

# Book Reviews

## The Rule of Law: An Unqualified Human Good?

*Albion's Fatal Tree: Crime and Society in Eighteenth-Century England.* By Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson & Cal Winslow. New York: Pantheon Books, 1975. Pp. 352. \$15.00. \$5.95 (paperbound).

*Whigs and Hunters: The Origin of the Black Act.* By E.P. Thompson. New York: Pantheon Books, 1975. Pp. 313. \$15.95. \$5.95 (paperbound).

### Reviewed by Morton J. Horwitz†

In his brilliant book, *The Making of the English Working Class*, E.P. Thompson, the author of one of these volumes and a contributor to the other, underlined "the paradox" in 18th-century England of "a bloody penal code" existing "alongside a liberal . . . administration and interpretation of the laws." This paradox raised a problem for Marxist historians like Thompson: While they portrayed the 18th-century English legal system as an instrument of class repression by a property-holding Whig elite, they nevertheless felt compelled to concede that "[a] quite surprising consensus of opinion," among gentry and common people alike, had successfully opposed establishment of a repressive system of police. "[T]he conviction that the rule of law was the distinguishing inheritance of the 'free-born Englishman', and was his defence against arbitrary power, was upheld even by the [English] Jacobins." And as Thompson perceived, this system of law actually served to restrain the intrusion of arbitrary authority "upon personal or property rights."<sup>1</sup>

In an important and perceptive essay in *Albion's Fatal Tree*, Douglas Hay illuminates and explains this basic paradox of 18th-century English law.<sup>2</sup> Hay argues that "the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army. The

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1. E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 80-83 (Vintage ed. 1966) (emphasis in original).

2. Hay, *Property, Authority and the Criminal Law*, in D. HAY *et al.*, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 17 (1975).

ideology of the law was crucial in sustaining the hegemony of the English ruling class."<sup>3</sup>

Hay's emphasis on "legal ideology" as a major instrument of class domination marks a major departure in the neo-Marxist understanding of the role of law. Hay recognizes that "terror alone could never have accomplished those ends."<sup>4</sup> Indeed, despite an increasingly bloody penal code, which imposed the death penalty "to protect every conceivable kind of property from theft or malicious damage," "[t]he available evidence suggests that, compared to some earlier periods, the eighteenth-century criminal law claimed few lives."<sup>5</sup> A series of discretionary institutions running from prosecutorial discretion to the widespread use of pardons by the Crown saved many offenders from the gallows.

But amidst the evidence he has gathered of modest state powers of enforcement as well as of a major disparity between a harsh law on the books and a more lenient law in practice, how can Hay still maintain that "more than any other social institution" the criminal law sustained the "hegemony" of class rule? To deal with that problem, he focuses upon the use of criminal law as one of the "chief ideological instruments" of the ruling class, an instrument that combined "terror" with "discretion" to mold "the consciousness by which the many submitted to the few."<sup>6</sup>

It is impossible in this short review to convey fully the detail, the texture, and the subtlety of Hay's demonstration of how the prevailing legal ideology combined "majesty, justice and mercy" to ensure class rule.<sup>7</sup> Briefly, Hay contends that the use of legal ideology "as an instrument of authority" also made it "a breeder of values" so that "English justice became [an] important focus of beliefs about the nation and the social order."<sup>8</sup>

The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of a ruling class—it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself.<sup>9</sup>

3. *Id.* at 56.

4. *Id.* at 25.

5. *Id.* at 22.

6. *Id.* at 26.

7. *Id.*

8. *Id.* at 58-59.

9. *Id.* at 33.

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Hay thus argues that the “rule of law” as an ideology required the English ruling classes to accept a degree of self-limitation in order to govern effectively. More importantly, he argues that use of legal ideology as a means of social control required that it be believed and acted upon by *both* higher and lower classes. Through a process of internalization the system of laws “became something more than the creature of a ruling class.”<sup>10</sup>

Hay’s important essay is part of a more general reconsideration of the function of law that has been going on among neo-Marxist historians during the past decade. As the dogmatic shadows cast by Stalinism and the Cold War have gradually dissipated, Marxists have finally begun to move away from those simplistic slogans by which thought was dismissed as mere “ideology” and by which law was treated contemptuously as a mere “superstructure” that simply “reflected” class relations.<sup>11</sup> A recent interpretation of Marx’s political theory, for example, has convincingly demonstrated that Marx himself consistently asserted a regular interaction between “substructure” and “superstructure” through which thought, values, and social arrangements actually do affect consciousness and, ultimately, history.<sup>12</sup> Similarly, in his recent book on slavery, America’s leading Marxist historian, Eugene Genovese, has devoted an entire section to discussing “The Hegemonic Function of the Law,” in which he has perceptively argued that legal systems are relatively autonomous:<sup>13</sup>

Only possession of public power can discipline a class as a whole, and through it, the other classes of society. The juridical system may become, then, not merely an expression of class interest, nor even merely an expression of the willingness of the rulers to mediate with the ruled; it may become an instrument by which the advanced section of the ruling class imposes its viewpoint upon the class as a whole and the wider society. The law must discipline the ruling class and guide and educate the masses. To accomplish these tasks it must manifest a degree of evenhandedness sufficient to compel social conformity; it must, that is, validate itself ethically in the eyes of the several classes, not just the ruling class.<sup>14</sup>

10. *Id.*

11. Some Marxist thinkers postulate that the fundamental aspects of a society are its methods of producing and distributing goods; they term this economic system the society’s substructure. They theorize that all other aspects of a culture—*e.g.*, its laws, politics, arts—are reflections of this substructure. Hence they pejoratively refer to these other cultural phenomena as superstructure.

12. S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 134-49 (1968).

13. E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25-49 (1974).

14. *Id.* at 27.

E.P. Thompson's latest book, *Whigs and Hunters*, stands in a perplexing relationship to these recent neo-Marxist contributions to the understanding of the function of law. Except for an excellent theoretical postscript on "The Rule of Law," which I will discuss in a moment, *Whigs and Hunters* is a surprisingly disappointing book. Its immediate purpose is to explain the origin of the Black Act of 1723 by which Parliament, without so much as a pause, substantially extended capital punishment to include a number of relatively petty offenses. Although the Black Act was initially drafted to punish "blacking" (*i.e.*, poaching) in royal forests under various disguises, including blackened faces, it was almost immediately expanded by judicial interpretation to cover other crimes never contemplated at its passage. The Act, Thompson writes, "signalled the onset of the flood-tide of eighteenth-century retributive justice,"<sup>15</sup> which substantially increased the brutality of the English penal code.

Thompson's discussion of the passage of the Act leads him in characteristic fashion to assemble a wealth of social and economic detail about the forest economy and the people who occupied it, as well as about the general political climate under Walpole which made passage of the Act possible. Thompson's most general argument is that the Act represented the culmination of a social and economic struggle through which a "customary" economy of forest dwellers was destroyed and replaced by a market-oriented regime based on "capitalist property rights." In Thompson's view "[t]he forest conflict was, in origin, a conflict between users and exploiters."<sup>16</sup> "During the eighteenth century one legal decision after another signalled that the lawyers had become converted to the notions of absolute property ownership," which, in turn, signaled the destruction of the customary "use-right" whose "messy complexities" were abhorred by the law.<sup>17</sup>

Unlike his earlier book, however, the ratio of interesting theoretical generality to undigested historical detail is too small. *Whigs and Hunters* constantly dwells on minor facts without indicating why we would care to know about them. Indeed, one is finally unconvinced that the entire subject has yielded enough general insight to have justified Thompson's prodigious research.

From his postscript on "The Rule of Law," one senses that Thompson himself doubted whether he had succeeded:

15. E. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 23 (1975).

16. *Id.* at 244-45.

17. *Id.* at 241.

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I sit here in my study, at the age of fifty, the desk and floor piled high with five years of notes, xeroxes, rejected drafts, the clock once again moving into the small hours, and see myself, in a lucid instant, as an anachronism. Why have I spent these years trying to find out what could, in its essential structures, have been known without any investigation at all?<sup>18</sup>

Thompson attempts an answer. He accepts, on the one hand, "some part of the Marxist-structural critique; indeed, some parts of this study have confirmed the class-bound and mystifying functions of the law." On the other hand, he "reject[s] its ulterior reductionism and would modify its typology of superior and inferior (but determining) structures."<sup>19</sup>

Then, in some extraordinary passages, Thompson brilliantly elaborates the neo-Marxist conception of legal ideology as an autonomous instrument of social control:

The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.

....

... [Moreover,] it was inherent in the very nature of the medium which [the 18th-century gentry] had selected for their own self-defence that [the law] could not be reserved for the exclusive use only of their own class. . . .

....

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions."<sup>20</sup>

What is disappointing about Thompson's book is that he rarely applies these thoughts to the historical materials themselves. Instead, the book's central thrust is to expose the mystifying functions of the law and to strip away its claim to class neutrality. The basic strategy of its argument is precisely to engage in the sort of reductionism that Thompson so severely (and perhaps self-critically) finally deplors.

I do not wish to be understood as arguing that historians should abandon the task of exposing the mystifying functions of law. Far too little of this presently is done by American legal historians, who as a

18. *Id.* at 260.

19. *Id.*

20. *Id.* at 263-65.

group already tend toward an excessively reverential and apologetic attitude towards law.<sup>21</sup> I wish only to emphasize, along with Thompson, that we will never completely understand the historical functions of the rule of law if we continue simply to pile on evidence of the hypocritical character of its claims to political neutrality.

Thompson, however, takes a surprising and disturbing further step, if I read him correctly. "I am insisting," he writes,

only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.<sup>22</sup>

Unless we are prepared to succumb to Hobbesian pessimism "in this dangerous century," I do not see how a Man of the Left can describe the rule of law as "an unqualified human good"! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.

This system of law may prove to be all that we can hope for in this desperate century. It may be true that restraint on power (and simultaneously on its benevolent exercise) is about all that we can hope to accomplish in this world. But we should never forget that a "legalist" consciousness that excludes "result-oriented" jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice. So can we say that the rule of law is an "unqualified human good"? Only if Hitler, Stalin, and all of the other horrors of this century have forced us finally to accept the Hobbesian vision of the state and human nature on which our present conceptions of the rule of law ultimately rest. It is a conservative doctrine. Perhaps at 50 years of age Professor Thompson should be allowed to pronounce its virtues.

21. See Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

22. E. THOMPSON, *supra* note 15, at 266.