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For the Common Good

A Critical Examination of Law and Social Control

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For the Common Good

A Critical Examination of Law and Social Control

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Dedication

R.R.M

To both my family and my Drury family.
I appreciate your support more than I can possibly express.

S.L.B

To Avery, the joy of my life.

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For the Common Good

A Critical Examination of Law and Social Control

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Introduction

Introducing a Critical Examination of Law and Social Control

"A Critical Examination of Law and Social Control: Introductory Remarks"

R. Robin Miller
Drury University

Sandra Lee Browning
University of Cincinnati

Introduction

On October 25, 2001, President George Bush signed into law the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism legislation, now known as the Patriot's Act. The ostensible purpose of this policy initiative is to give to national and international law enforcement officers the ability to ably pursue terrorists like the ones responsible for the September 11, 2001 Trade Center towers attacks.

By expanding the range of common tools of surveillance, namely: wiretaps, search warrants, pen/trap orders and subpoenas, government agents may now track Americans who enter certain "suspicious" words on their computers without showing cause, nor must they demonstrate that the person under surveillance is the target of some investigation. Agents may now use roving wiretaps that allow them to go from phone to phone or computer to computer, also without demonstrating that the person under surveillance is the target of some specific investigation.

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The Act also provides for the expansion of the definition of domestic terrorism, which quite reasonably heightens concerns about how legitimate protest activities and actors will be handled in the future. For instance, if the World Trade Organization protest which occurred in Seattle were to occur in the near future, would the powers that be decide to prosecute activists on terrorism charges?

The ways in which this initiative serves to threaten personal freedoms and citizens rights are glaringly obvious. And did the freedoms we had as American citizens from the unlawful and unprovoked spying of law enforcement officials actually give rise to the terrorist acts in the first place? Writing as someone who was heretofore reticent of posting students' grades, even by their personal school identification numbers, lest I violate the (completely necessary) Family Privacy Act of 1974, to be told by university administration that any one of us will now be forced to release private student information to any governmental official who asks (with or without pretense of cause) is more than a bit disturbing.

It seems that the state, by claiming that they are increasing our "collective security" through these broader powers, is in actuality, operating against the common good. More than anything else, recent events highlight the need for texts such as this.

The Necessity of Critical Perspectives on Law

It is understandably difficult to put forth a definitive statement about what does and does not constitute a critical perspective. Many other scholars have tried and failed to delineate the element(s) which must be included to ably define this perspective. However, it can be boldly stated that critical perspectives in the Western tradition include predominately European influences from the Frankfurt school like Marcuse (1960), Horkheimer (1974), and Habermas (1971). Thinkers from this perspective were to move from a strict Marxian focus on the material conditions of reality and economy to "…the cultural system, which it came to see as the major force in modern capitalist society… This was consistent with, but an extension of, the position taken earlier by Hegelian Marxists…" (Ritzer, 1996: 67). It may even be stated that a history of critical theory is a history of its various definitions. An inclusive articulation of all that critical theory encompases is of course well beyond the scope of this text. Therefore, for the purposes of this anthology, the critical perspective on law tends to include Marxist and neo-Marxist elements—whether they be focused on the importance of material conditions in society or states of consciousness. Obviously, not all contributors to this text will write from the same ideological vantage point. Nor is that singular focus strictly neces-

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sary for readers to gain a better understanding of the myriad ways we are controlled through law.

This anthology is necessary for so many reasons. Examining the structure and influence of law has long been something that social scientists have done. Social philosophers dealing with the influences of the law and polity are many and a few of them have been mentioned previously. Emile Durkheim (1897/1951) wrote of institutional structures which served to bind individuals more firmly to the social fabric and in so doing served as forces of social control. Of course, he addressed the influence of law more explicitly in *Division of Labor in Society* (1893/1964).

Karl Marx is, arguably, our first and most influential theorist to deal critically with the influences of law and the political order. Furthermore, many of these theoretical precursors have been previously mentioned. And while there have been theorists and researchers who have hastened us toward a critical perspective (as detailed earlier in this essay), surprisingly, the study of law and society at least through the texts that have been written and studied in the last decade continue to be dominated by a less critical perspective. In 1999, A. Javier Trevino conducted a comparative review of nine law and society and sociology of law texts. Only one of them had the economic order as a key element. Less than half of these texts included a critical examination of legal case studies. And finally, only two of these nine texts had a critical theoretical focus according to Trevino (1999).

What has been the difficulty of advancing a critical approach to reality including issues like law and social control? Marvin Harris (1974) would name these factors: that there has been ignorance of cultural and societal alternatives; that there is a fear which causes some to cleave to a false consciousness; and that there are the powerful in society who would seek to control and exploit others through the manipulation of reality, so that, "these inequalities are as much disguised, mystified, and lied about as old age and death" (Harris, 1974: 3). Given this paucity of perspective in recent years on the one hand and our long and varied history of critically examining law and social control on the other, it appears that we need to refocus our energies in this direction. This anthology serves in this capacity.

A Brief Explication of Terms

A critical perspective has been previously addressed, but what of "law"? What of "social control"? And what of the "common good"? I firmly believe that it is both necessary and good to study closely both law and social control.

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If social control is the normative, or expected, element of social reality, then law can be understood as "governmental social control" (Radcliffe-Brown, 1933/1965) over the citizenry. It is in this way that law is so powerful. Law is a structural force that, at least theoretically, reaches everyone. It can be powerful in its scope, its frequency, and its intensity. Law is not divorced from the public over which it is exercised but is, again, some reflection of the normative order which reigns. And a law that is not commonly accepted by the people still has the power to shape behavior through sheer force of the punishments handed down for violations of it.

However, Donald Black (1976) states, "law itself is social control, but many other kinds of social control also appear in social life, in families, friendships, neighborhoods, villages, tribes, occupations, organizations, and groups of all kinds" (1976: 6). Because law is only one form of social control it would be an obvious and regrettable mistake to focus only on the behaviors of governmental bodies. Consequently, the reader will find a variety of processes explored with this text.

A brief review of the concepts touched on by the works of this anthology would be incomplete without some mention of the socially constructed nature of both reality and social control. The construction of social reality and the creation of deviance are processes about which much has been written and on which many of the works of this anthology indirectly depend. While this approach has developed over more than the last century in philosophy and the social sciences, we may more specifically begin our look with the work of W.I. Thomas who suggested that the powerful have, quite literally, the power to define the situation. Furthermore, Berger and Luckman (1967) believe that we must be most concerned with "…the processes by which any body of 'knowledge' comes to be socially established as 'reality'" (1966: 3). Richard Quinney in *The Social Reality of Crime* (1970) states that, "the social reality of crime is constructed on conflict in our society…" and further asks the question, How do persons and behaviors become criminal? He will point us toward a society's social, economic and political structure to answer that question. More specifically, our capitalist order must be examined to understand the forces which underlie the social construction of crime and deviance. But the constructionist approach to law and social control predates the work of Quinney. Howard Becker's (1963) idea that "social groups create deviance" (1963: 5) more than implies that deviance is a social construct that simply does not exist if the rules and norms of society are not constructed and maintained. And Edwin Shur (1984), following in the path of Becker, will suggest that even the statuses one holds in society (e.g. gender) can be defined as deviant as easily as overt behaviors. There is a long, rich tradition of examining

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law and social control from a social constructionist perspective, and to end, nearly every paper in this anthology speaks, at least tangentially, from this constructionist view of reality.

Finally, what of the "common good"? I regret the fact that a common understanding of this term is largely assumed but so rarely articulated. At its most basic, the good of all is meant. From the enlightenment thinkers, we gain the sense that the "public interest" in its most general sense is intended. From John Locke's notion of the liberties of citizens which must be protected, to the utilitarian James Mill who suggested that we seek "the greatest good of the greatest number," to his son, John Stuart Mill, who apparently believed that the common good should be promoted through public welfare programs (Mill, 1859/1978), the term, "common good" has been quite laden with value. At least implied in many of the works included here is this last, more visionary, meaning. It is our responsibility as citizens to be critical in our examination of the forces of law and social control.

Conclusion

Times of national crises seem to often give rise to increased prejudice and scapegoating—processes which rob citizens of individual rights. Our system of law, as reflective of the normative order, mostly operates to maintain this system. Nowhere is this more apparent than the executive branch. As case in point, since the implementation of the Freedom of Information Act (FOIA) in the 1970s, four attorneys general have issued memorandums regarding this Act to the heads of all departments in the executive branch. On October 12, 2001, shortly following the September 11, 2001 terrorist attacks Attorney General John Ashcroft released his own memorandum. This memorandum made only a glancing nod of recognition to our need of maintaining an open system of government that is accountable to the people. Instead, his memorandum was a call for the staunch defense of national security—suggesting that our need to stop terrorism overrides all other concerns we may have as a nation. He writes:

> The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy…When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the

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> Department of Justice will defend your decisions.…(U.S. Department of Justice Freedom of Information website, 2001)

Ashcroft speaks of our national interest to maintain a government that is "fully functional and efficient." Apparently, allowing citizens to make themselves aware of the various daily actions of governmental agencies simply slows the efficiency of these governmental agencies and there is no time to be lost in catching terrorists.

It is these actions and others like them that call most strongly for a critical perspective on law and the processes of social control. Quite simply, our close and judicious examination of these processes may stand as the only true safeguard of the common good.

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