a "moral unity" in American society, which presumably reflects a broad consensus on social and economic issues. Neither of these crucial assumptions is discussed or defended in Bickel's treatment. The entire social and economic context in which the Court operates is simply taken for granted, and most of the really interesting questions about the role of the courts in American society remain unasked.

Herbert Packer's discussion, *Who Can Police the Police?*,²⁵ provides another illustration of the influence of the dominant model. Packer notes that the issue of what the police do and how they do it has recently become increasingly important and "is given added poignance by our discovery of the urban poor who, by an interesting coincidence, turn out to be the principal objects of police attention."²⁶ The Supreme Court's intervention into the control of police conduct, Packer argues, has come about through the default of the more appropriate avenues of legislation and/or internal efforts at control by the police themselves. What, then, is the best approach to the control of the police for those who are concerned with libertarian values?

"The most obvious and effective way," Packer writes, "is by changing the police: better education, better recruitment policies, better pay."²⁷ In the interim, new sanctioning devices ought to be created

23. Bickel, *The Counter-Majoritarian Difficulty*, in SCHWARTZ 249-62. An analysis of the role of the judiciary that deals with some of the issues Bickel leaves out may be found in R. MILIBAND, *THE STATE IN CAPITALIST SOCIETY* 138-45 (1969).

24. SCHWARTZ 259-60.

25. Packer, *Who Can Police the Police?*, in SCHWARTZ 463-74.

26. *Id.* at 464.

27. *Id.* at 473.

—perhaps improved means for aggrieved individuals to bring suit against police departments, perhaps better complaint and review procedures that might make the “internal processes of police discipline more responsive to values other than efficiency in police terms.”²⁸

It seems almost malevolent to carp at such worthwhile sentiments; but when all is said and done, Packer’s discussion amounts to little more than a statement of good intentions. Most of us might agree that we would prefer the police to abide by libertarian values, and we might also agree that it would be nice if legislatures or police departments would take steps to insure that they did. But underlying Packer’s discussion is the apparent assumption that people like legislators and police officials would behave in the way civil libertarians would like them to behave, if only they saw the light. A consensual model of the social order has been assumed, one in which the interests of apparently opposed social groups—the powerful and the powerless, the well-off and the poor—are seen as ultimately compatible.²⁹

An analysis of the police that took its bearing from a theory more sensitive to questions of class and power would begin differently. It would probably ask at the outset why there are so few controls over the behavior of the police in American society—why, for instance, there are so many jurisdictions that simply have no rules at all governing the use of firearms by policemen. Such an analysis might start with the suspicion that an uncontrolled police exists because it is in someone’s *interest* for it to exist. We know that it is mainly the poor who suffer from arbitrary police action, but who gains? According to the consensual model, no one gains, with the possible exception of the cop on the street. Packer suggests, therefore, that even police officials may be persuaded that “their present opposition to proposals designed to pry open the para-military system of police discipline is a case of a sinking ship firing on its rescuers.”³⁰

But if no one of any importance really gains from the lack of control over the police, why are there no reasonably effective sanctions against police arbitrariness, and why have there *never* been any in this country? The problem, after all, is not a new one, as the most cursory reading of American history makes clear. The specific focus of police harassment and violence may have fluctuated somewhat over the years, but it is safe to say that it has always been aimed in the same

28. *Id.*

29. Thus, Packer hopes that, in time, the poor may come to see the police as “[n]ot friends, perhaps, but inhabitants of the same society.” *Id.*

30. *Id.* at 474.

general direction—from the propertied to the poor, white to black, top to bottom. Police rarely beat up Standard Oil executives, or even slumlords. Can anyone think of instances when police violence has been used on *behalf* of the poor?

All of this suggests that, though police behavior may often be *arbitrary*, it is not therefore *accidental*. The consensual model of policing, in short, does not adequately consider the possibility that, in the words of Eldridge Cleaver, the problem is not trigger-happy cops but a trigger-happy social order.³¹ The consensual model underestimates the stake that established interests may have in the police as armed enforcers of the status quo, and it therefore also underestimates the resistance of those interests to any measures that might curtail the effectiveness of the police as an instrument of control. The model therefore cannot satisfactorily explain the absence of rules and sanctions governing the police; it can only deplore the situation and issue pleas for legislative intervention, bureaucratic self-restraint, and more pleasant cops.

Ultimately, the “most obvious and effective way” to control the police is not “by changing the police” but by changing the structures of class and racial domination that the police now serve. If we were talking about some other society—say, South Africa or Haiti or some colonial regime—this would doubtless seem obvious. Yet liberal social scientists seem strangely addicted to the notion that, in America, the instruments of repression can be substantially changed (for the better) without changing the oppressive conditions that have called them forth. In colonial regimes, the police are controlled not through education or even litigation, but by decolonization. Should it not be asked whether something similar may be required in advanced capitalist societies?

III

Perhaps it is a little unfair to generalize about the whole subject from only a few studies. But I think these examples do reflect some of the most important presuppositions in the sociology of law: the conception of law as the outcome of pluralistic competition among various groups; the tendency to look at legal institutions in relative isolation from the broader framework of domination and exploitation within which they function; and the related, often implicit, conception

31. E. CLEAVER, *Domestic Law and International Order*, in *SOUL ON ICE* 134 (1963).

of American society as, if not exactly harmonious, at least capable of resolving its conflicts without radical structural change.

These presuppositions, as the above discussion of the police suggests, lend themselves to a meliorist approach to social policy that is rarely questioned. Two main tendencies seem to dominate the policy side of most work in the field. They are not, strictly speaking, mutually exclusive, but there is a definite tension between them. One is the tendency toward rationalization—the effort to make the various agencies of the law more efficient, particularly those agencies most strained under the conditions of contemporary society, such as the police and the lower criminal courts.³² The second tendency emphasizes the need to humanize legal and social institutions generally, especially those dealing with the poor: for example, prisons and the welfare system. The aim is to build responsiveness and regard for personal rights into these institutions, and where necessary, to conceive and institutionalize new definitions of rights, as, for example, the rights of welfare recipients to the “New Property.”³³

Both tendencies have been with us for some time. Both, I think, are ultimately limited in their analysis of contemporary institutions and in their vision of alternatives. One envisions only the strengthening of existing institutions without altering their character in the least, despite substantial evidence that those institutions do not work very well, even by the barest pragmatic standards. The other seeks to modify the institutions in the direction of expanding their capacity to promote and sustain the rights and personal dignity of their clientele. Yet all of this presupposes the basic structural framework of American society.

Consider, for example, the idea of securing the rights of the poor vis-à-vis the official agencies that control so much of their lives. “[W]hat are the potential resources,” it is asked, “within the existing areas of law for promoting the interests and aspirations of the poor and for insuring conformity of official action to the rule of law?”³⁴ Again, these are laudable aims. Yet there is a sense in which the very language employed suggests a decision not to confront the larger framework of social class and economic power that creates and main-

32. See, e.g., President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, in SCHWARTZ 403-14. See also Note, *The All-Purpose Parts in Queens Criminal Court: An Experiment in Trial Docket Administration*, 80 YALE L.J. 1637 (1971).

33. See Cahn & Cahn, *The War on Poverty*; Carlin, Howard & Messinger, *Poverty and Legal Competence*; Reich, *The New Property*, in SCHWARTZ 303-05, 591-95, 595-605.

34. Carlin, Howard & Messinger, *supra* note 33, at 593.

tains poverty to begin with. The poor will get their advocates, but they will still be the poor. They will be treated with more dignity and with better chances of having at least some of their immediate grievances resolved, but their poverty will remain an unfortunate but inevitable fact of urban life.

In addition, this approach often fails to appreciate the strength and significance of entrenched resistance to important reforms within the legal system. The perils of legal services programs around the country under the onslaught of conservative power should serve as an object lesson in this respect. The fact that on a variety of levels the most interesting reform efforts of the early sixties are being systematically eroded is of great theoretical, as well as practical, interest for the sociology of law. Its implication is, again, that more attention needs to be paid to those theoretical traditions in social science that make the phenomena of class and power central rather than peripheral.

In the area of social policy as well as of social analysis, then, the sociology of law needs to become more critical in its premises and farther-reaching in its proposals. As it is, most of our thinking about ways of changing and humanizing legal institutions takes place within the confines of the dominant political and economic ideologies in the United States. But we need to think in terms not only of humanizing the present institutional structure but of creating new kinds of institutions and new levels of challenge to the social and economic bases of class injustice. To do this intelligently would require a challenge to the dominant pluralist and consensual assumptions that, however implicitly, guide the sociology of law at present.

The materials for such a challenge are available, in those traditions of critical social theory that have been so thoroughly neglected. Marx, in particular, has much to offer the sociology of law; so do Karl Mannheim and C. Wright Mills, not to mention the host of newer scholars—economists, sociologists, and historians, both in Europe and in the United States—who are now doing important work on the nature of modern capitalism as a social system.³⁵ It is not necessary to be a partisan of this kind of analysis to recognize the intellectual poverty of a social science that ignores it.

35. An introduction to these materials might begin with Marx's economic and philosophical manuscripts of 1844 in E. FROMM, *MARX'S CONCEPT OF MAN* 85-196 (1963); F. ENGELS, *supra* note 7; and Lenin, *The State and Revolution*, in *THE ESSENTIAL LEFT* 147-254 (Unwin edition 1961). (All are available in various editions.) More recent Marxian thought may be approached through J. CAMMETT, *ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM* (1967). G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963) is an excellent example of recent critical analysis of the American historical background. See also K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936).

IV

There is also a great need for serious comparative analysis. Perhaps paradoxically, the inability of the sociology of law to make much critical sense of what is going on in American society comes partly from an over-concentration on studies of the American legal system. Again, most areas of American social science have been weak on comparative and historical analysis, and the sociology of law is hardly unique in this respect.

Both of these readers are remarkably short on comparative materials. Friedman and Macaulay, in fact, point out that not only is their collection based almost wholly on American materials, but the selection has been strongly influenced by the concerns of the United States in the 1960s.³⁶

In practice, this reinforces the tendency to avoid framing questions that could transcend the logic of the system that is being studied. Without comparative materials, especially from other industrial societies with different political and economic bases, it is hard to conceive of alternatives to the American system or of the possible social roots of such alternatives. At the same time, in a kind of vicious circle, the tendency to take the system and its values for granted reduces the impulse to make the kind of comparative analysis that can shed critical light on the problems of our own society. In academic social science generally, comparative analysis is not often used as a means of discovering possible alternatives to established institutions. At worst, comparative work frequently becomes an excuse for self-congratulation, as in the shallow comparisons often made in the recent past between "democratic" Western societies and "totalitarian" socialist countries. Even at best, comparative analysis often treats other societies' institutions as manifestations of an exotic culture rather than as potentially alternate ways of arranging social life. In the sociology of law there are a number of studies of Soviet law, for instance, and a few of law in the People's Republic of China.³⁷ But these are often presented, at least implicitly, as examples of pathological deviations from our own tried and tested institutions, not as alternative ways of viewing and using law from which we might learn something. It may be, of course, that there really is not much to be learned from the

36. FRIEDMAN xi.

37. H. BERMAN, *JUSTICE IN THE U.S.S.R.* (1963); J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963* (1968); Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966).

legal experience of other societies; the conditions of their social development may be too different from our own. But we won't know this without a serious effort to find out. As it is, there is a lack of even speculative concern with how things might be different, and this is partly responsible for the perplexing sense of confusion and inertia in the sociology of law at a time when our own system seems to be working badly.

V

The great value of Marxian and other critical perspectives for the sociology of law is that they make problematic precisely those aspects of law and society that the dominant model assumes or ignores—especially the historically specific social and economic context in which Western legal institutions function and which gives them their shape and their direction. Issues could then be raised that are now obscured. Many of these issues have to do with the limits and possibilities of justice in capitalist society. What, for example, are the limits of effective reform of legal agencies in a society that remains dominated by private corporate enterprise? To what extent can a legal system that is historically associated with the rise of an entrepreneurial class be refashioned into an instrument of liberation for the propertyless and powerless? What is the historical background of our contemporary agencies of justice and the ideologies that underlie them? How does this background relate to the more general development of class structure and ideology in the capitalist countries? What alternatives to the present institutions of justice may be possible “within the system”? Can something like community control of the police make a significant difference in the impact of law on the poor, or is it more likely to function as a new form of indirect rule?

A final issue has to do with the future of liberal (or “bourgeois-democratic”) legal values in the face of a deepening social and economic crisis in American society. What historical precedents are there for an authoritarian solution to the problems of capitalism under stress? Some signs of such a crisis have already appeared. It would be unfortunate if social science turned out to be completely unprepared for the results.

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"Kelsen is probably the most eminent living legal philosopher; he has been called by his contemporary peers 'the Kant of legal philosophy.' His emancipation of law from the natural sciences is comparable to the liberation of the social sciences from the natural sciences by Plato and represents a revolutionary accomplishment."—*Archiv für Rechts- und Sozialphilosophie* (Germany)

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