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## ANTILAW SENTIMENTS AND THEIR PHILOSOPHICAL FOUNDATIONS

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In an age of political turmoil and rapid social change, the institution of law is subjected to severe stresses and strains which are apt to create, in the minds of many observers, a somewhat distorted impression of its meaning and functions in the life of a political society. When illegal or unauthorized acts are committed with considerable frequency by law enforcement officers, when discriminations against members of minority groups occur in a governmental or non-governmental context, when socially disruptive situations provoke an unrestrained use of force in a growing number of instances, such actions are often viewed as typical manifestations of "the law," not only by the victims of such practices but also by third persons sympathetic to their plight.

Such an identification of law with the actual doings of law enforcement officials (regardless of whether or not they are in conformity with applicable legal norms) is frequently encountered today by the teacher of law in the responses of students in classroom discussions. There is a disposition in the minds of the students, especially those critical of their society, to generalize misuses and perversions of legal procedures into examples of operative principles of legal control. The conclusion may easily ensue from such generalizations that the essence of law is repression of unpopular groups or a technique for crackdowns on troublesome, non-conforming individuals by those in authority, while the more traditional image of the law as a standard against which the legality of official acts of coercion must be measured is repudiated as a hypocritical or fraudulent form of idealistic thinking. The next step in this pattern of reasoning is a wholesale rejection of the institution of law. The assumption is made that a system of controls which lends itself to authoritarian or oppressive uses is a manifestation and concomitant of a diseased form of society. A hope and expectation is nurtured in the minds of the critics that the more per-

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fect community of the future will have no difficulty in dispensing with such an instrumentality of coercive rule.

There is another ideological source from which the contemporary stream of discontent with legal regulations and restraints is fed. The opinion prevails in certain sectors of the modern youth movement that no group in society has any legitimate authority to make binding rules for any other group of human beings. This far-reaching extension of individualistic thinking is apt to question, for example, the propriety of any legislation requiring the covering of the human body, or abstention from certain types of sexual practices, or restrictions on the use of psychedelic drugs. Since a great deal of law consists of impediments to an untrammelled exercise of personal freedom, the institution will necessarily become suspect in the eyes of those who regard the "doing of your own thing" as the essence of human fulfillment.

It would be wholly inadequate to dismiss the antilaw philosophy current in many youthful quarters today as an extravagance contrived by untrained and immature minds. There exists, on the extremes of the philosophical, political, and sociological spectrum, an impressive body of authority which, though it may not support certain concrete manifestations of latter-day antagonism to legal controls, generally gives aid and comfort to the view that law is an anachronistic institution, embodying the values of a misguided past and present, which is deserving of speedy relegation to the museum of historical antiquities.

One such fountainhead of authority can be traced to the writings of a highly influential thinker of the late nineteenth century whose views are having a still growing impact on the thinking of intellectuals in the United States. Friedrich Nietzsche advanced the thesis that law was a fetter upon the activation of the individual's power impulse. Since he considered this impulse as the prime motive force in human life which should be allowed full sway, he viewed the law with antipathy and distaste and sought to allocate to it a secondary role in the regulation of human affairs. "Legal conditions," he asserted, "can never be other than *exceptional conditions*, since they constitute a partial restriction of the will of life, which is bent upon power."<sup>1</sup> He found justification for the making of legal arrangements chiefly in two situations: (1) where, due to an equality of strength, a stalemate or standoff between holders of power had occurred which required temporary adjustments or "bargains," and (2) where, in a context of dominance and subordination, it was deemed prudent by the ruling powers to grant concessions in the form of

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1. F. NIETZSCHE, *Genealogy of Morals* (Second Essay, Aph. 11), in *BASIC WRITINGS OF NIETZSCHE* 512 (Kaufmann ed. 1968).

“rights” to the weaker members of society in order to ensure their co-operation and loyalty. In both of these situations, however, the creation of legal relations resulting in the allocation of rights was not an end in itself but merely a temporary expedient adopted for the purpose of stabilizing existing power constellations. Any substantial change in the relative position and strength of one of the parties terminated, in his opinion, the strict obligation to respect the rights of the other side: “When we have become a great deal more powerful, the rights of others cease for us, at least in the form in which we have so far conceded them.”<sup>2</sup>

In this view, law merely serves as a temporary breathing spell, an armistice in a relentless struggle for power. Nietzsche was afraid that a legal order conceived of as a means for granting equal justice to all, without respect of persons and their rank in society, would be destructive of the natural hierarchy of domination and subjection which he considered a necessary condition of social organization:

A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of *preventing* all struggle in general—perhaps after the communistic cliché of Dühring that every will must consider every other will its equal—would be a principle *hostile to life*, an agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness.<sup>3</sup>

A second frontal assault on the law was launched, for reasons diametrically opposed to those responsible for Nietzsche’s hostile attitude, by certain groups associated politically with the extreme left. Nietzsche distrusted the law because he considered it an undue shackle upon the power impulses of the strong. He imputed anti-elitist and democratic connotations to the concept of law and feared its use by the combined forces of the lower classes to bring about an egalitarian form of society. The leftist antilaw philosophy, in utmost contrast to this position, looks upon law as an anti-egalitarian and pro-elitist device for the perpetuation of class rule, a weapon used by the strong to oppress the weak. An elimination of legal controls in the society of the future is deemed desirable by the adherents of this view on the assumption that the demise of law would guarantee the achievement of true freedom and

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2. F. NIETZSCHE, *The Dawn*, (Aph. 112), in BASIC WRITINGS OF NIETZSCHE 170 (Kaufmann ed. 1968).

3. Note 1 *supra*.

equality, the disappearance of all forms of dominion by men over other men.

The original sources of authority for the leftist challenge to the law are scanty since the fathers of political leftism, Karl Marx and Frederick Engels, never undertook a thoroughgoing analysis of the phenomenon of law. Furthermore, pertinent statements are ambiguous and susceptible of conflicting interpretations. One source, often quoted by Marxists, is the following passage from Marx's *Communist Manifesto*, addressed to the bourgeoisie of his day: "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 economic conditions of existence of your class."<sup>4</sup> This sentence, however, does not go further than to characterize *bourgeois* law as an expression of class will and sets forth no generalized judgment on the nature of law. It also contains no pronouncement to the effect that the classless society of the future envisaged by Marx could conveniently dispense with the institution of law.

The authority for the last-mentioned assumption is usually found in the following statement by Engels:

The first act in which the state really comes forward as the representative of society as a whole—the taking of possession of the means of production in the name of society—is at the same time its last independent act as a state. The interference of state power in social relations becomes superfluous in one sphere after another, and then ceases of itself. The government of persons is replaced by the administration of things and the direction of the processes of production. The state is not "abolished," it *withers away*.<sup>5</sup>

It will be noted that this statement does not specifically refer to the law; it merely predicts the disappearance of *state* power in a socialist economic order. While it is possible that Engels viewed state and law as twin institutions whose fate in future society would be a common one, such a presupposition was never made explicit by him. Certainly a modern, refined, sociological conception of law is aware of the fact that law is not necessarily tied to state power and may well exist in other forms of social organization.

Notwithstanding the paucity, vagueness, and ambiguity of pronouncements by the "founding fathers" of Marxism, the notion that law is in its essence a tool of class rule destined to disappear in socialist

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4. K. MARX, *THE COMMUNIST MANIFESTO* (pt. II) 47 (Possony ed. 1954).

5. F. ENGELS, *ANTI-DÜHRING* 309 (Burns ed. 1935).

society received a great deal of favor and attention in the writings of certain Soviet Russian legal authors during the 1920's.<sup>6</sup> The "withering-away" doctrine, in particular, was expounded in an original and interesting manner by E. B. Pashukanis, whose rise and fall as the dean of Soviet legal philosophers and eventual execution as a traitor to Marxism contributes an odd chapter in the history of legal thought.<sup>7</sup> For a number of years his ideas were very much in vogue among Soviet jurists, but a retreat from the notion that socialism and law were inherently incompatible was staged (without complete abandonment of this doctrine) when the Soviet rulers discovered that they could not dispense with the law as an instrumentality of social control.

There are indications that this retreat is not confined to the "withering away" doctrine but is gradually being extended to other facets of earlier Soviet legal theory. What may be in the offing is, in this writer's opinion, a basic revision of legal thinking which may herald an eventual "repeal" of the class-whip conception of law (which at one time found its official recognition in a Soviet statute). Of particular interest in this connection is an article published in 1968 by L. S. Mamut, Senior Research Assistant at the Institute of State and Law at the U.S.S.R. Academy of Sciences.<sup>8</sup> Mamut in this article ascribes to Marx a full awareness of the fact that law might be used by nondominant or disfavored classes in society to wrest lasting concessions from the ruling powers. To prove this contention, Mamut makes reference to passages in Marx's *Das Kapital* which point out that the English Parliament in his time had repealed certain laws against strikes and trade unions under the pressure of the masses, that it had revised the stringent conspiracy laws which had hampered the growth of labor organizations, and that it had introduced the ten-hour working day.

One characteristic paragraph in Mamut's essay reads as follows: "According to Marx . . . the intervention of the law is dictated by the effort to restrain excessive evil-doing on the part of the masters of the factories, mines, mills, and means of communication, and to prevent a destructive exhaustion of all the physical and mental energy of the proletarians . . . ." He also suggests that Marx attributed great import-

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6. The volume entitled *SOVIET LEGAL PHILOSOPHY* (Hazard ed. 1951) provides the reader with ample source materials for a study of this period. See also Bodenheimer, *The Impasse of Soviet Legal Philosophy*, 38 *CORN. L.Q.* 51 (1952).

7. Pashukanis, *The General Theory of Law and Marxism*, in *SOVIET LEGAL PHILOSOPHY* 111-225 (Hazard ed. 1951). See also Fuller, *Pashukanis and Vyshinski: A Study in the Development of Marxian Legal Theory*, 47 *MICH. L. REV.* 1157 (1949).

8. Mamut, *Questions of Law in Marx's Capital*, 6 *SOVIET LAW AND GOVERNMENT* 3 (1968).

ance to the successes of the proletariat in the field of legislation, because "the workers attain by means of a universal act of legislation what they could hardly have gained by a multiplicity of isolated individual efforts."

This reinterpretation of Marx obviously subverts the associations which orthodox Marxist theory, especially in its early Soviet variety, had linked with the concept of law. The earlier theory viewed law as an institution designed to serve the benefit and advantage of the ruling class, with the consequence that law was considered an undesirable adjunct of an unjust society. According to Mamut, on the other hand, Marx was willing to concede that law could also serve as a brake upon class interest, a weapon of progress wielded by the lower classes in society to ameliorate their position. Similar volte-face reappraisals of Marx's attitude toward law have recently appeared in print in East Germany.<sup>9</sup>

While such developments mark the beginning of an attempt on the part of legal theorists in the Soviet orbit to restore the law to a position of ideological respectability, the antilaw attitude has experienced a renaissance in the United States, Germany, France, and other countries of the Western World in the rise of a neo-marxist philosophy espoused by the New Left. Interestingly enough, this new philosophy has repeated the phenomenon found in original Marxism: the intellectual fathers of the movement do not address themselves clearly and specifically to the problem of whether or not law is a beneficial institution worthy of being preserved in the society of the future. I have not been able, for instance, to find any open denunciation of the law in the writings of Herbert Marcuse, who is unquestionably a leader of neo-marxist thought. The reason why he has been identified with the antilaw forces<sup>10</sup> must probably be sought in an overall interpretation of his philosophy, which includes a declaration of war on all social institutions repressive of freedom (among which he might count the law or at least substantial segments of it). Another spokesman for the New Left, Ernst Bloch, has vaguely hinted at the likelihood of a demise or at least significant decline of law in a regenerated society, without committing himself definitely and forcefully to this prophesy.<sup>11</sup> Positive expressions of opposition or hostility to the law are, on the other hand, frequently encountered in discussions with young representatives of radical thought and especially

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9. G. HANEY, *SOZIALISTISCHES RECHT UND PERSÖNLICHKEIT* 29-43 (1967). See particularly page 38: "It is . . . incorrect when bourgeois theoreticians, due to complete ignorance, impute to Marxism the view that it represents law as a form of 'ruling class ideology.'" (My translation)

10. See R. MARCIC, *RECHTSPHILOSOPHE: EINE EINFÜHRUNG* 49 (1969).

11. E. BLOCH, *NATURRECHT UND MENSCHLICHE WÜRDE* 257-59, 269 (1961).

the law students among this group. By equating unlawful or overstrict acts of law enforcement officials, instances of discriminatory treatment of minority groups, antisocial uses of loopholes in taxation statutes, and restrictions on political activism more or less with "the law" itself, the youthful critics of the law foresee an erosion and eventual disappearance of legal controls in a reconstructed society of full-fledged freedom and equality.

While it is primarily the Marxist pattern of challenge to the law which has shaped the thinking of the New Left, the observer of the contemporary academic scene will also find that Nietzsche's skeptical attitude toward traditional forms of social control has had an impact on the minds of many young intellectuals. Upon first impression, this may seem surprising since Nietzsche's elitism and aristocratic disdain of equality is quite incompatible with the political and social ideas which inspire the activist groups among the students today. There are, however, good reasons for the substantial attraction which the Nietzschean philosophy has exercised upon the thinking of the new generation. Nietzsche was a severe and unflagging challenger of the cultural and moral convictions which are still accepted today by the majority of elders in the Western World. His relentless attacks upon middle class values and conventional modes of living have furnished a great deal of grist upon the mills of social criticism engaged in by the alienated part of today's youth.

Furthermore, Nietzsche advocated a vitalistic, ego-expanding, limit-rejecting attitude toward life which has substantial points of contact with the "do your own thing" philosophy fashionable in many quarters today. The aggressive dynamism preached by him is essentially contemptuous of the restraints which the law imposes upon many spontaneous manifestations of a rationally uncontrolled life-will. Nietzsche's downgrading of the law as a universal regulatory agency has therefore added weight and momentum to the suspicion with which the law is often viewed today even by those who have chosen to make it their lifetime vocation.

Neither Nietzsche nor the leaders of Marxist thought were lawyers. It might therefore seem logical for the teacher of jurisprudence or social theory—provided he does not share the sentiments of the skeptics—to refer his students to the body of professional opinion about law, the considered judgment of experts who have studied their subject from close range. But there are two good reasons why such referral to the possessors of "know-how" would not meet with acceptance and success. First, their appraisal of the merits of law would presumably be dis-

missed as biased, as an *ex parte* statement of persons with a vested interest in a subject from which they derive financial returns and social prestige. Second, and this is the weightier obstacle, there exists no unified or homogeneous expert opinion regarding the nature and functions of law. Law has variously been described by professional jurists as a bulwark of freedom; as a guarantor of human dignity and equality; as a congeries of rules of conduct safeguarding order and security in societal life; as a neutral tool of governmental control which can be used for good as well as evil purposes; as a system of repressive restraints on liberty and individual autonomy; and as an instrument of domination used by a ruling group (an "establishment") to perpetuate inequality and class stratification. Deference to the opinion of legal experts thus would compound rather than alleviate the confusion. Kant's remark that "the jurists are still searching for a definition for their concept of law"<sup>12</sup> turns out to be as true today as it was in Kant's own time.

As long as the institution of law was taken for granted and operated on a fairly satisfactory basis on the various levels of societal organization, the theoretical controversies concerning the nature and functions of law could safely remain the hobby of specialists. But when "the law" as an agency of political control—and not merely one particular system of law—becomes engulfed in a crisis of major dimensions, when the gauntlet of radical doubt regarding its general usefulness and beneficial role is thrown into the arena of political and philosophical discussion by articulate members of a rising generation of professional leaders, then it is time to reflect on the foundations of social order and undertake a wholesale re-evaluation of an institution whose continued existence may be in jeopardy. Otherwise the quality of life in national and international society may become deeply affected by presuppositions which, on deeper analysis, may be incapable of standing close scrutiny.

In a time of trouble when the political barometer points to "storm,"<sup>13</sup> it will not serve the public interest to focus jurisprudential inquiry principally, as has been the fashion during the last decade, on conceptual analysis stimulated by developments in modern symbolic logic, or on sophisticated investigations of legal semantics. The range of vital, perplexing questions relating to the survival of civilization and organized society is too comprehensive to permit of extended journeys to the playful grounds of an intellectual Disneyland. It should also be emphasized

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12. I. KANT, *CRITIQUE OF PURE REASON* II, ch. 1, § 1 (2d ed. 1787). Since all published English translations erroneously render the German word "Recht" into "right," I have supplied my own translation.

13. I have borrowed this metaphor from R. MARCIC, *supra* note 10, at 26.

that the answers to the questions engendered by the radical contemporary challenge to the law require more than empirical studies of actual human behavior, the compilation of social statistics, and similar activities (often producing largely quantitative results) which have dominated social science research in the recent past. They demand sustained rational reflection and vivid dialectical argumentation concerning the nature of the building stones which are indispensable for the erection or preservation of healthy social structures. How broad or narrow should be the role assigned to the law in the creation and maintenance of such structures? Is law too much of a fetter on the individual's power, authenticity, and autonomy? Is it a brake on self-realization and progress and for this reason undesirable as a universal regulator of human affairs? Should legal arrangements remain exceptional conditions, limited to situations where clashes of wills require temporary adjustments? Is it true that the will to power is the primary and most beneficial force in human life? Or, is there a deep-seated psychological need for law, which is rooted in certain traits of nature more basic and less transient than the desire to have occasional breathing spells in a relentless struggle of individual and collective wills? These would be examples of questions raised by the Nietzschean challenge to the law.

Has law, in its most significant historical manifestations, been a tool of repressive class rule rather than an agency for the amelioration of social conditions? Differently expressed, has law been used primarily as a weapon by the strong to subjugate the weak, by dominant groups against the mass of the citizens, or has the institution served principally as a shield designed to protect the common man from arbitrary exercises of power by the mighty? Has law perhaps performed both of these functions in historical alternations, depending on the uses made of it in particular political, economic, and social contexts? If this last interpretation is true, what has been the *chief* impact of law on the lives of human beings in the history of civilization? Has it been beneficial or oppressive? Would a symbolic representation of the law choose Magna Carta (with its British and American progeny) as the prototype of law in civilized society or the Sedition Act of 1798? Does the history of ancient Roman Law (which can be surveyed from its beginnings in the Roman city state to its end at the time of the fall of the Roman Empire) throw any light on these questions? On an over-all evaluation, has the institution of law, bestowed on us a heritage of distinct values and social-psychological benefits which make it desirable to preserve it rather than let it "wither away"? These would be types of questions to which a response is called for by the Marxian challenge to the law.

The endeavor to answer these questions will require a harnessing of the efforts of many disciplines. Psychology, anthropology, sociology, history, philosophy, and jurisprudence will have to join hands in a collaborative venture of major scale in providing an adequate analysis of the functions which law has performed for mankind in the past and which it can be expected to perform in the future. It cannot be taken for granted that meaningful and satisfactory answers will emerge from such inquiries. The objective validity of any conclusions resulting from them will certainly be questioned by positivistic skeptics, who will argue that these conclusions are conditioned by arbitrarily-selected definitions of law and purely subjective ways of interpreting the historical and sociological materials. The controversial character of the methodological tools to be used in such investigations will make it mandatory for the researcher to lay bare the fundamental epistemological and value assumptions on which his inquiries are based. Intellectual honesty requires this all the more as that which is at stake in such investigations is evaluation—justification or censure—rather than mere description of an institution.<sup>14</sup>

In contrast to much recent jurisprudential work which has dealt with problems of secondary rather than basic import, the legal scholar to be honored in this issue of the *Indiana Law Journal* has never ceased to write about law in the "grand manner." He has repudiated the reductionist premises on which much of the analytic and semantic jurisprudence currently in vogue is predicated, preferring instead to approach the phenomenon of law from broadly-defined philosophical foundations.

A great deal of insight can be gained from a study of Jerome Hall's writings into some of the problems concerning the law which have been touched upon in the present essay. First, he has fought the proposition that law, in a radically empiricist manner, can be identified with the actual doings of men, especially law enforcement officers, a view which is so often encountered today by the teacher of jurisprudence in discussions with his students. He has insisted that laws constitute normative standards, prescriptions of what *ought* to be done rather than mere descriptions of the factual conduct of private persons or functionaries of government. He has at the same time emphasized the dependence of the norms on existing social conditions, psychological data, and the cultural matrix.<sup>15</sup>

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14. I have stated my own views on social science methods in E. BODENHEIMER, *TREATISE ON JUSTICE* 44-56 (1967).

15. See Hall, *Reason and Reality in Jurisprudence*, 7 *BUFF. L. REV.* 351, 372-80

Secondly, he has strongly opposed the assertion that law is a system of governmental mandates unlinked even to minimum postulates of ethical behavior. He has advocated the adoption of a restrictive meaning of law which would limit the term to "actual ethical power norms" resting on a substantial volume of popular acceptance and which would exclude "sheer power norms" of an oppressive character. Although Hall would be the last one to deny that a particular legal system may go through periods of sickness and decay, he has maintained that, in the total picture of human historical experience, law has played a salutary and beneficial role.<sup>16</sup>

Third, Jerome Hall has been a leading protagonist of the position, endorsed in the present essay, that the jurisprudence of the future must be based on a broad-gauged integration of anthropological, sociological, psychological, and ethical knowledge into the analysis of the nature and functions of law.<sup>17</sup> His work in legal philosophy as well as criminal theory is imbued with the conviction that legal precepts and legal arrangements are not abstractions dwelling in a social vacuum but reflections of cultural developments and psychological needs which, after having passed through the evaluative filter of the human mind, have made many worthwhile contributions to civilized human existence.

The value-oriented, synthetic jurisprudence of the coming decades will derive much benefit from a close study of the writings of Jerome Hall.

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(1958) and *From Legal Theory to Integrative Jurisprudence*, 33 U. CINC. L. REV. 153 (1964).

16. J. HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* 84-89, 131-41 (1949).

17. See Hall, *Integrative Jurisprudence*, in *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 25-47 (1958) and *Reason and Reality in Jurisprudence*, *supra* note 15, at 399-403.