The Dialectics of Capitalist Legal Policy

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The New South Wales Labor government's Attorney-General, Frank Walker, recently instituted a well-publicised campaign against what he flamboyantly described as "corporate crooks". (1) And to prove his mettle he has been taking on some of the "big fish" he promised us: Sir Paul Strasser being among those summoned to appear in court. (2) That Walker's campaign follows by a year-and-a-half moves in the same direction by the Federal Attorney-General in the Whitlam government suggests the possibility that the legal policies, including criminal policy, of capitalist governments can be analysed within the marxist problematic in the same manner as any other governmental policies.

Before discussing the nature and functions of capitalist legal policy it is necessary to analyse the role of the state in the capitalist social formation, for it is through the agency of the state that law is given effect both instrumentally and symbolically. In the succinct words of Lenin, "The state is a product and manifestation of the irreconcilability of class antagonisms. The state arises where, when and insofar as class antagonisms objectively cannot be reconciled". (3) And again, "The state is a machine for maintaining the rule of one class over another ... for holding in obedience to one class other, subordinated classes". (4) In addition to this primary domination function of the state emphasised by Lenin, Marx and Engels underline the broader management function in the following, "The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie", while also noting the tremendous impact that the class has had, "The bourgeoisie, historically, has played a most revolutionary part". (5)

And, of course, a major implement in the hands of the bourgeoisie has been the law, for it has been used to carry out the economic, political and ideological functions of the state in order to guarantee the reproduction of the economic system. Included within this guarantee are the means of production, an acquiescent and disciplined labor force, an effective capitalist class, and the social, political and ideological conditions in which the relationship between capital and labor can be maintained. The manner in which the capitalist state acts to fulfill its task is,
according to Lenin, various: “The forms of domination of the state may vary: capital manifests its power in one way where one form exists, and in another way where another form exists”. (6) Now to begin to develop these ideas in the contemporary Australian situation: given the general function of the state to protect the overall interests of the ruling class, what special function does a particular government’s crime policy serve in helping to provide that protection?

In a recent and excellent book, Frank Pearce goes some distance toward explaining the function of criminal policy in capitalist society. (7) While focusing almost entirely on the United States, Pearce’s analysis is certainly applicable to capitalist countries generally; of course, the specific relationships which Pearce details between the State and organised crime and between the latter and criminal elements in the trade union movement would not be found to have developed to the same degree or in the same pattern in other countries. Nevertheless, such relationships have not been absent from the Australian scene. (8)

Just as the concept of the interventionist state has been important to an understanding of contemporary capitalist economic and social policy, Pearce applies it to what we might call capitalist crime policy. Thus, he notes that “The operation of the state’s repressive apparatus is not simply determined by considerations of legality and illegality. Not all criminals need concern themselves overmuch with the law (e.g. some white-collar criminals); at the same time certain law-abiding citizens are subject to the attentions of this repressive apparatus. The criterion for state intervention is the extent to which activities undermine the social order .... the only way to understand the actual workings of social control mechanisms within capitalism is to recognise that they are directed against those activities which threaten its effective reproduction, as it really is, in all its naked barbarity”. (9)

Pearce’s work is an outstanding example of the power but also the subtlety provided by a marxist analysis of the functions of law in a class society. (10) This becomes apparent when we compare his analysis of corporate crime with that employed by traditional
CRIMINOLOGISTS. The latter have been aware for some thirty years, since the publication of Sutherland's pioneering work, (11) that a large amount of crime is committed by business people and corporations in the ordinary course of business. Following the conventional mode of bourgeois analysis, criminologists have primarily been concerned to discover the general "cause" of such criminal behavior. This has resulted in micro-level analysis, following Sutherland's lead for the most part, of the socialisation process by which, it is claimed, corporate criminals in general learn to act in an illegal manner. Of course, this analysis is never related to the specific material conditions of the capitalist mode of production, out of which arise compelling pressures to act illegally. (12) Nor do bourgeois criminologists ask fundamental questions even when suggested by their own findings. Thus Sutherland and his associates have shown that special methods of law enforcement and sanctioning have been developed which, by and large, provide far more favorable treatment for people committing corporate crimes than for those predominantly working class offenders committing what might be called urban property offences. However, by failing to consider the differential response by the state within their monolithic category of corporate crime, traditional criminologists have been unable to grasp the political nature of crime - and therefore of crime policy in a class society.

As opposed to bourgeois criminologists, Pearce does not place corporate crime into a generalised, monolithic theoretical category; thus he is able to confront the basic issue: how can we explain capitalist crime policy? He argues:

"Not all white-collar crimes are equally immune to prosecution. If for example embezzlement was left unprosecuted and there was a large increase in such activity, capitalism might well collapse; for the financial transactions essential to this kind of economy inevitably involve trust but cannot take place in a manner which gives fool-proof protection from violations of it. It is necessary to investigate the social effects of these crimes. Thus, in the Second World War it was imperative that the state should succeed in stopping those black market offences that undermined the American war effort, since American capitalism depended on military success, in order to gain control of crucial Asian markets. Immediate easy profit was in this case opposed to long-term interests. On the other hand, violations of the anti-trust laws (involving monopolistic control of certain markets) do not pose a threat to the social structure of American capitalism and can, therefore, be tolerated. The crucial question then that must be asked of white-collar or any other offences is - what effects do these
crimes, and public awareness of them, have on the social order.” (13)

And as with any other capitalist policy, so too with capitalist crime policy:

“The answer to this question can only be given by examining a specific example of criminal activity in its own particular socio-historical context.”

Again, Pearce stands bourgeois criminology on its head by nothing that:

“The focus should no longer be on the strategies used to avoid prosecution but rather on the effects of different kinds of crime. It is then possible to explain why the state wishes to prosecute certain offences and not others.”

In his second chapter “Corporate Crime and American Society” Pearce makes it clear, through an analysis of the evolving American economy, that what determines the choice of behavior to criminalise and to prosecute is the need to provide the appropriate political and economic conditions for the maintenance of the capitalist system. Thus the state will, in general, allow capitalists “open slather” (14); Pearce notes that US Senator Warren Magnuson “named deceptive selling as today’s most serious form of theft, accounting for more dollars lost each year than robbery, larceny, auto thefts, embezzlement, and forgery combined” (15). Again, violations of laws supposed to control American corporations are seldom prosecuted but:

“The occasional prosecution under these Acts lays bare a volume of illegal excess profits that is staggering .... Such ‘business activity’ is typical .... of large corporations in America generally. The corporations provide the most efficient and largest examples of organised crime in America.”

And in his third chapter, “Organised Crime in Historical Context”, Pearce shows convincingly the inter-relationship between the state, big corporations, right-wing labor racketeers and organised crime operating in concert to maintain the capitalist system.

Yet the general public sees a far different picture most of the time, and the role of the law in shaping that picture, what Pearce refers to as the “imaginary social order”, is crucial. Thus, occasionally the time arises when things start to get a bit out of hand and the legitimacy of the capitalist state and the system it protects is threatened. Then, as Gordon has written:

“The state may be pressured either nominally or effectively to prosecute the wealthy if their criminal practices become so egregiously offensive that their victims may move to overthrow the system itself. In those cases, the state may punish individual members of the class in order to protect the interests of the entire class. Latent opposition to the practices of the corporations may be forestalled .... by token public efforts to
enact and enforce anti-trust, truth-in-lending, anti-pollution, industrial safety and auto safety legislation.” (16)

It sounds almost like a description of recent Australian government (Federal and State) reform programs!

Pearce also deals with the effectiveness of the criminal law in maintaining an appropriately docile working class. As a number of writers recently have stressed, crime control can be more usefully understood as being, fundamentally, class control. (17) Pearce quite rightly argues that by concentrating on lower-class criminality, the state “strengthens the dominant individualistic ideology. If the criminals are also the social failures (those at the bottom of an open, competitive, hierarchical class system, where any man can succeed), then their criminality is caused by their inadequacies (lack of determination, moral weakness, etc.) and the major social institutions are not exposed to critical assessment. Secondly, by criminalising them and treating them as asocial and amoral, their potential for developing an ideologically sophisticated understanding of their situation is neutralised, and by incarcerating them it is made difficult for them to organise their ideas”. (18) And, of course, if then they do begin to tear away the ideological veil and organise, for example, at Attica and San Quentin, they are mercilessly shot down. (19) As George Jackson wrote -

“We attempted to transform the black criminal mentality into a black revolutionary mentality. As a result, each of us has been subjected to years of the most vicious reactionary violence by the state.” (20)

It needs no repeating that there are no prosecutions for killing or brutalising prison militants, particularly when Mr Big Business - Rockefeller himself - orders it to be done. And let us not hold our breath until it occurs in New South Wales. (21)

Pearce’s book joins a now substantial and rapidly growing collection of work by marxists (and radicals) who have focused on capitalist state legal - mainly criminal - policy. (22) To some extent this can be explained simply because of the nature of the marxist critique - comprehensive and systematic - and the nature of the class struggle in capitalist society. An analysis of the exercise of state power through law is of primary importance in such circumstances, especially perhaps in Australia where, due to specific historical factors the struggle is - or appears to be - encased in a legal thicket of considerable density and complexity. Thus the events of November 11, 1975 by tending to bring into disrepute the legal system have been seen by some by no means radical critics to have been injurious to the larger system. (23)

Another reason for the burgeoning marxist critique of “loranorder” (24) is, as in other fields, the inability of bourgeois social science to provide a satisfactory alternative. Thus many years ago even bourgeois social scientists turned away from the traditional concern with crime, as defined by the state, and its causes. A leading sociologist, Lemert, explained that rather than crime leading to social control, “I have come to believe the reverse idea, i.e. social control leads to deviance”. (25) Yet this view, often referred to as “labelling theory”, is also extremely limited. Not only does it tend to focus criticism solely upon the administrators of the law, thereby failing to challenge the State standing behind them, it also tends toward an idealist and romantic view of criminal behavior. Thus the criminal is seen essentially as a hero, consciously choosing deviant behavior in his individualistic struggle to come to grips with the world. The labelling school, not accidentally, has therefore tended to deal with phenomena such as mental illness, homosexuality, prostitution, and drug use rather than facing the fact that crimes:

“Arise out of a structure which has as its fundamental bench-mark the ultimate value of property. Indeed, most crime is directly or indirectly related to that value whether it is the unlawful taking (theft or related offences) the failure to possess (vagrancy and related offences), behavior which results from not having or rebelling against the need or pressures to have it (drug use of various kinds), behavior which results from obsession with it (various forms of gambling and
speculation), behavior which results from an inability to separate the concept from social relationships (rape) and so on." (26)

Indeed, according to Mr. McGeechan, New South Wales Commissioner for Corrective Services:

"The majority of offenders .... are serving sentences for property offences." (27)

Additional support for the view that the nexus between property and crime is fundamental comes from recent research carried out in Papua New Guinea. It is stated that:

"About 90 per cent of all housebreaking offences so far examined involve the selective theft of food, drink and small household items .... All the evidence so far indicates that housebreaking gangs are supplying an obvious community need - the redistribution of items of basic necessity from the haves to the have-nots." (28)

A third and more fundamental reason for the development of the marxist critique of capitalist legal policy is the demystifying effect of the contemporary crisis in capitalism. More than a decade of political and economic struggles against the capitalist system in the ghettos, in the prisons, in the factories, in the education system, and throughout the Third World, has brought capitalism under great pressure. A major weapon in the arsenal of the ruling class is, of course, the state legal system, particularly the criminal law. But the extensive use of the criminal law creates further problems, primarily because of the fundamental tension between short-term repression and the maintenance of long-term legitimacy. This is what Balbus has termed "the dialectics of legal repression", (29) brilliantly illustrated in the recent film, Special Section, which showed the tensions inherent in any law and order program, there the implementation of Emergency laws in Vichy France. (30)

"Anxious capitalism" is much less able than usual to cover its tracks, the more repression is required, the further is the ideological veil pierced with a strong likelihood that the anti-state forces, and ideology, will become stronger.

Perhaps the only weaknesses in the general marxist critique of capitalist legal policy has been the tendency to concentrate almost exclusively on the criminal law to the neglect of the civil law, and a failure to analyse the articulation of both kinds of legal policy with other policies of the interventionist state. (31) It isn't here possible to provide the complex analysis required to remedy these weaknesses. Nevertheless, some idea can be given of the work that needs to be done if we look briefly at recent developments in Australia, at Federal and State (NSW) levels.

In the present prolonged crisis, Australian governments have still had as a primary task the protection of the common interests of the ruling class. Linked to that task is the necessity to retain the support of the rest of the population but especially that of the working class. In some cases, the two tasks are easy to reconcile; but where it is not, the state is sometimes able to make some form of trade-off in order to maintain the legitimacy of the system in the consciousness of the working class. (32) It is often the use of the criminal law, or its threat, which is basic to such a trade-off. To take the example we began this article with, campaigns against "corporate crooks" can be in the interests of both ruling class and governments supported by the working class. (33) Such a policy plays a part in the dynamic political process whereby the capitalist system is reproduced: Walker has indicated that it was his purpose in the campaign to combat the form of criminal behavior which is economically the most important in New South Wales and which had been neglected for years by the previous governments. Another important purpose of the campaign is symbolic - re-legitimation in the eyes not only of the domestic ruling class, but of foreign investors who might consider investing in the Australian economy but who are dubious about doing so in the light of the messy aftermath of the 1960s investment circus.

At this conjuncture, with the difficulties in the economy continuing and obdurate, government policies are similarly pointing in different directions. Thus while unemployment is kept at high levels and the media is attacking "dole bludgers" in order to weaken the morale of sections of the working class and to "divide and rule" the working class, the Australian governments
pledge wage and tax indexation, to go all out against "corporate crooks", to promote pollution control, factory safety, consumer protection and prices control. Furthermore, at a time when tens of thousands of young people look like remaining unemployed, the New South Wales government has pledged to introduce a program of decriminalisation (drugs, vagrancy, offensive behavior, etc.), the probable extension of drinking hours, and even the possibility of legal abortions. Of course, the contradictions in the situation must be recognised. This array of policies and programs suggests several things: first, that the governments are trying to develop more subtle, non-criminal methods of social control over a potentially dangerous segment of the working class in order to reduce the potential for losing control through having to impose a comprehensive policy of penal repression; (34) and second, that in response to problems in the economy, social policy, including legal, is being developed which will provide more consumption. (35) This in turn is to be channelled into more profitable, more efficient sectors of the economy, partly through constraints imposed by law. (36)

Of course, while some of the measures indicated appear to be aimed at restricting ruling class power and delegitimating ruling class values, there are measures and policies pointing in the opposite direction, i.e. clearly supporting the interests of the ruling class. (37) Thus wage indexation is knocked on the head, unemployment is maintained at a high level, Medibank is sabotaged, and much of the program which appeared intended to restrict the autonomy of capital is emasculated, e.g. with regard to trade practices, consumer protection, prices justification, pollution (more than likely factory safety will go the same way) and even the campaign against "corporate crooks" has quietened down. Further, there are threats in the direction of restricting "political" strikes, the continuing media barrage of propaganda against "dole bludgers", the Federal government's campaign against the ABC. Also, the extent of decriminalisation in New South Wales has been put into the problematic category by the government's delay, followed by the punitive police raid on the commune at Tuntabale Falls, and the continuing use of summary offences charges against demonstrators.

How these opposing tendencies will be reconciled will be determined not by any simple decisions based on what is "right", nor certainly by any consideration of what the "Rule of Law" will permit, but according to ruling class calculations based on the need for short-term "Order" (repression), long-term "Law" (legitimacy) and the relationship of these to developments in the economic sector.

FOOTNOTES

1. See e.g. "30 face charges in NSW company blitz", The Australian, 13.8.76; "NSW Out to Land Big Fish", Australian Financial Review, 13.8.76.

2. See the report, under a picture of a bath-robed Sir Paul "in the living-room of his $250,000 home", The Australian, 9.9.76.


8. See the recent articles based on interviews with lawyers concerning police abuse of power and corruption, especially with regard to organised crime, and failure to prosecute successfully in the area of corporate crime, in The National Times, 1.11.76 and 8.11.76.


10. In the Australian context see the two articles by Andrew Fraser, "Marxism, Legal Theory and the Radical Lawyer", Arena No. 44 (forthcoming); "Sackville, Poverty and the Law", Arena No. 42, 3-10, and see Hopkins, op. cit.

11. Published subsequently as a book in White Collar Crime, Holt, Rinehart and Winston, 1949, the original work appeared in 1940.

12. An illegal response to such pressures is often considered justified, e.g. the admitted "malpractices" of Qantas, The Australian, 24.9.76. The editorial in the same issue ignored
the issue of criminality, except to encourage
the airline to compete harder.

13. This and the following two quotations are
from Pearce, op. cit., pp. 81-2.

14. But see how limitations may be imposed to
preserve the system from excesses, Louis B.
Boudin, Government by Judiciary, Russell

15. This and the following quotation are from
Pearce, op. cit., p. 78.

of Crime”, Review of Radical Political

17. See e.g. my paper “Third World Criminology:
Crime Control or Class Control?” presented to


19. Or in NSW; see e.g. T. Green and G. Mullen,
“Bathurst Bashings and the Perversion of
Justice in NSW”, Prisoners Action Group,
1974. (For a general review of government
legitimation of repression, see A. Platt, The
Politics of Riot Commissions, MacMillan,
1971.)


21. Yet the results of the on-going cover-up of the
atrocious New South Wales prison system
became counter-productive to the ruling class:
a militant Prisoners Action Group, a radical
Alternative Criminology Journal
(banned from but widely read in the prisons)
and a continuing series of embarrassing
articles in The National Times.

22. See, e.g. R. Lefcourt (ed.) Law Against the
People, Vintage, 1971; J. Black (ed.) Radical

23. The importance of such concepts as
‘legality’, the ‘rule of law’,
“constitutionality” to the maintenance of
ruling class hegemony is recognised by
bourgeois politicians, academics and the
capitalist press, etc. See, e.g. D. Horne, “The
Rage on the Right”, Nation Review,
29.10.76.

24. For the reality of bourgeois law and order in
NSW, see “Loranorder”, Tribune, 14.11.72;
and “State Police”, Tribune, 22.8.72. And see
P. O’Shane, “An Alternative View on the Role

25. E.M. Lemert, Human Deviance, Social
Problems and Social Control, Prentice
Hall, 1967, p. 5.

and Prisoners’ Movements; Partnership or
Rip-off?”, Alternative Criminology

27. Quoted in Tribune, 4.8.76.

28. M.L. Mackellar, “Current research into law
and order problems in Port Moresby”, in D.
Biles (ed.), Crime in Papua New Guinea,
Austr. Institute of Criminology, 1976, pp.120-1.

29. I. Balbus, The Dialectics of Legal

30. On emergency powers generally, which puts
the events of November 1975 into perspective.
See M. Tubbs, “Emergency Powers, Class and

31. I have attempted this kind of project in
“Imperialism, Development and the
Underdevelopment of Criminology”,

32. The role of the trade union leadership in this
process should not be overlooked, nor
underestimated, see M. Tubbs, “Hawke The
Manager of Discontent”, unpublished ms.
1976.

33. However, Walker’s campaign drew a shot
across its bow from the capitalist press as soon
as it appeared that he was going to go after
corporate crooks sufficiently seriously to use
Parliamentary privilege to denounce them
and intended to reform the legal procedures
which protected them; see the editorial,
“Company Crime”, Sydney Morning
Herald, 22.9.76.

34. See generally D. Brown, “Reform as
Adaptation: An Examination of
Decriminalisation”, D. Chappell and P.R.
Wilson, Australian Criminal Justice
System, 2nd ed. (forthcoming).

35. The Federal government has continued to
exhort Australians to spend. And the New
South Wales economy is sufficiently poor to
evoke threats of internal protectionism, see
“Call to Favor NSW goods angers States”,
The Australian, 12.8.76. This is a possible
explanation for decriminalisation of some
recreational, “victimless” crimes, although
the relationship is a complicated one.

36. Here the Trade Practices Act is a main
battleground, see e.g. “Trade Laws Under
Fire”, The Australian, 8.6.76. The Prices
Justification Tribunal has of course been
maintained by the Fraser government.

37. A particularly good example is the reform of
the ground rules for the Prices Justification
Tribunal which cuts down substantially the
number of big companies under its
jurisdiction, see two articles in The
Australian, 17.9.76. And see critical
comments on the ineffectiveness of the Trade
Practices Commission by one of the
commissioners, “Trade Watchdog Slated”,
10.9.76.