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UNDERSTANDING CRIME UNDER CAPITALISM: A CRITIQUE OF AMERICAN CRIMINAL JUSTICE AND INTRODUCTION TO MARXIST JURISPRUDENCE

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“Your Honor, years ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest on earth. I said then, and I say now, that while there is a lower class, I am in it, and while there is a criminal element I am of it, and while there is a soul in prison, I am not free.”[1] — Eugene Victor Debs

INTRODUCTION

Americans have a pronounced tendency to boast that our system of justice is superior in form and in fairness to virtually all other international legal structures.  Prudent observers have noticed the casuistry with which media outlets discuss the relative inequities of those juridical models foreign to the American method.[3] As a result of this and other related causes, we Americans have come to understand crime, why crime occurs, and our sense of justice in narrowly, if not exclusively, American terms.[4] These assertions are not unique, and they appear


[3] See generally Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries, 31 ARIZ ST. L.J. 737, 738-44 (1999) (detailing the concept of ethnocentrism to explain how Americans have been culturally conditioned to believe in our justice system’s superiority).

with regularity in scholarship on the subjects of ethnocentrism and American exceptionalism.\textsuperscript{5} Traditional criminologists generally understand crime and why it occurs based on either behavioral theories or definitional theories of crime.\textsuperscript{6} Behavioral theories of crime tend to focus on crime as a product of learned characteristics developed as a result of upbringing, interpersonal relationships, or even inherited traits that make a given person more or less likely to commit crime.\textsuperscript{7} By contrast, definitional theorists consider the social and political processes that go into deciding whether and why one act or another is to be labeled criminal.\textsuperscript{8} In the context of the American and capitalist models, the more broadly accepted of the two theories is the behavioral theory.\textsuperscript{9} In many ways this is to be expected when one considers the American emphasis on


\textsuperscript{7} MICHAEL J. LYNCH ET AL., \textit{THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY} 3 (3d ed. 2000).

\textsuperscript{8} MICHAEL J. LYNCH ET AL., \textit{THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY} 1–3 (3d ed. 2000).

\textsuperscript{9} MICHAEL J. LYNCH ET AL., \textit{THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY} 23 (3d ed. 2000).
individualism.\textsuperscript{10} As a result, the American justice system has developed in response to this understanding of crime.\textsuperscript{11} The American law enforcement arm polices based on the behavior of individuals as they have been observed, the courts and prosecuting apparatuses of the state seek to convict people whose behavior violates the law as it is written, and the prisons warehouse offenders whose behaviors deviate from our legally and culturally accepted edicts.\textsuperscript{12}

For Marxists, crime is conceptualized altogether differently. All crime can be understood as the expression of a set of power relations, either occurring in affirmance or in attempt to subvert that relationship.\textsuperscript{13} Every deviant act from petty thievery to sexual assault can be

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\textsuperscript{10} See MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY 29–31 (3d ed. 2000) (analyzing the American concept of individualism as a mechanism for understanding behavior; therefore crime as well).
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\textsuperscript{11} See generally MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY 104–06, 192–96 (3d ed. 2000) (describing in detail the manner in which the justice system has developed alongside and as a byproduct of capitalism).
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\textsuperscript{12} See generally CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 190–205 (David F. Greenberg ed., 1st ed. 1981) (discussing the role of the three branches of the criminal justice system as they have evolved in conjunction with American capitalism).
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\textsuperscript{13} CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 8–9 (David F. Greenberg ed., 1st ed. 1981). “[I]ncarceration is political since it is the end-product of decisions to treat some social harms as deserving of penal sanctions and others as not—with little regard to the actual extent of social damage.” Id. See generally MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN
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explained in this manner.\textsuperscript{14} This is not to say that crime is an inevitable byproduct of capitalism, though it may be, but that crime is necessary inasmuch and to the degree that wage and influence disparities are represented within the sphere of those power relations.\textsuperscript{15} Marxists also utilize the definitional analysis to critique the manner in which acts come to be labeled criminal, along with the degree to which those acts are punished based on the “distribution of political and economic power.”\textsuperscript{16}

This discussion has become increasingly relevant as we struggle to articulate more equitable measures of criminal justice in the face of mounting civil unrest. Following the highly publicized deaths of Eric Garner and Michael Brown at the hands of white local law enforcement officers, along with the subsequent failure of the justice system to address this repugnant state of 

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\textsc{Radical Criminology: Critical Perspectives on Crime, Power & Identity 25, 8–11 (3d ed. 2000)} (discussing the emergence of Marxist criminology).
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\textsuperscript{15} \textit{See} Mark Cowling, \textit{Can Marxism Make Sense of Crime?}, 2 \textsc{Global Discourse: An Interdisc. J. of Current Aff. & Applied Contemp. Thought} 59, 64–66 (2011) (illustrating that incarceration, while necessary under capitalism, is actually less prevalent in countries with an adequate welfare state functioning to lessen the degree of wage and income disparity).

\textsuperscript{16} \textsc{Michael J. Lynch et al., The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 25, 4 (3d ed. 2000).
affairs, it has become essential for left-legal activists and advocates of social justice to begin crafting a model of criminal justice that is capable of withstanding the bias of perceived class, gender, and racial supremacy. Further, it seems necessary to express these ideas in a manner that is amenable to implementation, rather than conveyed in the abstract terms of bourgeois ideology. Such a design of legal structures and procedures can be deduced from the concepts provided by Karl Marx and the various leftist practitioners and theoreticians that have followed in Marx’s footsteps. Nevertheless, it is beyond our ability to fully or accurately construct a Marxist model of criminal law in abstract, just as it would have been impossible for slaves in pharaonic Egypt or feudal serfs to outline a model of modern capitalist criminal law. Socialism represents the transcendence of humanity from the barbarism of capitalism to a new and more equitable society; therefore, the construction of society and its institutions lie in the execution of

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that new society, as opposed to the development of any ideological concepts. With this statement, we arrive at the crux of Marxism that distinguishes it from mere philosophy in that Marxism represents the marriage of theory and practice understood more broadly as “praxis”. Praxis is embodied in Marx’s statement that philosophers have merely interpreted the world up to now, but the point should be to change it. This is, in part, the component of Marxism that stresses human agency above all else. As concepts emphasizing human agency, such as praxis and the necessity of self-determination and self-emancipation, are so core to the Marxist framework, it follows that these elements are to be considered inexorable components of the Marxist model of criminal justice.


25 See Paul D’Amato, *The real Marxist tradition*, SOCIALISTWORKER.ORG (Dec. 12, 2013), http://socialistworker.org/2003-2/479/479_10_MarxTradition.shtml (explaining the essentiality of these and other components to the production of authentic Marxism, while using the presence of such elements to distinguish it from inauthentic Marxism, such as Stalinism or Maoism).
In order to fully understand what envisioning a Marxist model would entail, it is necessary to lay the foundation of the Marxist legal tradition in its historical context, and then in explicitly Marxist terminology as such terms may relate to crime and criminal justice. Some of this information may seem overly introductory for those who have studied Marx in any detail. Nonetheless, it is intended for this piece to be digestible for a wide array of readers, many of whom are less likely to have delved into the depths of Marx’s work—let alone the niche subject of legal critiques and applications of Marx to law and criminal justice. We will journey first through a brief history of Marxism as it relates to law and the legal systems purported to have existed in the name of Marx, particularly the Soviet legal system. Following this historical analysis, we will consider the specific tenets of Marxism and how those concepts may guide us in constructing an authentic Marxist model of criminal justice. Next we will implement these tenets in laying out a critique of each of the three phases of the American criminal justice system: 1) the police, 2) the courts, and 3) the prisons. Finally, we will conclude with an attempt at providing brief recommendations for constructing a Marxist criminal justice system. What follows is intended to be an introductory overview of these concepts and systems. As a result, the complexity of insight devoted to each section may appear somewhat limited. I encourage the reader to follow the works cited herein and wade out further into the depths of the ideas and methodologies of the Marxist tradition.

THE MARXIST LEGAL TRADITION

“Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.”

— Karl Marx

Karl Marx and Friedrich Engels were nineteenth century writers and political activists who put forth the general theory of revolutionary communism and its transition period, more commonly referred to as socialism.27 The understanding of these ideas and practices is nestled more broadly under the banner of Marxism.28 A rudimentary explanation of the basic methodology of Marxism could be expressed as follows: Capitalist society is divided into two distinct classes—the working class and ruling class—whose attributes are defined by their relation to the means of production.29 The means of production are the tools utilized to produce the goods upon which society depends.30 The ruling class dominates ownership of the means of production, while the working class is made to compete against one another at the individual level in effort to sell the greatest amount of their individual labor possible to the ruling class in exchange for a wage that represents the least possible amount of cost to the ruling class.31 This struggle in labor represents an irresolvable conflict or contradiction in capitalism, as the value of an individual laborer, a commodity to be exchanged for a wage, is alienated from the laborer’s

value as a human being. In order to effectuate meaningful and lasting change, the workers must develop a sense of their own class-consciousness, organize collectively against the ruling class to seize the means of production, and control the means of production democratically so that the workers may enjoy the full fruit of their own labor.

Marx and Engels were prodigious in their intellectual output, writing on virtually every aspect of politics and economics—from critiques of governing authorities and the tedium of inessential bureaucracy, to the labor and economic impetuses for determining how societies are organized and the ineradicable conflicts that arise as a result of that organization. So it is with no end of confusion and consternation that leftist jurists have been forced to bear with the relative dearth of material from Marx and Engels on the subject of law and jurisprudence.

Much of the information provided by Marx and Engels actually touching on the subject tends to apply only tertiarily to the topic of law as it related at the time to private property, labor, finance

35 See R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 11–12 (1st ed. 1980) (stating that the task of writing on the subject of Marxist jurisprudence is made more complicated due to the lack of material provided by Marx and Engels); see also Hugh Collins, Marxism and Law v (1984) (articulating the author’s surprise at the lack of study dedicated to the subject).
or economic crimes against the proletariat—most often mentioned only with regard to some other aspect of the political economy and class oppression. This is has created some sense of doubt among legal theorists and academics as to whether a substantive Marxist theory of law is even discernable based on such scant source material. In fact, the subject of law and Marxism

36 See BOB FINE, DEMOCRACY AND THE RULE OF LAW: LIBERAL IDEAS AND MARXIST CRITIQUES 5 (2d ed. 1986) (noting that Marx’s attention to the analysis of jurisprudence was vastly outweighed by his critique of political economy); see also R.W. MAKEPEACE, MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW 12–14 (1st ed. 1980) (providing that Marx and Engels wrote very little explicitly about law, and much of the analysis must necessarily be deduced from their theories on the economic structures of the state); CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 11 (David F. Greenberg ed., 1st ed. 1981) (explaining that Marx and Engels did not provide a systematic analysis of law and criminal justice); CSABA VARGA, MARXIAN LEGAL THEORY xiv–xv (Csaba Varga ed., 1993) (detailing Marx and Engels’ lack of interest in the law, despite their educational background in legal studies).

37 See, e.g., HUGH COLLINS, MARXISM AND LAW 9 (1984) (suggesting that a decidedly Marxist legal theory may not even exist); Raymond A. Belliotti, Marxist Jurisprudence: Historical Necessity and Radical Contingency, 4 CAN. J. L. & JURISPRUDENCE 145 (1991) (positing that there is not much of Marxist theory of law); JANET CAMPBELL, AN ANALYSIS OF LAW IN THE MARXIST TRADITION 3–4 (Studies in Political Science ed. 2003) (quoting Boaventura de Sousa Santos to note that it is commonly stated that there is no Marxist theory of law); HANS KELSEN, THE COMMUNIST THEORY OF LAW 12–13 (1955) (pointing out that Marx was largely dismissive of law as bourgeois ideology); CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 79 (Haymarket Books ed. 2006) (noting that the absence of an
is so rarely touched upon in academia that some scholars have investigated the field of Marxist jurisprudence while laboring under the belief that they were quite alone in the undertaking.\textsuperscript{38}

In spite of Marx’s enduring relevance and applicability in the fields of sociology, economics, and politics, the state of Marxist jurisprudence appears upon cursory inspection to be a case of arrested underdevelopment.\textsuperscript{39} This condition is rendered all the more intimidating and incomprehensible when one considers the efforts made by Soviet era jurists who tried to square the circle in establishing a legal system that sought to make quasi-Marxist analyses conform to the restrictions of a debased, debauched, gerontocratic, and dictatorial form of Soviet-style communism.\textsuperscript{40} A few Soviet jurists protrude from this ideological wreckage, Evgeny Pashukanis articulable Marxist theory law is a barrier to establishing a systematic legal structure based on Marxism).

\textsuperscript{38} \textit{Marxism and Law} 2 (Piers Beirne & Richard Quinney eds., 1982) (stating the editors’ belief that their assemblage of writings was the only contemporary collection on the subject Marxist jurisprudence).


\textsuperscript{40} See HUGH COLLINS, \textit{Marxism and Law} 2, 144 (1984) (noting the general failure by Communist states to offer any meaningful contributions to Marxist jurisprudence, and of the inherent contradictions between Marxism and the nature of Soviet-style communism); see also R.W. MAKEPEACE, \textit{Marxist Ideology and Soviet Criminal Law} 12–14 (1st ed. 1980) (decrying the theoretical perversions and discordant attempts by Soviets theorists who sought to force isolated fragments of Marxism into their distorted system of communism). See \textit{generally}
and Petr Ivanovich Stuchka among them, but the vast majority of their writings and research dealt with aspects of jurisprudence that were largely unrelated to criminal law, nor were their efforts directed significantly toward the actual establishment of a structurally sound justice system in the new society.\textsuperscript{41} Pashukanis was a Russian attorney in the early decades of the twentieth century following the Bolshevik Revolution.\textsuperscript{42} His primary contribution to Marxist jurisprudence is represented in the development of his voluminous work, \textit{The General Theory of Law and Marxism}.\textsuperscript{43} Pashukanis’ theory attempted to draw from already existing legal forms while incorporating explicitly Marxist principles to create a kind of socialist law of the transition period, which was to have been further developed and implemented during the time in which Soviet society progressed toward full communism.\textsuperscript{44} Stuchka, who had been a colleague and

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\textsuperscript{41} \textit{See generally} China Miéville, \textit{Between Equal Rights: A Marxist Theory of International Law} 60–64, 77, 82–83 (Haymarket Books ed. 2006) (discussing the valuable contributions and, by implication, the relative worth of Soviet jurists like Pashukanis and Stuchka compared with the shameful and devastatingly suppressive legal enactments perpetrated by Andrey Vyshinsky); Hugh Collins, \textit{Marxism and Law} 10, 13 (1984) (noting that Pashukanis’ contributions were toward establishing a generalized theory of law and Marxism).


\textsuperscript{43} Hans Kelsen, \textit{The Communist Theory of Law} 89 (1955)

\textsuperscript{44} China Miéville, \textit{Between Equal Rights: A Marxist Theory of International Law} 79 (Haymarket Books ed. 2006); \textit{see also} Michael Head, \textit{The Passionate Legal Debates of the Early
critic of Pashukanis,\(^{45}\) believed that the law was solely a function of state oppression, and that law in its existing bourgeois form did not provide a model from which the Soviet form could be constructed.\(^{46}\) Stuchka also rejected the need for any distinction between a law of the transition period and the regulatory functions required for society under full communism.\(^{47}\) The complexity of Pashukanis’ and Stuchka’s arguments exceed our purpose here, but it is useful to recognize that there did exist an authentic attempt at constructing a viable Marxist theory of law in the early years of the Soviet Union. It is possible that Pashukanis might have eventually constructed a working theoretical model justice system that conformed or expanded logically from Marxist methodology, but Josef Stalin saw an end to his work and life in 1937 during the great purges, and branded Pashukanis an “enemy of the people” in the process.\(^{48}\) Stuchka was spared this fate by having the fortune and good timing to pass away from natural causes before

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\(^{46}\) *China Miéville, Between Equal Rights: A Marxist Theory of International Law* 83 (Haymarket Books ed. 2006)


the purges began.⁴⁹ Such was the state of affairs under Stalin,⁵⁰ and that alone should serve reason enough to merit dismissing the criminal justice model under Stalin and his successors from consideration here.

It is important to note that the veritable famine of work committed to the subject of Marxist jurisprudence is in many ways a byproduct of design.⁵¹ Law, particularly criminal law, was considered an intrinsic component of state sanctioned tyranny—a tool created by the ruling

⁴⁹ See Michael Head, The Passionate Legal Debates of the Early Years of the Russian Revolution, 14 CAN. J.L. & JURISPRUDENCE 3, 26 (2001) (believing it all but certain that Stuchka would have been executed along with Pashukanis had he lived that long); see also P.I. STUCHKA, SELECTED WRITINGS ON SOVIET LAW AND MARXISM vii, xx (Piers Beirne et al. eds., 1988) (noting the year of death as 1932, then implying that Stuchka might not have survived the Stalinst purges had he lived any longer).

⁵⁰ See generally Michael Head, The Passionate Legal Debates of the Early Years of the Russian Revolution, 14 CAN. J.L. & JURISPRUDENCE 3, 25–26 (2001) (discussing instances in which Stalin pressured, threatened, even executed the leftist jurists who failed to fall in line with Stalin’s capricious concept of the Party and its renunciation of the universally Marxist concept that the state should wither away).

⁵¹ See JANET CAMPBELL, AN ANALYSIS OF LAW IN THE MARXIST TRADITION 1–7 (Studies in Political Science ed. 2003) (pointing out that the concept of law was not necessarily intended to be an element of Marxism, due to its theoretically limited shelf life upon the establishment of the proletarian dictatorship).
class and wielded by the state for the purpose of further disenfranchising the proletariat.\textsuperscript{52} As per Marx, the entirety of the state and its legal apparatuses were eventually to wither away upon the successful self-emancipation of the working class, more or less phasing itself out as the outmoded artifice of a reliquary construction.\textsuperscript{53} Contributing to the evident aversion of Marxists to legal analysis is the fear of giving way to legal fetishism.\textsuperscript{54} Legal fetishism refers to any conviction that the rule of law is necessary, autonomous, or even desirable in any fashion.\textsuperscript{55} For  


\textsuperscript{53} Hugh Collins, Marxism and Law 15 (1984). The concept of the withering away of law is potentially Marx’s most notorious pronouncement. \textit{Id.} See also Michael Head, The Passionate Legal Debates of the Early Years of the Russian Revolution, 14 Can. J.L. & Jurisprudence 3, 26 (2001) (stating that the Soviets initially attempted to create the conditions by which the state could begin to wither away until Stalin came into power and forcibly reversed Soviet consensus on the necessity of this basic tenet of Marxism).


Marxists, the general purpose of law is to sanction the existing material relations between the working class and the state, where law is considered the codified will of the bourgeoisie.\textsuperscript{56} This very accusation was stated in no uncertain terms by Marx in the \textit{Communist Manifesto}.\textsuperscript{57} A belief in the necessity of law to maintain social order and harmony presupposes a rather nasty and unscientific conception of the nature of man.\textsuperscript{58} Nevertheless, the notion that law may simply cease as if it were the victim of a massive coronary seems plainly utopian on its face.\textsuperscript{59} It follows that it would be likewise utopian to believe that the political economy could change immediately upon the breach in some revolutionary watershed.\textsuperscript{60} The obvious truth of the matter is in the concept’s nomenclature—the state does not vanish but merely withers as if from atrophy, redundancy, or both.\textsuperscript{61} This, of course, was one of the great failings of the early Soviet

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\item \textsuperscript{56} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 18 (1st ed. 1980) (paraphrasing Engels in the \textit{Contribution to the Critique of Political Economy}).
\item \textsuperscript{57} Karl Marx & Friedrich Engels, \textit{The Communist Manifesto, A Road Map to History’s Most Important Political Document} 9–14 (Phil Gasper ed., Haymarket Books ed. 2005).
\item \textsuperscript{58} See Hugh Collins, \textit{Marxism and Law} 120 (1984) (writing that such a belief relies on the supposition that man is naturally inclined to greed and selfishness).
\item \textsuperscript{59} Hugh Collins, \textit{Marxism and Law} 15–16 (1984).
\item \textsuperscript{60} See R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 25 (1st ed. 1980) (stating that common sense gives the lie to this impossibility).
\item \textsuperscript{61} See R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 25 (1st ed. 1980) (paraphrasing Engels in \textit{Anti-Duhring} to explain that the state is not simply abolished, but gradually erodes as post-revolutionary society moves towards an eventual state of classlessness); see also Michael Head, \textit{The Passionate Legal Debates of the Early Years of the Russian
Union, wherein the Bolsheviks attempted to hasten the necessary structural and industrial preconditions in order to sooner arrive at the final stateless and classless destination. Given the general hellishness of Russia in the years succeeding the Revolutions, it seems the Bolsheviks were yoked to the chain of unrelenting circumstance and terminally bad luck. Had conditions allowed for the organic growth of communism in Russia, and had the Bolshevik revolution been emulated internationally, as they believed it would, the Soviet Union might have gone through the protracted period of transition from capitalism to full communism known in Marxist parlance as socialism or vulgar communism.

Revolution, 14 CAN. J.L. & JURISPRUDENCE 3, 9 (2001) (quoting Lenin from The State and Revolution to show that the state is an impossible and unnecessary institution in a society that lacks the usual class antagonisms).

62 See Michael Head, The Passionate Legal Debates of the Early Years of the Russian Revolution, 14 CAN. J.L. & JURISPRUDENCE 3, 7–9 (2001) (discussing the manner in which the Bolsheviks modified Marxism in order to adapt the methodology to their circumstances, and later the perversions spearheaded by Stalin’s doctrine of socialism in one state).

63 See generally Paul D’Amato, What happened to the Russian Revolution?, SOCIALISTWORKER.ORG (Feb. 10, 2012), http://socialistworker.org/2012/02/10/what-happened-to-the-russian-revolution (laying out the various external and internal calamities during in the early years of the Soviet Union).

64 See generally Michael Head, The Passionate Legal Debates of the Early Years of the Russian Revolution, 14 CAN. J.L. & JURISPRUDENCE 3, 7–9 (2001) (explaining that Lenin and Trotsky had not intended for an immediate transition to full communism, but that they had fully expected international revolution and a protracted temporary proletarian state).
The laws and legal forms that developed in response to these unique circumstances represented new contributions to Marxism, as revolutionaries sought to incorporate Marxism into their legal analysis.\textsuperscript{65} To fully understand these contributions, it is necessary to first examine some of the more classically Marxist concepts and the manner in which those ideas naturally bear relation to law.

**Historical Materialism & the Dialectic**

Marx’s critique of capitalist society, from economics to its jurisprudence, revolves around the concept of historical materialism.\textsuperscript{66} Materialism is the element of Marxism that sets it apart from crude philosophy in its rejection of any measure of idealism.\textsuperscript{67} In terms of a legal analysis, the materialist jurist should concern oneself with the social and economic imperatives that drive and “direct the course of legal development,” as opposed to the letter of the law, which is a socially produced construct in the idealist sense.\textsuperscript{68} The law as it is written is only a matter of words, but to study the machinations that gave rise to the law, the manner in which the law is

\textsuperscript{65} \textsc{China Miéville}, \textit{Between Equal Rights: A Marxist Theory of International Law} 60 (Haymarket Books ed. 2006);

\textsuperscript{66} \textsc{Hugh Collins}, \textit{Marxism and Law} 17 (1984); \textsc{Michael J. Lynch et al.}, \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 25 (3d ed. 2000).

\textsuperscript{67} \textit{See} \textsc{Hugh Collins}, \textit{Marxism and Law} 17 (1984) (explaining the distinction between materialism and idealism).

\textsuperscript{68} \textit{See} \textsc{Anthony Chase}, \textit{Law and History} 20, 28 (New Press ed. 1997) (discussing the meaning of materialism as it relates to jurisprudence).
carried out, and how that law affects our objective reality is to examine law as a materialist.  

This emphasis on historical materialism has given rise to assertions that Marx was a historical determinist. The truth of that matter is that Marx, while acknowledging history has some part, actually emphasized human agency above all else. This is the heart of materialism, which is the production and reproduction of the events by human self-action. The particular form of human action Marx analyzed is that of the interaction between the bourgeois and the proletariat—the ruling and working classes, respectively—and relationship of the proletariat to

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the means of production. Instead of analyzing these groups as sociological abstractions, Marx held that the relation of these classes to the means of production must be considered in light of the present mode of production—capitalism. The implications of this argument extend beyond the common tools of industry and factory labor, and into the realm of jurisprudence. Legislators and the judiciary, comprised of the bourgeoisie, use the law as an instrument to maintain class antagonism by preserving the economic order and relations of the people to the means of production. Crime control and law enforcement, often capricious and arbitrary, are methods used to preserve class divisions and regularly emphasize the protection of private property at the expense of the welfare of the people. Further, crime can be expressed in

75 See Michael J. Lynch et al., The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity 21 (3d ed. 2000) (discussing the law as a means of maintaining class divisions).
77 See generally Kristian Williams, Our Enemies in Blue: Police Power in America (South End Press ed. 2007) (expounding upon the role of law enforcement as anathema to the working class).
material terms as a function of supply and demand. Society has a demand for crime, to which supply corresponds, and gaps in society are filled by new criminals, new inmates, and new executees.

The next aspect of Marx’s materialism is the dialectic. If historical materialism is the foundation of Marxism, then the dialectic is the means by which we can come to understand the way social change occurs. The bulk of Marx’s work centers on the dialectic, so it is exceedingly difficult to give full justice to the concept in such short space. Nevertheless, a simple, if overly simple, definition of the dialectic is as follows: the dialectic is the understanding of “contradictions and their resolution through a transcendence or overcoming.” The dialectic, then, is the organizing principle for Marxists. When internal contradictions cannot be resolved from within the confines of the existing social order, we consider that circumstance to be dialectical. This is an intrinsic contradiction because the conflict is specific

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83 V.G. Afanasyev, Dialectical Materialism 13 (1987)

to the present societal configuration; therefore, the only way to resolve these contradictions is through the creation of a new social form.\textsuperscript{85} For Marxists, the new form represents the revolutionary shift from capitalism to communism.\textsuperscript{86} This, it seems, supports the Marxist aversion to law because the dialectic analysis posits that law in its present bourgeois form cannot facilitate the ushering in of a new social form since the purpose of law is to preserve the current configuration.\textsuperscript{87} We can begin to grasp the dialectical method as an understanding of the history of conflicts between opposing views and classes, as well as the struggle to synthesize these views into an ascertainable truth.\textsuperscript{88} This understanding is called dialectical materialism.\textsuperscript{89}

To gain full comprehension, it may be necessary to illustrate this method in strictly legal terms. Let us consider the offense of prostitution. Prostitution is a form of labor in the Marxist


\textsuperscript{87} CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 317 (David F. Greenberg ed., 1st ed. 1981)


\textsuperscript{89} V.G. AFANASYEV, DIALECTICAL MATERIALISM 14 (1987)
sense, more broadly known as “sex work” in the parlance of modern Marxist-feminism.\textsuperscript{90} Prostitution is also outlawed in the United States.\textsuperscript{91} This is an example of criminalizing labor simply because it does not fit within the culturally accepted strata, but the Marxist analysis doesn’t end by merely pointing out this contradiction.\textsuperscript{92} The Marxist critique considers the conflict between women laboring in sex work, marginalized and disenfranchised as a result of the laws prohibiting the conduct, against the ruling class that legislates against their interests.\textsuperscript{93} Further, laws implemented with the professed intent of protecting women in the sex industry, such as broad laws against human trafficking, actually have the effect of further alienating women and their lived experiences in the sex industry.\textsuperscript{94} To consider this issue dialectically is to consider the intent of the legislators, expressed or otherwise, the law as it is written, and the


\textsuperscript{92} See Cara Beusman, \textit{Demonizing Sex Work Harms Sex Workers}, \textsc{Jezabel.com} (Mar. 6, 2014), http://jezebel.com/demonizing-sex-work-harms-sex-workers-1537828241 (emphasizing further the need to recognize sex work in all its forms as a legitimate form of labor).

\textsuperscript{93} Charlotte Shane, \textit{Invisible Sex Workers}, \textsc{Jacobin} (May 14, 2014), https://www.jacobinmag.com/2014/05/invisible-sex-workers/.

effects the law and its implementation have on the people. Where the law creates contradictions, or where law creates conflict between class interests, that conflict is said to be dialectical because such conflicts cannot be remedied by creating new laws or lessening the restrictions of preexisting laws—it requires fundamental change in the law and all laws.

**Alienation, Exploitation, & False Consciousness**

A predominant explanation for the occurrence of crime is believed to come from the school of thought stemming from Emile Durkheim known as anomie theory, which may be more clearly understood as the theory of alienation articulated by Marx. The concept of alienation, as stated earlier, has to do with the working class’ alienation from the product of its labor. Workers produce products for consumption, but those workers have no connection to the product

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95 See generally Anthony Chase, Law and History 20, 28 (New Press ed. 1997) (offering an explanation of dialectic contradictions inherent within the law and legal structures).

96 Crime and Capitalism: Readings in Marxist Criminology 8–9 (David F. Greenberg ed., 1st ed. 1981). “A process is dialectical when it is based on an inner contradiction that cannot be reconciled within an existing set of relationships. Because the contradiction is inherent . . . it can only be resolved by creating a new social form.” Id.

97 See Crime and Capitalism: Readings in Marxist Criminology 8–9 (David F. Greenberg ed., 1st ed. 1981) (analyzing the concept of anomie, though specifically as it relates to juvenile delinquency); see also Christopher Hitchens, Hitch-22: A Memoir 98 (1st ed. 2010) (remarking on the origin of anomie in Durkheim, then briefly comparing the concept to the Marxist understanding of alienation and class relations).

once it’s produced, or to the value for which it is sold.\textsuperscript{99} As a result, the worker is unable identify his labor from any other indistinct portion of the physical machinery itself—owned by the capitalists and employed to serve their ends.\textsuperscript{100} Marx believed that humans are naturally inclined toward socialization and creativity, but the alienation of labor under capitalism separates the workers from their natural state and orients them instead around their economic life, which becomes the dominant focus.\textsuperscript{101} The worker does not experience anything relatively close to the full financial benefit his product, which results in profit for the capitalist, and this profit is the representation of exploited labor.\textsuperscript{102} Exploitation is what the worker experiences when his labor has been sold for less than the use value of his labor.\textsuperscript{103} As workers lack the ability to bargain for their wages on equal ground with their employers, the workers are essentially forced to do labor for the offered wage with minimal room for adjustment.\textsuperscript{104} If the worker is unable to meet

\begin{footnotesize}
\textsuperscript{99} Peter Osborne, \textit{How to Read Marx} 51–52 (First American ed. 2006).

\textsuperscript{100} Paul D’Amato, \textit{The Meaning of Marxism} 70 (2006).


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his subsistence requirements based on that wage or sum total income from multiple lawful forms of labor, the worker seems left with only unlawful remedies in order to supplement his lawful income. But there are those workers who, rather than appearing alienated or attempting to push back against the system that exploits their labor, affirmatively endorse the interests of the ruling class. This condition can be understood as a form of “false consciousness,” wherein workers embrace ethics that are counter to their class interests—from the more common labor competition and individualism, to the more extreme forms of racism and sexism. These sentiments are contradictory to the class interests of the laborers because they serve to fragment and decollectivize the workforce, which, but for these conflicts, might organize against the bosses. For Marxists, these concepts may provide an explanation for why the poor

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105 Raymond A. Belliotti, Marxist Jurisprudence: Historical Necessity and Radical Contingency, 4 CAN. J. L. & JURISPRUDENCE 147 (1991). But see Mark Cowling, Can Marxism Make Sense of Crime?, 2 GLOBAL DISCOURSE: AN INTERDISC. J. OF CURRENT AFF. & APPLIED CONTEMP. THOUGHT 59, 62 (2011) (noting that the explanation of alienation and exploitation as a source of crime was not put forward by Marx himself, but is an extrapolation of Marx by others who have adapted Marxism to the problem of crime, and perhaps an inaccurate extrapolation at that).


commit crime. Two causes of criminality have been identified in relation to alienation and exploitation: 1) the working class is exploited and deprived access to much of society’s surplus goods and services; and 2) competitive capitalism encourages and reinforces normative values of greed and selfishness, which drives commodity fetishism and other covetous sentiments. In essence, the working class cannot attain the things they’re culturally instructed to value, or achieve the legitimate stations that would allow them to acquire those goods or services, so a natural outcome of this conflict may be theft, for instance, or other offenses to varying degrees of severity. The criminal is alienated, in a sense, because the egoism and greed of the ruling class is essentially legalized or normative, while the exact or similar behavior performed by the working class is prohibited and punished harshly.

The Lumpenproletariat

The lumpenproletariat is a contentious subject in the realm of Marxist legal scholarship, but it remains one of the few concepts that Marx addressed that spoke directly to issue of crime.

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and criminals. Therefore, aspects of the lumpen category, whether one even recognizes it as a distinct category, present requisite matters for discussion. In 1972, socialist Hal Draper authored the premier account of the lumpenproletariat as various misleading and mistranslated renditions of the phrase began occurring amidst revolutionary discussions and publications. Draper wrote, speaking for Marx, that the lumpenproletariat was an ill-defined constituent of parasitic elements—social scum, counterrevolutionaries, and vagabonds “capable of the basest banditry and foulest corruption.” This sedimentary class excrement, according to Marx, was


115 Hal Draper, The Concept of the “Lumpenproletariat” in Marx and Engels, 6 ÉCONOMIES ET SOCIÉTÉS 2285 (1972).

not to be recruited by leftists into the ranks of the revolutionary working class.\textsuperscript{117} In an instance where they had been mistakenly brought on as part of the revolutionary contingent, the lumpenproletarians resorted to looting the jewelry shops and committing acts of senseless property damage.\textsuperscript{118} Draper offers that the lumpenproletariat is the product of developed capitalism and the existing social order, as opposed to a prerequisite for its construction.\textsuperscript{119} Further, Draper recognizes in Marx’s writing that the lumpenproletariat character is not bound solely to the confines of the working class, but also found in the ranks of the bourgeoisie.\textsuperscript{120} Marx considered these lumpen-bourgeois to be likewise parasitic and socially functionless, but found in the finance aristocracy of beneficiaries, inheritors, and “hangers on of the rich and powerful.”\textsuperscript{121} This is a significant analysis because it seems to identify the criminal class responsible for the various Wall Street and banking catastrophes that have befallen the United States over the last century. In addition, the phrase, “hangers on of the rich and powerful,” seems to implicate the low-to-mid-level bureaucrats and other agents of the state that do not

\textsuperscript{117} Hal Draper, \textit{The Concept of the “Lumpenproletariat” in Marx and Engels}, 6 \textsc{Économies et Sociétés} 2285, 2298–301 (1972).

\textsuperscript{118} Hal Draper, \textit{The Concept of the “Lumpenproletariat” in Marx and Engels}, 6 \textsc{Économies et Sociétés} 2285, 2301 (1972).

\textsuperscript{119} Hal Draper, \textit{The Concept of the “Lumpenproletariat” in Marx and Engels}, 6 \textsc{Économies et Sociétés} 2285, 2287, 2303–04 (1972).

\textsuperscript{120} Hal Draper, \textit{The Concept of the “Lumpenproletariat” in Marx and Engels}, 6 \textsc{Économies et Sociétés} 2285, 2305 (1972).

\textsuperscript{121} Hal Draper, \textit{The Concept of the “Lumpenproletariat” in Marx and Engels}, 6 \textsc{Économies et Sociétés} 2285, 2287, 2306–07 (1972).
personally belong to the ranks of the ruling elite. Later, we will consider the position of the police in relation to the lumpenproletariat and determine whether such a classification may be more apt when describing the manner in which officers are employed to act against their class interests.

**Base & Superstructure**

Briefly, it may be somewhat necessary to explain Marx’s concept of base and superstructure and identify where the legal structures reside within those two categories. The base and superstructure analysis has been criticized, perhaps rightly, as being too vague and underdeveloped to be an empirical contribution to the Marxist critique of capitalism. The base and superstructure configuration is used to signify the relationship between the mode of production and political and ideological function of the state in a capitalist society. In essence, Marx believed that the mode of production, capitalism, represents the economic base, while politics and ideology represents the superstructure. The superstructure is molded by the

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124 Lee Goldstein, *High Theory And Low Practice: A Dream And Five Theses On Being A Left Lawyer And Legal Worker*, 8 UNBOUND: HARV. J. LEGAL LEFT 133, 146-50 (2012-2013).


economic base, which then provides context to our thoughts and experiences. The question for Marxists is where the law is situated in this analysis. The face-value answer suggests that law is necessarily part of the superstructure, as it is a part of political schema acting in preservation of the capitalism. Marx even wrote that society’s economic structure is what drives the legal and political superstructure. Notwithstanding, scholars and proponents of natural law have suggested that law is actually part of the economic base, as the mode of production itself adheres to certain laws of ownership. The debate itself is somewhat unremarkable as it relates to criminal law, but readers would be well served to be aware of the concept and its origin in Marxism. For our purposes, let us assume that the realm of criminal law is set in the superstructure, and the economic base informs the shape of the superstructural legal system in the America. This may be more helpful for the sake of clarity because it allows us


to observe the manner in which criminal law is used as a tool that has been shaped in the superstructure and wielded for the preservation and advancement of the capitalist mode of production.133

**MARXISM AND THE THREE STAGES OF CRIMINAL JUSTICE**

The Marxist critique of criminal justice under capitalism offers a sharp analysis of each stage in the tripartite justice system: 1) policing; 2) the courts; and 3) the penal system.134 It is important in constructing the appraisal of capitalist justice that Marxists remain critical of the legal systems that have operated, however fraudulently, under the banner of Marxism.135 To that end, each section will be accompanied by a brief assessment and comparison to the Soviet model. By no means could it be suggested that the Soviet model is at all viable or preferable, but it is worthwhile to draw comparisons if only to distinguish the system employed in the Soviet political and legal superstructure, wholly determined by the economic arrangements of a class-dominated society.” *Id.*


Union from any of the ideas and methodology actually attributable to Marx. It is important to note that much of the information regarding the legal structures in early years following the October revolution is fragmented due to the lack of statistics gathered on the topic of crime and general disinterest with the law and court system. As a result, the analysis of the Soviet model may seem limited or even perfunctory in some sections.

The Police

“I have no particular love for the idealized ‘worker’ as he appears in the bourgeois Communist’s mind, but when I see an actual flesh-and-blood worker in conflict with his natural enemy, the policeman, I do not have to ask myself which side I am on.” — George Orwell

It is commonly asserted that the police, particularly an armed police force, are necessary, even desirable, in a civilized society. According to Gallup polls performed yearly since 1993,

136 See generally CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 60–64 (Haymarket Books ed. 2006) (providing a summary dismissal of the Soviet legal system, while pointing out the wholesale disconnect between that system and Marxism).


138 GEORGE ORWELL, HOMAGE TO CATALONIA 124 (Harcourt ed. 1980).

139 MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL PERSPECTIVES ON CRIME, POWER & IDENTITY 145 (3d ed. 2000); see also Michael Medved, Slow down, police are the good guys, USA TODAY (Aug. 21, 2014) http://www.usatoday.com/story/opinion/2014/08/21/police-militarization-ferguson-crime-violence-justice-bureau-column/14307505/ (arguing that police are a force for good in the U.S., and necessary agents in the continued survival of “African-Americans”). See generally Steve Adubato, By Any Means Necessary: Do We Need Police In Schools?, N.J. MONTHLY (Feb. 11,
a majority of Americans polled have expressed confidence in the police every year.\textsuperscript{140} Even during periods of turmoil and conflict between the police and the citizenry, such as the year following the Los Angeles riots of 1992,\textsuperscript{141} or the years featuring clashes between police and

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http://njmonthly.com/articles/towns_and_schools/steve-adubato-only-in-nj/by-any-means-necessary.html (intimating that an armed police presence in schools may be necessary to preserve the safety of the children); Heather MacDonald, \textit{New York’s Indispensable Institution}, CITY JOURNAL (July 11, 2009) http://www.city-journal.org/2009/nytom_nypd.html (describing the correlation between economics and law enforcement in New York City, and concluding that the police are an indispensable element for continued economic growth); Timothy Roufa, \textit{Does Society Still Need Law Enforcement? If So, What Is It Worth?}, CRIMINOLOGYCAREERS.ABOUT.COM (Nov. 18, 2012) http://criminologycareers.about.com/b/2012/07/12/does-society-need-law-enforcement-if-so-what-is-it-worth.htm (discussing the historical necessity of the police in relation to their salary); Jazz Shaw, \textit{The “militarization” of police was not only inevitable, but necessary}, HOTAIR.COM (Aug. 16, 2014) http://hotair.com/archives/2014/08/16/the-militarization-of-police-was-not-only-inevitable-but-necessary/ (concluding that the militarization of the police is necessary to combat the armed criminals who outnumber them).
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\textsuperscript{140} \textit{Confidence in Institutions}, GALLUP (June 5–8, 2014), http://www.gallup.com/poll/1597/confidence-institutions.aspx.

Occupy Wall Street protestors, Critical that law enforcement have become commonplace following the events of police violence in Ferguson, MO and elsewhere, and perhaps 2015 might finally be year to when this unbroken chain of police confidence finally begins to show its rust. Nevertheless, staunch confidence in law enforcement is to be understood, as Americans are more or less conditioned to view police violence as a something that happens in isolation, while other police supporters tend to chalk criticism of law enforcement up to an overemphasis on just a few

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142 Rebecca Solint, The truth about violence at Occupy, SALON (Feb. 21, 2012), http://www.salon.com/2012/02/21/the_truth_about_violence_at_occupy/.

143 See Confidence in Institutions, GALLUP (June 5–8, 2014), http://www.gallup.com/poll/1597/confidence-institutions.aspx (directing the reader’s attention particularly to the polls performed on March 22–24, 1993, and June 1–4, 2013).


146 KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE POWER IN AMERICA 8–9 (South End Press ed. 2007).
bad apples on the force.\textsuperscript{147} In light of mounting civil unrest, some commentators have felt obliged to speak out in favor of reforms and other remedies aimed at issues in addition concerns of racism.\textsuperscript{148} There remains a possibility that issues are at last coming to a head, and even President Obama has been compelled to speak and act on the racial biases so prevalent amongst police officers.\textsuperscript{149} President Obama found it necessary to intervene when, on December 18, 2014, an Executive Order was issued establishing the “President’s Task Force on 21st Century Policing.”\textsuperscript{150} Nevertheless, the task force’s interim findings and reform recommendations fail to

\textsuperscript{147} Joel Hughes, \textit{There are no “bad apple” police officers}, \textsc{The Denver Post} (Feb. 14, 2015, 5:00 PM), \url{http://www.denverpost.com/voices/ci_27521364/there-are-no-bad-apple-police-officers}. “Yet, nearly every time someone criticizes the police, someone else counters with the argument that we are unjustifiably fixing our attention on ‘a few bad apples.’” \textit{Id.}

\textsuperscript{148} Timothy Lynch, \textit{2015 can be the year of criminal justice reform}, \textsc{Wash. Examiner} (Feb. 9, 2015, 5:00 PM), \url{http://www.washingtonexaminer.com/2015-can-be-the-year-of-criminal-justice-reform/article/2559732}; see, \textit{e.g.}, José Martín, Policing is a Dirty Job, But Nobody's Gotta Do It: 6 Ideas for a Cop-Free World, \textsc{Rolling Stone} (Dec. 16, 2014), \url{http://www.rollingstone.com/politics/news/policing-is-a-dirty-job-but-nobodys-gotta-do-it-6-ideas-for-a-cop-free-world-20141216} (presenting ideas aimed at reforming

\textsuperscript{149} Dave Boyer, \textit{Obama says police training needed to reduce their racial ‘bias’}, \textsc{The Wash. Times} (Jan. 22, 2015), \url{http://www.washingtontimes.com/news/2015/jan/22/obama-says-police-training-needed-reduce-their-rac/}.

\textsuperscript{150} \textit{Interim Report of the President’s Task Force on 21st Century Policing}, \textsc{President’s Task Force on 21st Century Policing} 83 (Mar. 2015), \textit{available at} \url{http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf}. 

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address the functional and substantive deficiencies of the American model of policing.\(^{151}\)

Despite the reforms recommended by the task force up to now, the recommendations would still leave the role of community mediator largely, if not exclusively, in the hands of the police.\(^{152}\)

But it is not enough to state simply that law enforcement officers have exhibited a marked tendency toward engaging in practices that are racist,\(^{153}\) sexist,\(^{154}\) homophobic and


\(^{153}\) Reddit Hudson, *Being a cop showed me just how racist and violent the police are. There’s only one fix.*, THE WASH. POST (Dec. 6, 2014), http://www.washingtonpost.com/posteverything/wp/2014/12/06/i-was-a-st-louis-cop-my-peers-were-racist-and-violent-and-theres-only-one-fix/; see also Charlene Carruthers, *Black Future Month: End the Anti-Black Police State*, HUFFINGTON POST (Feb. 4, 2015, 2:59 PM), http://www.huffingtonpost.com/charlene-carruthers/end-the-antiblack-police-_b_6604488.html?ncid=fcbklnkushpmg00000047 (pointing out the persistent and pervasive mistreatment of blacks by law enforcement).

transphobic,\textsuperscript{155} and Islamophobic,\textsuperscript{156} all while developing a growing penchant for thuggish violence\textsuperscript{157}—the Marxist critique must analyze law enforcement in its totality as an institution and its relation to the capitalist mode of production.\textsuperscript{158} A Marxist must ask how the police contribute to the preservation of the existing capitalist mode of production.\textsuperscript{159} In essence, the

\textsuperscript{155} Walter Armstrong, \textit{Brutality in Blue}, \textsc{Amnesty International} (Mar. 27, 2007), http://www.amnestyusa.org/node/87367; \textit{see also} \textsc{Amnesty International}, \textsc{Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.} 2–4 (2005), available at http://www.streetwiseandsafe.org/wp-content/uploads/2011/01/StonewalledAI.pdf (analyzing the extent of police violence and misconduct directed toward LGBTQ people); \textit{accord} George Gillett, \textit{We need to talk about homophobia in the police}, \textsc{The Independent} (July 23, 2014), http://www.independent.co.uk/voices/comment/we-need-to-talk-about-homophobia-in-the-police-9614725.html (examining the same issue as it relates to the United Kingdom and drawing similar conclusions).


question to be posed is whether law enforcement is inherently classist, and not merely anti-poor as a matter of unintended consequence.\textsuperscript{160} Law enforcement and policing has long functioned as a method employed to control the working class.\textsuperscript{161} The police have been implemented as a tool of state-sanctioned violence, used to protect the interests of the ruling class and the preservation of capitalism.\textsuperscript{162} While many Americans believe the police to be the standing guard between the public and the criminals, the reality is that the purpose of the police is to serve as the gatekeepers of social peace for capitalists.\textsuperscript{163} In point of fact, the modern police developed largely in response to capitalism, as industrialization and the shifting mode of production rendered obsolete the prior methods of social control.\textsuperscript{164} The police emerged as a centralized unit post-1829, as officers became divorced from their previous working class consciousness, and began to identify

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\textsuperscript{161} KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE POWER IN AMERICA 105 (South End Press ed. 2007).


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their duty with the interests of private property and preserving order. The police became part of the evolving capitalist infrastructure, and their social and financial interests grew ever entwined with ensuring that the system of capitalism would not fail. When workers tried to rebel against the bosses, the police proved virulently anti-labor, aligned themselves with the interests of the bosses, and engaged in countless acts of strike-breaking and arrests of labor demonstrators for spurious “public-order offenses.” As organized labor and strikes have become virtually nonexistent, police have tended more towards policies that are anti-black, and consequently anti-poor. On March 1, 2015, police in Los Angeles shot and killed a homeless man, Charley Robinet, for reasons that remain in dispute. Officers claim Robinet was going for a gun, but eyewitnesses and video evidence plainly suggest otherwise. The reality is that


166 KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE POWER IN AMERICA 25 (South End Press ed. 2007).


Robinet is merely the most recent in a long line of police attacks upon the poor and homeless throughout the country, all in effort to protect the interests of private property in Los Angeles and other cities where the poor and homeless have been forced to congregate in greater numbers.\(^\text{171}\) And that is ultimately where the Marxist critique establishes itself apart from other analyses of law enforcement. The clearest illustration of law enforcement serving the interests of class lays its utter inability or disinterest in policing the behavior of anyone save the poor and socially immobile.\(^\text{172}\) Corporations are expected to police themselves, despite overwhelming evidence of the horrors and atrocities attributable to unregulated corporate misconduct—from wide scale instances toxic pollution and contaminations, withholding the information related to the lethal effects and byproducts of such pollutants and contaminants, to coordinating attacks on union members and striking workers, and orchestrating the establishment of sweatshops and the displacement of indigenous populations.\(^\text{173}\) The police simply do not hold the finance class to account, either because they do not want to, or because their directed away from these larger issues by the people whose class interests are likewise antithetical to those of the working poor.\(^\text{174}\) The police are likewise willfully obfuscatory and incapable of policing themselves or


turning over honest data and statistics for review.\textsuperscript{175} Whatever the rationale, it is plain that the needs of the poor are secondary at best to the needs of the ruling class.\textsuperscript{176}

Just prior to the October revolution in Russia, the provisional government established the Special Committee for Fighting Pogroms in September 1917, which was essentially the first form of law enforcement in post-Tsarist Russia.\textsuperscript{177} They were short lived, as the “Extraordinary Commission for the Struggle with Counterrevolution, Sabotage and Speculation,” known as the Cheka, succeeded this agency in December 1917.\textsuperscript{178} The early duties of the Cheka were geared toward confronting counterrevolutionary subterfuge, but the Cheka was criticized severely for the frequency and degree of its actions in response to counterrevolutionary infractions.\textsuperscript{179} The Cheka was formally abolished in February 1922 in an effort to curtail the adjudicative power granted to law enforcement, which was then replaced by the State Political Police—the GPU—who were tasked with the investigatory functions previously vested in the Cheka.\textsuperscript{180} In practice, very little had changed, as the GPU had largely preserved the old attitudes and methodology that


\textsuperscript{176} Kristian Williams, \textit{Our Enemies in Blue: Police Power in America} 116–19 (South End Press ed. 2007).

\textsuperscript{177} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 67 (1st ed. 1980).


\textsuperscript{179} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 74 (1st ed. 1980).

\textsuperscript{180} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 75 (1st ed. 1980).
had so marred the Cheka. There is little instructive to say on the subject of Soviet policing as it relates to Marxism, save to emphasize that there was never any significant period of time following the October revolution when policing did not exist in Russia, that the police were armed and comprised of members of the working class, and that all of the incarnations of post-Tsarist police often proved to be a violent and repressive force. It may be possible to rationalize much of this, as Lenin and Trotsky attempted, but such a discussion is beyond our scope.

In analyzing the police from a Marxist perspective, it may be useful to consider Draper’s analysis of the lumpenproletariat, discussed supra. Draper drew comparisons between the lumpenproletariat and the Naples lazzaroni—groups that sold themselves to the bourgeoisie for the purpose of combatting and destabilizing the working class. This sounds exceedingly similar to the role of police in modern society. The police are a group of hired actors from predominantly working class backgrounds with little formal education. They are then

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183 R.W. MAKEPEACE, MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW 75 (1st ed. 1980).
184 See generally Hal Draper, The Concept of the “Lumpenproletariat” in Marx and Engels, 6 ECONOMIES ET SOCIÉTÉS 2285 (1972) (noting that the lumpenproletariat may not refer to any particular class of workers at all).
employed by the state to protect the interests of property above the interests of the working people, and to preserve the codified bounds normative behavior established by governing bodies comprised of members of the finance class.\textsuperscript{187} Marx provided little on the subject of policing as an exclusive area of consideration; instead all of Marx’s critiques of the state necessarily implicated the police as a tool of state action.\textsuperscript{188} This supports the possibility that the police could serve a legitimate purpose once divorced from its “political attributes” in the hierarchical structure of the state, and then made accountable to and revocable by the working class.\textsuperscript{189}

**The Courts**

\textsuperscript{187} \textsc{Michael J. Lynch et al.}, \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 145 (3d ed. 2000).

\textsuperscript{188} \textsc{Karl Marx}, \textit{The Civil War in France} 50 (Progress Publishers ed. 1979). “The centralized state power, with its ubiquitous organs of standing army, police, bureaucracy, clergy, and judicature – organs wrought after the plan of a systematic and hierarchic division of labor – originates from the days of absolute monarchy, serving nascent middle class society as a mighty weapon in its struggle against feudalism.” \textit{Id}.

\textsuperscript{189} \textsc{Karl Marx}, \textit{The Civil War in France} 53–4, 64 (Progress Publishers ed. 1979). “Instead of continuing to be the agent of the Central Government, the police was at once stripped of its political attributes, and turned into the responsible, and at all times revocable, agent of the Commune. . . [I]n fact, for the first time since the days of February 1848, the streets of Paris were safe, and that without any police of any kind.” \textit{Id}.
“I had seen enough of the miseries of war, to wish it might never more have existence in the world, and that some other mode might be found out to settle the differences that should occasionally arise in the neighbourhood of nations. This certainly might be done if Courts were disposed to set honestly about it, or if countries were enlightened enough not to be made the dupes of Courts.”

— Thomas Paine

The judicial system is a legitimizing agent that reaffirms existing social inequalities and perpetuates class contradictions by applying laws that are purported to be neutral, but are actually quite unequal and biased in their origin and application. The American criminal courts routinely and disproportionately punish the wrongdoing of the society’s most disenfranchised people, all while mildly punishable administrative laws, or often no laws at all, are applied to the crimes committed by the wealthy elite. In essence, the judicial system seeks to ensure that prosecution and adjudication for some is maximized exponentially, while prosecution for a select few is drastically minimized. The playing field is unequal with respect to the poor, as the quality of legal representation for the poor is markedly deficient compared to those who are able to afford private defense counsel. The system’s interest is not in justice, but in ensuring that the poor are dealt with in a manner that is fundamentally contrary to the way


in which the courts handle the rich.\textsuperscript{195} Consider in the abstract the disparity in punishment, prosecution, and quality of representation between a common drug dealer charged with possession with intent to distribute and a rich pharmaceutical executive charged with illegally prescribing medication to people without the requisite medical infirmity.\textsuperscript{196} We could also observe to distinctions in the substantive law applied in either situation, as well as the inequitable ramifications for the related offense in either scenario.\textsuperscript{197} This point illustrates the flaw the American judicial system, in that procedural adherence to the laws proscribing these offenses would result in an equitable apportion of justice, but that is simply not the case.\textsuperscript{198} Radical criminologists have termed this the procedural model of justice.\textsuperscript{199} The procedural model focuses on the individual offender as a rational actor, and crime as a matter of decision-making undertaken by the individual, which creates the impression that harsh sentencing would result in

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\item \textsuperscript{195} Michael J. Lynch et al., \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 168 (3d ed. 2000).
\item \textsuperscript{196} Michael J. Lynch et al., \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 169 (3d ed. 2000).
\item \textsuperscript{197} Michael J. Lynch et al., \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 169 (3d ed. 2000).
\item \textsuperscript{198} Michael J. Lynch et al., \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 169 (3d ed. 2000).
\item \textsuperscript{199} Michael J. Lynch et al., \textit{The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity} 170 (3d ed. 2000).
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less crime, either by way of specific or general deterrence, or incapacitation. If this were the case, then crime in U.S. should be amongst one of the lowest rated comparatively, as opposed to one of the highest in the world. The critique of criminal courts from a radical Marxist perspective is incomplete without examining the class bias in civil courts as well, where the members of the working class are exceedingly less likely to appear. There is an element of design to this that is beyond our scope to analyze, but it suffices to say that the civil courts, where punishment is expressed almost exclusively in currency, tend to be reserved for the finance class, while the criminal courts exist functionally for the purpose of punishing the poor.

The Bolsheviks sought to radically reconfigure the judicial system in post-Tsarist Russia. The most common crimes discussed in the annals of Marxist jurisprudence are crimes against the revolution, or counterrevolutionary crimes. Such offenses bear a natural and obvious significance to Marxists, though official response to counterrevolution has often been

deplorable.\textsuperscript{206} Lenin believed that the judicial function of the courts would soon dissipate after the October revolution, becoming largely administrative, and that formal judges would come to be replaced by members of the working class.\textsuperscript{207} Though Lenin had little personal interest in laws or the judiciary, he was keen to see that bribery and other offenses typically associated with the means of the bourgeoisie—something akin to white-collar crimes—would be outlawed and punishable.\textsuperscript{208} Nevertheless, infractions that had been considered criminal conduct prior to the revolution would be reconsidered in light of the new social order.\textsuperscript{209} It was intended that criminal matters be stripped of their class bases and for rules and regulations to replace previous laws to allow for the managerial organization of society.\textsuperscript{210} Public participation in the gradual withering of the state in the period of transition would guide the new society in redefining the rule of law, or the rule of regulation as it were.\textsuperscript{211} On November 24, 1917, all preexisting courts were abolished and replaced by revolutionary tribunals comprised of working class citizens for the purpose of addressing offenses committed during the period of transition.\textsuperscript{212} This proved more complicated in practice, as the party leaders did not codify any new laws or regulations governing criminal or civil conduct, so the tribunals lacked any semblance of uniformity or

\textsuperscript{207} R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 58 (1st ed. 1980).
\textsuperscript{208} R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 50 (1st ed. 1980).
\textsuperscript{209} R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 29 (1st ed. 1980).
\textsuperscript{210} R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 29 (1st ed. 1980).
\textsuperscript{211} R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 45, 58 (1st ed. 1980).
\textsuperscript{212} Harold J. Berman, Principles of Soviet Criminal Law, 56 Yale L.J. 803, 804–06 (1946–47).
guidance beyond community where the tribunal was situated.\textsuperscript{213} The revolutionary tribunals were to have jurisdiction over cases involving organized uprisings against the revolution, disturbances of social institutions, and misuse of position or employment in the administration of government—crimes generally committed by the bourgeoisie.\textsuperscript{214} Special revolutionary tribunals were established whose jurisdiction was solely over infractions committed by the press.\textsuperscript{215} Later, local courts were established to hear cases of “pogroms, bribery, forgery, illegal use of Soviet documents, hooliganism and espionage.”\textsuperscript{216} Tribunals could consider “fines, deprivation of liberty, exile, public censure, being declared a public enemy, total or partial deprivation or political rights or property, and compulsory public work.”\textsuperscript{217} The position of investigator and prosecutor, known as the procuracy, had also been abolished, so the duty of investigation was assigned to judiciary, and any working class citizen of good character could be appointed prosecutor or defense counsel.\textsuperscript{218} The courts and tribunals were forbidden from employing prerevolutionary law, and were instructed to fill in the gaps in revolutionary legislative authorities with the dictates of one’s “socialist legal consciousness.”\textsuperscript{219} As one might expect, this fractured arrangement was not at all successful given the material conditions of Soviet life at that


\textsuperscript{216} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 70 (1st ed. 1980).


\textsuperscript{218} R.W. Makepeace, \textit{Marxist Ideology and Soviet Criminal Law} 68 (1st ed. 1980).

It wasn’t until after Lenin’s death that the business of codifying procedural and substantive Soviet law was finally undertaken.\textsuperscript{221}

**Corrections**

“[P]unishment is nothing but a means of society to defend itself against the infraction of its vital conditions, whatever may be their character. Now, what state of society is that, which knows of no better instrument for its own defense than the hangman, and which proclaims through the ‘leading journal of the world’ its own brutality as eternal law?”\textsuperscript{222} — Karl Marx

America bears the distinction of housing more prisoners per citizen than virtually any other nation in the world.\textsuperscript{223} It should come as no surprise, then, that housing prisoners is part of a monstrously extensive for-profit industry, known pejoratively among critics as the prison-industrial complex.\textsuperscript{224} The corrections industry reaps the financial benefit of the rigorous policing and draconian sentencing policies discussed above. One private prison operator, Corrections Corporation of America (CCA), actually sought to purchase forty-eight prisons from

\textsuperscript{220}R.W. Makepeace, Marxist Ideology and Soviet Criminal Law 68 (1st ed. 1980).

\textsuperscript{221}See Harold J. Berman, Principles of Soviet Criminal Law, 56 Yale L.J. 803, 804–06 (1946–47) (noting that uniformity of law was not provided by the party until the 1936 constitution).

\textsuperscript{222}Karl Marx, Dispatches for the New York Tribune Selected Journalism of Karl Marx 121–22 (Penguin ed. 2007).


state governments. Governors were induced to sell by CCA’s promise of 90% guaranteed occupancy, irrespective of fluctuations in the crime rate. This appears to be an all too common practice in the industry. Further, those private prison corporations have actually helped write laws designed to ensure a consistent stream of inmates are available to help meet those occupancy requirements. In states that accepted contracts with occupancy requirements, the taxpayers are obligated to pay the cost of empty beds when occupancy dips below the requirement. This taxpayer indemnification practice has become known as a “low-crime


In Colorado, for instance, taxpayers were forced to make up the difference of $2 million in empty prison beds when the state’s crime rate declined significantly. The conclusion to be drawn from this is that it is in the taxpayer’s best interest for crime rates to be high, for prisons to be full, and for prison operators to be rich. Moreover, private prisons have become notorious for forcing prisoners to live in environments that are exceedingly unsafe and dangerously unsanitary. This is the case in spite of the incredibly immense profits corporations derive from this industry. This is to say nothing of the tremendous taxpayer expense in covering the appellate measures undertaken by inmates, the per inmate cost of incarceration, and the massive


231 April M. Short, 6 shocking revelations about how private prisons make money, SALON (Sept. 23, 2013, 07:22 AM), http://www.salon.com/2013/09/23/6_shocking_revelations_about_how_private_prisons_make_money_partner/


expense of administering executions in states that allow the death penalty.\textsuperscript{234} Death penalty cases alone cost taxpayers somewhere between $470,000–$1,000,000 more per case when compared against other cases where the death penalty is not considered.\textsuperscript{235} And that figure fails to take into account the sum of suffering and dehumanization involved in carrying out this manner of punishment, assuming even then that administering the execution itself goes according to plan.\textsuperscript{236} Nor can it be quantified the fact that, in administering the execution, the state has made a presumably innocent paid employee a complicit participant in a homicide. Studies report that at least 4\% of those set to be executed, around 120 inmates, are going to be executed based on wrongful convictions.\textsuperscript{237} Given the profitability of housing inmates, one can see how ensuring the veracity of a given conviction might be less important to the correctional industry than the profit to be gained as a result of the inmates continued incarceration. In fact, as demonstrated above, releasing inmates is positively contrary to their interests.


The profit critique of the private prison industry is low hanging fruit for Marxists, as the narrative of wild profits and willful disregard of human decency fits neatly within our class based analysis. Nevertheless, this appraisal of the prison-industrial complex must go beyond simply shaming the prison industry for being profitable, however rightful shaming may be, and cut further to the greater issue of assessing the function of punishment as a fundamental aspect of modern society. The Marxist analysis views imprisonment and punishment as a reflection and reproduction of the ruling class’ will—a class that has been able to construct punishments that are most amenable to their own interests. Marxist criminologist Dr. Michael J. Lynch, cited herein and throughout, posits that that rate of imprisonment is directly correlative to the rate of surplus value. Surplus value is expressed as “an empirical measure of labor’s exploitation and alienation.” This concept of surplus value is derived from Marx. Lynch studied the

238 See generally Scott McLemee, Our incarceration nation, SOCIALISTWORKER.ORG (July 14, 2014), http://socialistworker.org/2014/07/14/our-incarceration-nation (providing a lyrically leftist critique of the for-profit prison industry).


statistical relationship between rates of incarceration and the rate of surplus value and
determined that people became more marginalized economically as the rate of surplus value
increased. As people become more marginalized, the state recognizes a need for greater social
control. These new admissions into the prisons represent the surplus population, or surplus
labor. Capitalism cannot function at full employment, as some unemployment is necessary
and desirable in order for capitalism to remain a profitable system. In essence, capitalism
requires a reserve army of the unemployed poor who functioned, at least initially, as a looming
threat of replacement to discourage workers from striking. These unemployed workers
represent the sum of surplus labor, increasingly deprived and marginalized, and have become
increasingly imprisoned as a result.

244 MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL
PERSPECTIVES ON CRIME, POWER & IDENTITY 206 (3d ed. 2000).
245 MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL
PERSPECTIVES ON CRIME, POWER & IDENTITY 206 (3d ed. 2000).
246 MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL
PERSPECTIVES ON CRIME, POWER & IDENTITY 206 (3d ed. 2000).
247 DAVID SCHWEICKART, AFTER CAPITALISM 97–104 (2d ed. 2011).
248 DAVID SCHWEICKART, AFTER CAPITALISM 97–104 (2d ed. 2011).
249 MICHAEL J. LYNCH ET AL., THE NEW PRIMER IN RADICAL CRIMINOLOGY: CRITICAL
PERSPECTIVES ON CRIME, POWER & IDENTITY 206 (3d ed. 2000).
The early years of post-Tsarist Russia saw the Soviets attempt to rectify the inequalities of punishment experienced under the Tsar.\textsuperscript{250} The Soviets sought to consider offenses committed in proportion to the offender’s prior class identity.\textsuperscript{251} If the offender had been a member of the propertied class, the revolutionary tribunals were to consider whether such an offender could be adopted into the developing classless society, or whether to isolate the offender for the purpose of ensuring social defense.\textsuperscript{252} The concept of retributive justice was abandoned in abstract, but seizure of land and claims to property was a common outcome of criminal infractions.\textsuperscript{253} Whether that punishment was retributive in actuality, however rightfully under the circumstances, appears to be of little consequence.\textsuperscript{254} Chief among the penalties for deviant behavior was the concept and practice of labor re-education.\textsuperscript{255} This form of punishment was designed to reintegrate the offender into productive society, and to help the offender to realize the societal effects of the infraction—to awaken his consciousness to his own suffering.


\textsuperscript{254} See generally R.W. Makepeace, *Marxist Ideology and Soviet Criminal Law* 65–66 (1st ed. 1980) (noting the general degradation of retributive approaches to punishment, but commenting that such principles appear to have been at odds with the material reality of their application).

and the suffering of others.\textsuperscript{256} This practice, honest in its foundation, nevertheless devolved into the creation of harrowing forced labor camps and eventually the return of capital punishment.\textsuperscript{257}

**CONCLUSION**

For all intents and purposes, this has been an introductory overview of Marxism and criminal justice. The essay is limited in depth, owing to the wide breadth of subject matter to be covered in order to introduce the concepts and critiques to an audience that may yet be unfamiliar with Marxism, let alone the very narrow area of study within Marxism that is dedicated to legal study and criminology. In conceiving ideas and remedies moving forward, it will be immensely useful for Marxists and other leftists to keep these concepts alive in the mind. Also, it is important to identify the ideological and practical deficiencies of the early Soviet model, while acknowledging their honest efforts and ultimate failure to develop a more just and equitable system.

Marx identified human agency and the collective action of the working class as the driving force required in achieving the new socialist society. Therefore, a Marxist criminal justice model must incorporate collective human activity, rather than relegate citizens to the role of passive observer in the criminal justice process, included only for the purpose of securing indictments and providing verdicts. This is instructive in the present as it is ought be a guiding precept for leftists, and may help direct us toward establishing meaningful programs that may lessen the suffering of the working class on the road to a more achieving equitable society. Applying this concept to policing one can envision how a tribunal, distinct and apart from the existing legal apparatuses, made of ordinary citizens with actual adjudicative authority,


established for the purpose of reviewing officer conduct, could help curb the onslaught of police brutality and other transgressions. If the police serve the people, then they should be likewise answerable to and revocable by the people. The political component of the courts should also be divorced from judicial procedures—ending private campaign finance and eliminating racial and class biases in the adjudicative process. The prisons should not be able to profit from confinement, and the history of contracting private organizations to build inmate warehouses to the detriment of the prisoners and society in general must end. Police violence and misconduct will continue to be disregarded, so long as their actions preserve the stability of the capitalist infrastructure. The courts will continue to adjudicate along class lines, so long as their social and financial interests are inexorably dependent on the existing system. The prison-industrial complex will balloon and possibly burst, perhaps morphing into something even more sinister, so long as it is profitable to continue warehousing the poor. Such issues can be ameliorated to some degree, but cannot be satisfactorily eradicated by merely enacting institutional reforms. Collective action and movement building toward a fundamental change in the present social order must confront these issues. That change can be identified in the works and methodology of Marx. The organizing principles of Marxism are apparent: workers must become cognizant of the full value of their life and labor when confronted with those agents seeking to exploit their labor and alienate them from their sense of humanity, for change awaits the awakening consciousness of the working class. It is up to the workers—from the factories and the kitchens, to the classrooms and the courtrooms—for they remain the ones enchained.