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**E.P. Thompson and the rule of law:
Qualifying the unqualified good***

Douglas Hay

* Thanks for suggestions from Stephen Brooke, Peter Linebaugh, Bryan Palmer and Christine Sypnowich; errors are mine. Thanks too to Martin Loughlin and Jens Meierhenrich, the editors of *The Cambridge Handbook of the Rule of Law* (forthcoming), which contains a shorter version.

Introduction

...the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-inclusive claims, seems to me to be an unqualified human good. ... And if the actuality of the law's operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity, yet the notion of the rule of law is an unqualified good.¹

These words appear in a short 11- page section headed 'The rule of law' in E.P. Thompson's 300-page historical study of one British statute enacted in May 1723. Yet the passage – and particularly the quoted words – received enormous attention at the time and since, provoking widespread criticism as well as praise.² Edward Palmer Thompson (1924-1993) was probably

¹ *Whigs and Hunters: The Origin of the Black Act* (1975; Harmondsworth, Mddx: Penguin Peregrine, 1977), pp. 266, 267.

² A sampling: Morton Horwitz, 'The rule of law: an unqualified human good?' (1977) 86 *Yale Law Journal* 566; I. Clendinnen, 'Understanding the heathen at home: E.P. Thompson and his school' (1979) 18 *Historical Studies* 435-440; Adrian Merritt, 'The nature of law: A criticism of E.P. Thompson's *Whigs and Hunters*' (1980) 7 *British Journal of Law and Society* 194-214; Perry Anderson, *Arguments Within English Marxism* (London: Verso, 1980), pp. 69-73, 197-215; Harvey J. Kaye, *The British Marxist Historians* (1984; London: Macmillan, 1995), pp. 194-7, 199, 203-5; Mitchell C. Stein, 'Bringing Professors Hay and Thompson to the bargaining table' (1988) 68 *Boston University Law Review* 621-651; Robert Fine, 'The rule of law and Mugglestonian marxism: the perplexities of Edward Thompson' (1994) 21 *Journal of Law and Society* 193-213 (and his *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pluto Press, 1984), pp. 169-189); Robert W. Gordon, 'E.P. Thompson's Legacies' (1994) Yale University Faculty Scholarship Series Paper 1353, digitalcommons.law.yale.edu/fss_papers/1353; Daniel H. Cole, "'An unqualified human good: E.P. Thompson and the rule of law' (2001) 28 *Journal of Law and Society* 177-203; Paddy Ireland, 'History, critical legal studies, and the mysterious disappearance of capitalism' (2002) 65 *Modern Law Review* 120-140; China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden, Boston: Brill, 2005), pp. 315-16. Recent citations applying or questioning Thompson's relevance to current law include Mark Fathi Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (New York: Cambridge University Press, 2013), pp. 127, 219, 223-4, 229; Gabrielle Clark, "'Humbug" or "human good": E.P. Thompson, the rule of law, and coercive labor relations under neoliberal American

the best-known British historian of the second half of the twentieth century, acclaimed for *The Making of the English Working Class*.³ The 11 pages in 1975 were rooted in his life-long attempt to understand, celebrate, and promote a distinctive British socialist tradition; in his hostility to Stalinism for both its tyranny and its caricature of Marx's thought; and in his rage at what he deplored as the contempt for civil liberties by Britain's late-twentieth-century security state. British imperialism, Soviet Communism, World War II, post-war security 'emergencies' and the arms race of the Cold War—all, in different ways, raised three questions. When is state law legitimate, what is its relevance to social justice, and how can we understand law's wider role in societies past and present—and in any future socialist ones.

The answers he proposed were drawn from a much deeper history, 350 years of English popular movements and their experience of statute and common law. The law's relation to the state that was coeval with it, and the opposition of both to popular demands for justice, recur throughout his work. Unlike most who write on rule of law he found his arguments in detailed historical research, informed by a passionate commitment to recover the voices and the ideas of the 'real men and women' who made those demands for justice. Such people – radical democrats in the 1640s and the 1790s; protesting labourers, spinners, weavers, and early factory workers during the first industrial revolution; the Chartists of the 1830s and 1840s (the research interest of Dorothy, his wife); British admirers of Marx like William Morris – are largely invisible in most legal histories and philosophies. Thompson used their voices to inform and chastise the public and the politicians of twentieth-century Britain, while making class central to all adequate future

capitalism' (2015) 48 *Journal of Social History* 759-765, 776; Martin Krygier, 'The rule of law between England and Sudan: Hay, Thompson, and Massoud' (2016) 41 *Law and Social Inquiry* 480-88; B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd edn (Cambridge: Cambridge University Press, 2017), pp. 500-501, 342, 441, 451, 457-58, 522-24; John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017), pp. 268-70; Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2017), p. 228; Bryan D. Palmer, "'Gagging" the revolutionary party: the first Smith Act trial and the rule of law', in J. Fudge and E. Tucker (eds.), *Law With Class: Essays Inspired by the Work of Harry Glasbeek* (Halifax NS: Fernwood, forthcoming 2019).

³ *The Making of the English Working Class* (London: Victor Gollanz, 1963; New York: Vintage Books, 1966); 2nd edn with a postscript (Harmondsworth, Mddx: Penguin, 1968); 3rd edn with a new preface (Penguin, 1980). In the 1980s Thompson was reported by the *Arts and Humanities Citation Index* to be the most-often cited historian in the world, and among the 250 most cited authors ever: Eric Hobsbawm, 'E.P. Thompson', *The Observer*, 29 Aug 1993 and (1994) 58 *Radical History Review* 157. See also John Rule, 'Edward Palmer Thompson', *Oxford Dictionary of National Biography* 60 vols. (Oxford: Oxford University Press, 2004). See the select bibliography of his work by Harvey J. Kaye and Keith McClelland in John Rule and Robert Malcolmson (eds.), *Protest and Survival: Essays for E.P. Thompson* (New York: The New Press, 1994), pp. 417-21; a partial bibliography also appears in Anderson, *Arguments*, pp. 209-13.

histories of law. Class necessarily led to law—in the past, and in the twentieth century.⁴ His answers came from both politics and history, his thoughts expressed in vivid prose. But what did he mean by ‘the rule of law’? And how did it fit with Marxist – or any socialist – theory?

Politics

His father was a Liberal anti-imperialist Methodist missionary, and both parents supporters of Indian independence from British rule who welcomed Gandhi and Nehru to their Oxford home.⁵ When 16 or 17 and still at Kingswood School Thompson was greatly excited by Christopher Hill’s Marxist history of England’s seventeenth-century revolution, and sufficiently active on the left that the school authorities were alarmed. After the rise of Hitler and the outbreak of war against Nazi Germany, and Hitler’s invasion of Russia, Thompson joined the Communist Party of Great Britain (CPGB), following the lead of his adored older brother Frank.⁶ Going up to Cambridge on a fellowship, he soon left to enlist in an elite regiment (his mother insisted on a good tailor for his uniforms) and became a tank commander at the age of 18. He returned to Cambridge a war veteran age 22.⁷

⁴ For an earlier version of what follows see my introduction in D. Hay, P. Linebaugh, C. Winslow (eds.), *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 2nd edn (London: Verso, 2011), pp. xxxi-xli. It appears from correspondence after his death that Thompson’s 11 pages on rule of law were an afterthought. ‘According to Dorothy Thompson, his collaboration on [*Albion’s Fatal Tree*] left him deeply pessimistic about the role of law in society. She engaged him in a “very heated discussion,” during which she suggested that “he was leaning too far in the direction taken by some of the contributors to *Albion’s Fatal Tree* in dismissing the law simply as an instrument of class power. He took time to re-think the question and added the famous afterword to *Wh and H*.”’ Cole, ““An unqualified human good””, 181 n.18, 183 n.31.

⁵ Peter J. Conradi, *A Very English Hero: The Making of Frank Thompson* (London, New Delhi, New York, Sydney: Bloomsbury, 2012), pp. 96-99 and *passim*. A moving and insightful biography of Frank (and the family), the book is based partly on the now closed collection of Thompson papers deposited at the Bodleian Library, Oxford University. See also Thompson, *Beyond the Frontier: The Politics of a Failed Mission: Bulgaria 1944* (London: Merlin Press, and Stanford CA: Stanford University Press, 1997).

⁶ Conradi, p. 5, states that Dorothy Thompson told the author that Thompson joined the CPGB in 1940 age 17, a date repeated in recent writing. But he did not turn 17 until 3 Feb 1941. Thompson himself says he joined age 18 in 1942: *The Poverty of Theory and Other Essays* (London: Merlin Press, 1978), p. 323. See also *ODNB*; Gerard McCann, *Theory and History: The Political Thought of E.P. Thompson* (Aldershot: Ashgate, 1997), p. 19; Roger Fieldhouse and Richard K.S. Taylor (eds.), *E.P. Thompson and English Radicalism* (Manchester : Manchester University Press, 2013), p. 7. Conradi’s timing for his going up to Cambridge (pp. 173-4) is also unclear. Although his Party membership lapsed after he joined the army, he rejoined after the war.

⁷ For Thompson’s war see ‘Overture to Cassino’ in *Double Exposure* (London: Merlin, 1985) and ‘Drava Bridge’ in *The Heavy Dancers* (London: Merlin, 1985), pp. 231-7.

His socialism was, like his later reflections on the rule of law, deeply influenced by his experience of the war, where he shared the lives and hopes of many men and women in the volunteer army, and civilian life, for a post-war future of greater social equality.⁸ Equally important were the adult education classes he then taught for 17 years in Yorkshire as an extra-mural tutor-organizer for Leeds University.⁹ His political and intellectual relationships in an anti-fascist party which included working-class comrades and militants, not just the bureaucrats of King Street (the CPGB headquarters), were also critical. In Yorkshire he was active in Party opposition to the Korean War.¹⁰ Perhaps most important was his deepening knowledge of British labour and social and political history. His political activity gave him insights, not found among many academic historians, into how radical movements survived during the early nineteenth century, when democracy was treated by the state as treason. In the history of the British socialist and labour movements, and his relationships within the rank and file of the CPGB in Yorkshire, he saw ‘real men and women’ who had fought labour’s battles and faced the power of capital.¹¹ He read and shared research with some of the remarkable group of gifted historians in the Party: Dona Torr especially, but also A.L. Morton, Christopher Hill, Maurice Dobb, Rodney Hilton, Eric Hobsbawm and V.G. Kiernan, many of whom celebrated a tradition of British popular radicalism that escaped the limits of economic determinism prescribed by the Party.¹²

⁸ In February 1941 George Orwell was writing, ‘It is only by revolution that the native genius of the English people can be set free. Revolution does not mean red flags and street fighting, it means a fundamental shift of power. Whether it happens with or without bloodshed is largely an accident of time and place. Nor does it mean the dictatorship of a single class. The people in England who grasp what changes are needed and are capable of carrying them through are not confined to any one class, though it is true that very few people with over £2,000 a year are among them. [£2000 in 1941 equals £97,000 in purchasing power, and £500,000 in economic power (income relative to total output) in 2019: <https://www.measuringworth.com/calculators/ppoweruk/>] What is wanted is a conscious open revolt by ordinary people against inefficiency, class privilege and the rule of the old.’ *The Lion and the Unicorn: Socialism and the English Genius* (London: Secker & Warburg, 1941), reprinted in Peter Davison (ed.), *The Complete Works of George Orwell* 20 vols. (London: Secker & Warburg, 1986-7, 1998), vol. 12, p. 415.

⁹ *The Essential E.P. Thompson*, ed. Dorothy Thompson (New York: The New Press, 2001), p. ix; Peter Searby, John Rule and Robert Malcolmson, ‘Edward Thompson as a teacher: Yorkshire and Warwick’, in Rule and Malcolmson (eds.), *Protest and Survival*, pp. 1-23.

¹⁰ Interview by Mike Merrill of E.P. Thompson, March 1976, in Henry Abelove, Betsy Blackmar, Peter Dimock, and Jonathan Schneer (eds.), *Visions of History, by MAHRO* (Manchester: Manchester University Press), pp. 12-13.

¹¹ The phrase ‘real men and women’ appears in ‘Socialist humanism’ (1957) 1 *The New Reasoner* 105-143 at 109 and recurs throughout his work. It expressed his distrust of the abstractions, averages, and labels of Marxist and capitalist ideologues, and lazy historians.

¹² McCann, *Theory and History*, pp. 20ff emphasises their determination to develop an historical materialist account to counter the ‘mechanical determinism’ of Party orthodoxy. Hobsbawm, not close to Thompson, was an exception. For the varieties of approaches by historians in the Party see Tim Rogan, *The Moral Economists: Tawney, Polanyi, Thompson and the Critique of*

The family may have discussed the failures of the ‘rule of law’ in the 1930s; that history became important to him in 1956 and later. In 1930s Britain, an establishment deeply hostile to domestic and foreign Bolshevism (and anxious to do a deal with Hitler) loathed the wrong kind of free speech. The English judges showed a deep hostility to the left in particular.¹³ In the Soviet Union, Stalin’s later show trials of old Bolsheviks and other leaders in August 1936, January 1937, and March 1938 took place when Thompson was a boy, 12 to 14, and in England there was little public discussion or knowledge of the greater atrocities that lay behind them (we now know that 681,692 Soviet citizens were ordered executed in 1937-8 alone).¹⁴ Preoccupation with Hitler muffled English criticism of the show trials. The press was ambivalent or uninterested for the most part, the left extremely reluctant to believe the evidence and procedure corrupt, or to seem to criticize the Soviet Union.¹⁵ The Webbs, enthusiastic for all things Soviet by this date, defended the trials, but even Attlee, leader of the Labour Party (who actually attended a session of the 1936 Moscow trial of Zinoviev and others) did not publicly question their legal validity.¹⁶ After the collapse of the Hitler-Stalin pact, and the beginning of the war with Russia allied with Britain, Popular Front politics united much of the left.

With the victory of the Labour Party in 1945, Dorothy and Edward greeted the developing welfare state as ‘a socialist achievement’, based on ‘a symbolic shift in the terms of class power’ nationwide. It was a victory of both movement and electoral politics, in the spirit of the Popular Front. In 1947 Thompson wrote a pamphlet for the Party, *The Fascist Threat to Britain*, a response to recent fascist demonstrations, that called for petitions to the Home Secretary, in line with the Party’s call for ‘police action to maintain order and democracy’, rather than street

Capitalism (Princeton NJ and Oxford: Princeton University Press, 2017), pp. 136-143.

Thompson was associated formally with the CPGB Writers Group rather than the Historians (where Dorothy was active); he had read both literature and history at Cambridge.

¹³ K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (Oxford: Oxford University Press, 2000).

¹⁴ Robert Service, *The Penguin History of Modern Russia* 4th edn (Harmondsworth: Penguin, 2015), p. 222. Anderson, *Arguments*, p. 117 blames Thompson for not objecting to show trials in 1951 and 1952, but largely ignores his fierce opposition to the party in 1956, and his expressions of regret (see below).

¹⁵ Left opinion in England was also probably aware of statements even before these trials from the Soviet Writers' Union, over the names of Boris Pasternak, Mikhail Sholokhov and Alexei Tolstoy: ‘We demand the spies’ execution! We shall not allow the enemies of the Soviet Union to live!’ And ‘No mercy to the Trotskyite degenerates, the murderous accomplices of Fascism!’ (Andrei Platonov, Isaak Babel, and others): Arkadii Vaksberg, *The Prosecutor and the Prey: Vyshinsky and the 1930s’ Moscow Show Trials* (London: Weidenfeld and Nicolson, 1990), pp. 107-8.

¹⁶ Paul Corthorn, ‘Labour, the left, and the Stalinist purges of the late 1930s’ (2005) 48 *The Historical Journal*, 179-207; Peter Deli, ‘The quality press and the Soviet Union: a case study of the reactions of the *Manchester Guardian*, the *New Statesman* and *The Times* to Stalin’s great purges, 1936–38’ (1999) 5 *Media History*, 159-180.

clashes. By 1947 the Thompsons were deeply critical of Labour as its leadership moved to full support of American cold war strategies. In 1956 they left the CPGB.¹⁷

Before the events of 1956 precipitated their complete rejection of the Communist Party Edward and Dorothy had disliked many things about it: its rigid ideology, its authoritarian bureaucracy, its complete defence of Stalinism. Khrushchev's 'secret' speech in February 1956 on Stalin's terror, and then the Soviet invasion of Hungary later that year were critical. In March Thompson questioned the chief party theorist's 'intellectual integrity', denounced the leadership as 'lacking in socialist principle', and declared he was moving to a position of opposition within the party.¹⁸ As the leadership gradually learned more about Khrushchev's revelations of torture and mass shootings, it tried to suffocate debate, prevaricate, and minimize the outrages by emphasising Soviet economic progress.¹⁹ An apparently full text of Khrushchev's four-hour secret speech was published by the *New York Times* and the London *Observer* in early June. Thompson responded in a crescendo of outraged articles: 'it was painful to watch the way our [Party] press gradually (under pressure from below) jacked up its words: from "errors" to "mistakes" to "malpractices" to "abuses" to "crimes".' He decried its hostility to democracy, in the party and in the country. Invited earlier to take part in a CP School on the 'History of our Labour Movement' he had suggested a session on 'The Free-Born Englishman' showing '*the illusions and realities* [my emphasis] of our democratic tradition'. It was not included in the main programme: 'When I speak of our democratic climate I mean that the British people will not trust a party that regards its democratic liberties as an optional or extra item.' (On the 'vastly different historical problems of the Soviet Union' he did not comment: it was 'a country about which I know little, and very much less than I had once been led to think.')

He quoted Milton and Lilburne, and invoked Winstanley, Cobbett, Oastler, Ernest Jones, William Morris, Keir Hardie, and Tom Mann—a list whose heterodoxy (including paternalist Tories!) must have enraged King Street, if they actually knew all the names. Thompson quoted the *Just Defence* of the Leveller John Lilburne in 1653:

...for what is done to any one, may be done to every one; besides, being all members of one body, that is, of the English Commonwealth, one man should not suffer wrongfully, but all should be sensible, and endeavour his preservation; otherwise they give way to an

¹⁷ Michael Kenny, *The First New Left: British Intellectuals After Stalin* (London: Lawrence & Wishart, 1995), p. 145; Abelove et al. (eds.) *Visions of History*, p. 12; Nigel Copsey, *Anti-Fascism in Britain* 2nd edn (London and New York: Routledge, 2017), pp. 81-2; 'Mr Attlee and the Gadarene swine,' in Thompson, *The Heavy Dancers*, p. 242.

¹⁸ Thompson to J. Klugman 22 March 1956 in Glyn Powell, 'The best of all possible worlds? The ideology and practise of British communism in the cold war, 1953-1961', PhD dissertation, University College London (2001), p. 120 citing CPGB archives.

¹⁹ Powell, pp. 103ff. See also Stephen Woodhams, *History in the Making: Raymond Williams, Edward Thompson and Radical Intellectuals, 1936-1956* (London: Merlin, 2001), pp. 134ff.

inlet of the sea of will and power, upon their laws and liberties, which are the boundaries to keep out tyranny and oppression...²⁰

And he concluded,

Bourgeois democracy, we know, is a liar and a cheat. But it is a libel on our proudest history to say that all our liberties are illusions, the ‘fig-leaf’ of absolutism. It is a libel upon the British working class to suggest that they would exchange these liberties for a higher standard of life.²¹

The predictable Party riposte, ‘A caricature of our Party’²², prompted Thompson’s article in the first issue of *The Reasoner*, the internal unapproved review he started with John Saville. In it he attacked the dogma of party doctrine (‘we get, do we not, some analogy with Holy Church?’), its reluctance to examine Khrushchev’s revelations, and its stultified version of Marxist theory. Again, he referenced the English past: Bunyan, Darwin, Bradlaugh, and the popular support for their challenges to received thought. He quoted Engels: ‘The materialist conception of history has a lot of friends nowadays to whom it serves as an excuse for *not* studying history. Just as Marx used to say... “All I know is that I am not a Marxist.”’ He again cited Morris as an inspiration for British socialism. The moral bankruptcy of the CPGB was complete:

What impresses the British people is that for twenty-odd years we have been eagerly justifying as ‘the highest form of democracy’ a society [the Soviet Union] in which there is no real freedom of the press—whether for the publication of information, opinion, or creative writing—no freedom from arbitrary arrest, and no contested elections.

He concluded that he was not proud of the Party or its record, and ‘I am *not* proud of the silence which I and others have kept too long over these and other matters.’²³

In the third (and final) issue of the paper, written as the Soviet Russian tanks rolled into Budapest to suppress the November Hungarian rising, Thompson condemned the silence about the show trials of Hungarian Communists and other ‘socialist legality’ perversions, and the willingness of

²⁰ *The Just Defence of John Lilburne, Against Such as Charge Him with Turbulency of Spirit* (London, [1653]).

²¹ Thompson, ‘Winter Wheat in Omsk’, *World News*, 30 June 1956, reprinted in Paul Flowers and John McIlroy (eds.), *1956: John Saville, EP Thompson and The Reasoner* (London: Merlin Press, 2016), pp. 110-112.

²² George Matthews in *World News*, 30 June 1956, *ibid.*, pp. 114ff.

²³ Thompson, ‘Reply to George Matthews’ (July 1956) 1 *The Reasoner*; *ibid.*, pp. 150-155. See also *Poverty of Theory*, p. 324.

the British *Daily Worker* to ‘call for “no vengeance”, in the interests of hushing up truth and perverting justice... I do not want to see vengeance. We have all had our fill of executions.²⁴ But justice demands that criminals are tried for their crimes, and their associates shown out of public life.’ He quoted and derided a ‘stone axiom’ of Stalin’s:

‘The dictatorship of the proletariat is the domination of the proletariat over the bourgeoisie, *untrammelled by law and based on violence* and enjoying the sympathy and support of the toiling and exploited masses.’ As we learn from Hungary, such a dictatorship need not for long command the sympathy of the toiling masses: nor would it do in Britain.

In a peroration of sustained fury he denounced Stalinism for tying together the dictator’s ‘mechanical idealism’ of basis and superstructure, his militarism, and his terror: ‘distorted theories and degenerate practices about which we knew something, in which, to some degree, we shared, and which our leadership supports today.’ Thompson had not abandoned socialism, perhaps not yet communism. He hoped that the Hungarian rising would result in ‘a socialism of free people, and not of secret speeches and police, [that] will prove *more* dangerous to our own imperialism than any Stalinist state.’²⁵

These themes resonated through all of Thompson’s subsequent political and historical work; he returned to them again and again, to the end of his life. There is the celebration of civil liberties claimed by democratic radicals since at least the seventeenth century, including a free press, democratic elections, and protection from arbitrary state power by legal institutions—notably, the jury. There is the hope that a ‘humanist’ socialism can be attained, ideally by political action on a wide united front. There is a clear rejection of violence. All these beliefs deeply informed the ‘notion’ of the rule of law found in his history and excursions into theory.

History

Thompson’s first book, a ‘study’ (rather than biography) of William Morris (1834-1896), appalled some reviewers.²⁶ As well as the celebrated artist and designer, romantic poet, and

²⁴ Including that of his brother Frank, captured, tortured and shot in May 1944 during a British SOE infiltration of Bulgaria, in murky circumstances that for years Thompson tried unsuccessfully to clarify. He blamed missing British government files, and, by implication, collusion or indifference by Churchill’s wartime and postwar governments because Frank was a Communist, albeit a non-dogmatic Wykehamist one. See Conradi, *A Very English Hero*, pp. 286-370 and Thompson, *Beyond the Frontier*.

²⁵ Thompson, ‘Through the smoke of Budapest’ 1 Nov 1956) 3 *The Reasoner*, in Flowers and McIlroy, 1956, pp. 266-76. His quotation of Stalin is from *Foundations of Leninism* (my emphasis).

²⁶ *William Morris: Romantic to Revolutionary* (original edn. 1955) revd edn. (London: Merlin Press, 1976 and New York: Pantheon Books, 1977), reissued with a preface by Peter Linebaugh (Oakland CA: PM Press and Pontypool, Wales: The Merlin Press, 2011).

wealthy businessman, here was the revolutionary socialist agitator. Morris crossed ‘the river of fire’ to committed and indefatigable activist in 1883: he immersed himself in factional decisions, endless speaking engagements, bruising political confrontations. Repudiating both Fabian state planning and the parliamentarism of Hyndman’s Social Democratic Federation as compromises with capitalism, he fought for a socialism of workers. Earlier biographers, when they noticed this part of his life, insisted he was no Marxist. Thompson showed Morris’s admiration for Marx’s insight that surplus value was the result of labour’s oppression, and how admirers of Morris the artist had slighted or misrepresented those convictions.²⁷ The passages on Morris’s hatred of British imperialism, capitalist exploitation of labour, Victorian hypocrisy about sex and hunger and ‘merriment’, are splendidly represented by extensive quotation, joined to Thompson’s own pungent prose.

He remarked years later how good a companion Morris had been to him. His considered conclusion was that Morris was a revolutionary utopian socialist, committed to the idea and reality of class conflict, who united English Romanticism’s savage critique of capitalism with the insights of Marx’s ideas. The hardening ‘Orthodox Marxist’ tradition, beginning with Engels, misunderstood his significance, and misrepresented it. Thompson was still in the Communist Party when he wrote *William Morris: Romantic to Revolutionary*. In a postscript to the 1977 edition he notes that ‘in 1955 I allowed some hectoring political moralisms, as well as a few Stalinist pieties, to intrude upon the text. I had then a somewhat reverent notion of Marxism as a received orthodoxy... the vulgarity of my own polemic can only be understood against the all-pervasive and well-furnished vulgarities of the anti-Marxist orthodoxies of that time.’ But ‘Morris, by 1955, had claimed me.’²⁸

However good a companion, Morris’s view of the law was not to be Thompson’s. Morris’s account of law in his own society, capitalist late-nineteenth-century England, and in his vividly imagined future socialist utopia, *News From Nowhere* (1890, 1891), divides at the ‘Great Change’—a revolution in 1952-54. His own experience of police and military suppression of socialist demonstrations, notably ‘Bloody Sunday’ on 13 November 1887 in Trafalgar Square, confirmed his view that capital was ruthless in its use of law, and that parliamentary roads to socialism were dead ends.²⁹ In *News From Nowhere* he makes Bloody Sunday the first episode in an escalating war of military violence by the middle class and the state against working-class organizations, ending in civil war.³⁰

²⁷ See also the 2004 *Oxford Dictionary of National Biography* article on Morris by Fiona MacCarthy.

²⁸ *William Morris*, ‘Postscript’, pp. 769, 810, 812 n.32. Some passages in the first edition were deleted in 1977: see Peter Linebaugh’s preface to the 2011 edition, and Anderson, *Arguments*, pp. 188-189.

²⁹ *William Morris*, pp. 488ff.

³⁰ Legal institutions play a minor part in the narrative. The government thinks of using a special commission of judges, but draws back, and uses an ordinary jury trial, resulting in an acquittal. On Morris’s acceptance that violence would probably be necessary to bring socialism, *William Morris*, pp. 315, 325, 503, 545.

Thompson celebrated Morris's decency, his love of life and art and friends, his radical democracy and hatred of class distinctions, his enormous energy and devotion to the cause of socialism and social justice, his full commitment to equality for women, his generous encouragement of young workers and artists.³¹ He emphasised Morris's insistence that moral values, above all respect for human life and freedom and desires—denied by capitalism—had to be the essence of socialism. But he said little about Morris's pungent view of capitalist law, indeed any 'civilized' law. For Morris, 'civilization' was 'organized misery'. Capitalist privilege, he wrote in one of his lectures,

is but the privilege of the robber by force of arms...all the formidable executive... [of present society], army, police, law courts, presided over by the judge as representing the executive, is directed towards this one end—to take care that the richest shall rule, and shall have full license to injure the commonwealth to the full extent of his riches.³²

In *News from Nowhere*, without private property and permeated by a socialist morality of cooperation, conflict is minor, in 'the rest and happiness of complete Communism.'³³ No state exists to impose legal violence on any group at the behest of another; there is no crime beyond personal quarrels, readily settled by what sounds like restitution and reintegration—a society of personal honour but without the blood feud.³⁴ There is no need for law. In Marxist terms, the state has withered away and the state's law with it.³⁵

The point is made forcefully. Morris loved gothic architecture. At one point we seem to approach Westminster Hall, the largest gothic hall in Europe, the twelfth-century cradle of the common law, where the high courts still sat until 1882. The narrator sees 'the steep lead-covered roof and the buttresses and the higher part of the wall of a great hall, of a splendid and exuberant style of architecture, of which one can say little more than that is seemed to me to embrace the best qualities of the Gothic of northern Europe' (Westminster, we think, but he adds) 'with those of the Saracenic and Byzantine, though there was no copying of any one of these styles.'³⁶ So, not Westminster Hall; in fact, a modern twenty-first-century socialist building, and in Hammersmith, not Westminster.

³¹ In my experience as his student, all qualities of EPT himself.

³² 'The Socialist Ideal in Art', quoted in *William Morris*, p. 683.

³³ *News from Nowhere or an Epoch of Rest, Being Some Chapters from a Utopian Romance*, James Redmond, ed. (London: Routledge & Kegan Paul, 1970), p. 160.

³⁴ Indeed Morris hailed 'barbarism' as the progressive antithesis of the corruptions of 'civilization', and his translations of Icelandic sagas must have acquainted him with the honour-feud values of a society without a state. Other sources were probably Owen's co-operative village schemes, and Kropotkin: *William Morris*, pp. 270, 306, 505-6, 772, 805.

³⁵ *William Morris*, pp. 686ff. See below for Thompson's view.

³⁶ *News From Nowhere*, p. 19.

Morris could not make Westminster Hall a symbol of truth and justice. It was above all the seat and symbol of English common law and of parliament, the antitheses of socialist justice and equality and prosperity. Law was *the* origin of fraud and class oppression, the principal cause of man-made suffering in the nineteenth century. Capitalism, Morris wrote, is ‘the Law-Courts, backed up by the executive, which [handle] the brute force that deluded people [allow] them to use for their own purposes... the army, navy, and police.’ In a discussion of exchange, which in his utopia is governed by freely accepted customary market regulation, he describes the market society of nineteenth-century England, again in those terms: ‘When you see the judge on his bench, you see through him, as clearly as if he were made of glass, the policeman to imprison, and the soldier to slay some actual living person.’ Westminster Hall is the place in which law plans and also imposes death: this gothic building is the Gothic Macabre. In Morris’s twenty-first-century utopia, we are not surprised to learn, the gothicized Houses of Parliament (built 1840 to 1850), and presumably adjacent Westminster Hall itself, have a new function. They are market and warehouse for something useful, manure. Morris’s contempt for English law was profound.³⁷

In the 1950s Thompson was already writing lectures for his adult education classes that eventually became a chapter (‘The Freeborn Englishman’) of *The Making of the English Working Class* (1963), which began as a short textbook.³⁸ It made him famous and transformed social history in England and many other countries. Thompson had traced Morris’s friendships with aged Chartists, whose radical democratic demands in the 1830s and 1840s could be connected back to Tom Paine in the 1790s, and beyond that to the Levellers. *The Making* showed those links, over centuries, of the demands of ‘freeborn Englishmen’ and women—and the importance of law.³⁹ Struggles against legal repression, in court cases brought by radical or sympathetic lawyers, were everywhere in *The Making*. Juries were critical points of opposition to repressive laws, which is why English governments went to extraordinary lengths to secretly pack them with trustworthy men who would find guilty verdicts. The book opens with the trial and acquittal of treason of the London Corresponding Society leaders in 1794. State trials for sedition and treason punctuate the narrative of struggle for popular democratic rights, as a self-conscious working class emerged. Thompson explored the class character of state law in sedition charges, executions of rioters and unsuccessful revolutionaries, criminal penalties against trade unions, enclosures of common lands by a parliament of landlords (‘class robbery’), spying by police informers, and refusal to prosecute or punish the middle-class mounted ‘Volunteers’ who sabered to death peaceful demonstrators at ‘Peterloo’ in 1819. Artisanal riots and sabotage of gig-mills and other new machinery that was once forbidden by law were met by new capital statutes, exemplary mass hangings, and repeal of the ancient laws. All attempts by labour to reinstate some of the Tudor-Stuart protections it had enjoyed under the Elizabethan

³⁷ *News From Nowhere*, pp. 34, 65, 71, 98.

³⁸ Abelove et. al. (eds.), *Visions of History*, p. 14; David Goodway in Fieldhouse and Taylor, *E.P. Thompson*, pp. 53ff.

³⁹ In *Witness Against the Beast: William Blake and the Moral Law* (Cambridge: Cambridge University Press, 1993) he traced a possible link between the civil war and the 1790s through the Muggletonian sect.

Statute of Artificers (5 Eliz. c.4, 1562) were repulsed by a parliament of landowners and industrialists in the early nineteenth century.

Against state law Thompson already counterpoised the popular beliefs in customary legal rights that he developed in his later work on the ‘moral economy’ of food rioters, the ‘sale’ of wives by the poor, and such common rights as grazing and gleaning for the poor.⁴⁰ All entailed popular ideas of legal right, ideas also enacted in medieval, Tudor, and Stuart statute, or imbedded in ancient manorial custom. And again, both parliament and the judges (and troops and the newly-invented police of the nineteenth century) were used by capital and its state to expunge those popular claims and erase them from the law of England.⁴¹

Whigs and Hunters, famous for the 11 pages on the rule of law, actually made the argument through meticulous archival work that law was a principal instrument of power—the power of a state controlled by a rapacious agrarian capitalist class. The Waltham Blacks episode was a conflict between holders of local customary rights over land, and a parasitic upper class at the heart of the state prepared to use the most coercive of state powers, capital punishment, to reap profit at the expense of middling and plebeian commoners. Parliament passed the ‘Black Act’ (9 Geo 1, c.22) in their interest. The high court judges interpreted the Act expansively, contrary to the dictum that penal statutes, particularly those punishing with death, should be read narrowly. Possibly sympathetic local juries were circumvented by the unusual provision in the Act that cases could be tried in any county, allowing the state to prosecute one group of Blacks in Westminster Hall, and to have them executed in London. Whig crowds there did not sympathize with the Blacks, tainted with the suspicion of Jacobitism. Backed by a sophisticated understanding of Hanoverian land law as well as criminal law, the argument led Thompson to

⁴⁰ Mentioned in *Making*, fully developed in *Customs in Common* (London: Merlin Press, 1991), chaps. 4, 5, 7; Rogan, *The Moral Economists*, chap. 4.

⁴¹ Thompson perhaps understated the degree to which both wife sales and the moral economy of markets were parasitic on state law. The form of plebeian divorce in the wife sale referenced the fact that sale of a beast in ‘open market’ was a guarantee of the new owner’s title, even if a horse had been stolen. Statutes of 1555 and 1588 (2&3 Philip & Mary c.7, 31 Eliz. c.12) set out that guarantee. Copying their terms explains some incidents of wife sales: weighing the woman, using the halter around her neck, sometimes entering the sale in a market tollbook, even creating a written contract (*Customs in Common*, p. 421). This is not to deny that a wife was often the instigator of such a sale, leaving her husband for a lover, as Thompson explains. The point is that popular custom justified itself by closely copying analogous statute law as legitimation for the otherwise impermissible change of ownership by theft (and was not a wife ‘property’?). The practice was ended by the new police of the nineteenth century. In food markets, not until the high court judges accepted the arguments of Adam Smith did law repudiate moral economy: Hay, ‘The state and the market: Lord Kenyon and Mr Waddington’ (1999) 162 *Past & Present*, 101-162; Hay, ‘Moral economy, political economy, and law’ in Adrian Randall and Andrew Charlesworth (eds.), *Moral Economy and Popular Protest: Crowds, Conflict and Authority* (Manchester: Manchester University Press, 1999), pp. 93-122.

greatly qualify what he meant by the ‘rule of law’ in those 11 famous pages at the end. Law had to seem to be just in order to have purchase: ‘indeed, *on occasion*, by actually *being* just.’ The legal ideologies of the powerful ‘struck root in a soil, *however shallow*, of actuality.’ Rules of law ‘*may curb*’ power. ‘In a context of gross inequalities, the equity of the law must *always* be in some part a sham.’ ‘The forms and rhetoric of law acquire a distinct identity which *may, on occasion* inhibit power and afford some protection to the powerless.’⁴²

The importance of conflicts over definitions of property, legal and popular, was expanded in his subsequent work. For lawyers, custom was a source of law. General custom was the notional source of the common law; local manorial custom, limited to particular places, was recognized by the high courts; London had a custom of its own; custom formed part of legal contract terms in individual trades and employment.⁴³ On the land, ‘common rights’, multiple use-rights over the same piece land—by lords of manors, copyholders, and commoners—were recognized in law from medieval times. Manorial custom ensured the rights of commoners and copyholders (including widows’ right of occupation of land by right of ‘free bench’) through an amalgam of ancient practice, preservation in written customs and local memory, and occasional successful litigation when prosperous men went to the courts and sometimes encouraged their plebeian neighbours to riot against the pretensions of rich lords of the manor.⁴⁴

That alliance weakened in the eighteenth century and of course disappeared at parliamentary enclosure. His argument about this long process combined a detailed analysis of case law with an equally detailed recovery of the lives, beliefs, and struggles—legal, political, and riotous—of those who claimed common rights. Rights in many parts of the country had extended to poorer inhabitants without property—by custom, and because it made economic and political sense. Gleaning of fields by the poor was only one instance. Thompson made the case that common rights—especially these possibly very extensive uncodified rights of the poor—were swept away not only by acts of parliamentary enclosure. They were eroded by social change, as wealthy men sought to create full property in severalty, without coincident use-rights. They were powerfully supported by judicial interpretation. He concluded that ‘it was the law which served as a superb instrument for enforcing the reification of right and for tearing down the remnants of the threadbare communal grid. ... The judges sought to reduce use-rights to an equivalent in things or in money, and hence to bring them within the universal currency of capitalist

⁴² *Whigs and Hunters*, pp. 262-267, my emphases.

⁴³ Thompson, ‘The grid of inheritance: a comment’ in Jack Goody, Joan Thirsk, and E.P. Thompson (eds.), *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge: Cambridge University Press, 1978); *Customs in Common*, chap.3, ‘Custom, law and common right.’ For a statement of the legal doctrine see C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964), chap. 2 and Appendix. For a summary of the social significance of the change, see D. Hay and N. Rogers, *Eighteenth-Century English Society: Shuttles and Swords* (Oxford: Oxford University Press, 1997), chaps. 6, 7.

⁴⁴ See also J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge University Press, 1993).

ownership.’ In many cases they did this by importing into the law the tenets of classical political economy.⁴⁵ ‘If it is pretended that the law was impartial, deriving its rules from its own self-extrapolating logic, then we must reply that this pretence was class fraud.’⁴⁶

Finally, in two brilliant articles Thompson explored the way in which eighteenth-century law, and the upper-class rule that created and applied it, was an instance of hegemonic rule, a constantly recreated but contested ruling-class ideology in the Gramscian Marxist sense.⁴⁷ It fit with his earlier argument that Britain’s class formations from the seventeenth to the nineteenth century had been highly distinctive: notably an early, triumphant *agrarian* bourgeois capitalism, a category that European Marxist theorists, and Englishmen under their influence, found too unorthodox to accept.⁴⁸

The modern security state was the subject of most of Thompson’s writing throughout the later 1970s, and although he had given up writing history for a time (he returned to it near the end of his life) his polemical journalism constantly used historical arguments in an attempt to overcome citizens’ amnesia about constitutional liberties, now under serious threat.⁴⁹ He saw a complaisant Labour government, then a radically neo-liberal Tory regime, happily acquiescing in cold-war security demands from the intelligence services and their American counterparts. Parliament, judiciary and the police establishment aided and abetted the subversion of civil liberties and the rights of workers won by past popular struggles. He used history to lambast politicians, public officials, police and judges. He hoped to educate an electorate (and left activists) deplorably ignorant of their country’s constitutional history. Beyond freedom of the press and habeas corpus he particularly emphasised the jury. A place of public participation in the law, a place where the letter of the law could be neutralized by popular opinion, the jury also educated citizens in their rights and their power.⁵⁰

The 1970s saw huge legislated erosion of traditional trial by jury. Thompson invoked the coroner’s juries used by the Victorian radical Dr Wakeley to attack the coroner and judges who tried to block an inquiry into the death of Blair Peach, a protestor killed by the police in 1979.⁵¹

⁴⁵ ‘The grid of inheritance’, pp. 339, 341; *Customs in Common*, chaps.1, 3.

⁴⁶ *Customs in Common*, p. 176.

⁴⁷ ‘Patrician society, plebian culture’ (1974) 7 *Journal of Social History*, 382-405 and ‘Eighteenth-century English society: class struggle without class’ (1978) 3 *Social History* 133-65; both revised and expanded as chap.2 of *Customs in Common*. See also Theodore Koditschek, ‘The possibilities of theory: Thompson’s Marxist history’, in Fieldhouse and Taylor, *E.P. Thompson*, pp. 70-95.

⁴⁸ Thompson, ‘The peculiarities of the English,’ *The Socialist Register*, ed. Ralph Miliband and John Saville, no.2 (1965), reprinted in *Poverty of Theory*, pp. 35-91.

⁴⁹ The most important are collected in *Writing by Candlelight* (London: Merlin Press, 1980).

⁵⁰ ‘Subduing the Jury’, *London Review of Books*, 4 and 18 Dec 1986, originally given as ‘The Jury –an Endangered Species’, Meiklejohn Lecture, Brown University, 14 April 1980; reprinted as ‘In defence of the jury’ in *Persons and Polemics*, pp.143-168.

⁵¹ For which the Metropolitan Police admitted responsibility in 2010.

He pilloried law officers of the crown who secretly used the police to help choose politically ‘safe’ jurors, and legislated to make the probable views of jurors harder for defence barristers to identify. He denounced the government for transferring offences historically tried by juries, charges often arising out of street demonstrations, to the swift and certain summary convictions of magistrates’ courts. He deplored the move to jury verdicts based on majorities of ten rather than the historic unanimity of twelve. And he was scathing about the high court judges. They scurried to do the will of the government, they held deep-rooted establishment and right-wing prejudices, their reverence was more for the ‘Rights of Money’ than the rights of the citizen. But then, ‘no British liberty has ever arisen from the decision of judges, although there have been occasions when these liberties have been judicially *defined*...’ For ‘the law today can be a profoundly corrupting profession’, and judges drawn from such a profession would find it difficult to become guardians of the people’s liberties: ‘it will be no easy matter for a professional law-breaker to mend his habits overnight.’⁵²

Thompson believed the 1970s to be an authoritarian moment, with a strong smell of Weimar. In writing the 11 pages, Thompson countered the arguments of a vulgar current Marxism, but his mind was clearly somewhere else—in Hitler’s Germany and the Stalinist Soviet Union—and in the politics of class war and state secrecy that made him compare England in the 1970s and 1980s to the crisis of the 1930s.⁵³ State security services were out of control, police brutality was shielded by the legal establishment, and policing of demonstrations was all too similar to the tenderness shown to the British Union of Fascists in the 1930s. He accurately foresaw Thatcher’s escalating attack on the unions, and a further ‘brutalizing of the common law.’ ‘This may be good class war, but it has nothing to do with the rule of law. The British ruling class has always been hazy about the distinction.’ The rule of law was not a settled thing. It had always been a contest:

This contest has swayed backwards and forwards, through a thousand episodes, and with each generation it has been renewed. We have subjected feudal barons, overmighty subjects, corrupt Lord Chancellors, kings and their courtiers, overmighty generals, the vast apparatus of Old Corruption, inhumane employers, overmighty commissioners of police, imperial adventurers and successive nests of ruling-class conspirators to the rules of law. Every now we have notched up a victory, and every then the ratchet has slipped back [*sic*].⁵⁴

But the sectarian ultra-left seemed to be indifferent, consumed by academic Marxist theoretical debate that was doubly compromised: unconnected to any popular political movement, and unpleasantly reminiscent of King Street in its certitudes.⁵⁵ Behind everything stood the threat of catastrophe, nuclear war. The state intelligence services on both sides of the iron curtain stifled

⁵² *Writing by Candlelight*, pp. 37, 99-111, 187, 192-3, 206-8, 211-23, 217-218, 220ff, 245.

⁵³ *Writing by Candlelight*, pp. ix, x, pp. 122, 254.

⁵⁴ *Writing By Candlelight*, pp. 197ff, 211, 213-4, 239, 242, 246, 251.

⁵⁵ Thompson, *Persons and Polemics* (London : Merlin Press, 1994), published in the USA as *Making History : Writings on History and Culture* (New York : New Press, 1994), pp. 340-41.

debate, whether by Stalinist repression in the east, or the more subtle—sometimes not so subtle—subversion of civil liberties in the west. His polemical journalism of the later 1970s seems to spring directly from the famous 11 pages; it certainly was of a piece, but is far from a celebration of English justice.

Theory

A good many supporters of liberal capitalism invoked Thompson's 'rule of law' as a counter-Marxist argument, providentially delivered by a (reformed?) Marxist. We have seen that they could do so only by ignoring not only most of *Whigs and Hunters* but also the rest of his historical and political writing. Ironically, this mistaken judgement was shared by many readers who were Marxists, or scholars sympathetic to a class analysis of law. They thought Thompson had become an apologist for capitalist 'justice'. In fact, Thompson's focus on law is much narrower than some read him. In spite of his assertion in the quote at the opening of this article that law was a constraint on 'power's all-inclusive claims', it is clear he meant the power of state actors. He concentrated on basic civil liberties issues, and especially on criminal procedure. Unfortunately the term 'rule of law' is often vaguely defined, in academic as well as demotic usage. Sypnowich has remarked its many meanings, and Waldron how few jurists using the term have gone beyond rather abstract principles. In an attempt to give the term more content both have emphasised legal *procedure*.⁵⁶ That was also Thompson's focus.

To the liberal-left critics of 'rule of law' rhetoric, Thompson seemed to be ignoring the enormous malleability or even indeterminacy of law. The legal issues most germane to capitalism today—the insulation of the corporation from regulation, the expansion of its intellectual property claims, its rights under international trade agreements to derail state regulation of either its capital or its workers—are also those where the shibboleths of 'rule of law' are now most likely to be invoked by capital.⁵⁷ Thompson said relatively little about private law later than the eighteenth century, although it was much on the minds of his critics in the law schools, notably the (sometimes *marxisant*) critical legal studies theorists, heirs of the legal realists of the 1930s,

⁵⁶ Christine Sypnowich, 'Utopia and the rule of law,' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford: Hart Publishing, 1999), pp. 178-95; Jeremy Waldron 'The Rule of Law and the Importance of Procedure' NYU School of Law Working Paper 10-73 ssrn.com/abstract=1688491, 2010; Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1-61.

⁵⁷ Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* (Minneapolis: University of Minnesota Press, 2013), borrowing from Giorgio Agamben the idea that law defines itself by what it excludes, argues that corporate law makes companies virtual sovereigns, from which the state's 'rule of law' is now excluded. On 'rule of law', he is more cautious than EPT, given the law's 'problematic structuring legality', but he notes (pp. 163-4) that *Whigs and Hunters* 'clarifies the stakes of abandoning liberal law as a political tactic.' I owe this reference to Harry Glasbeek.

who were exploring the indeterminacy of law.⁵⁸ They thought Thompson failed to see the manifold ways, perhaps particularly in a common law tradition, that law can be opportunistically reshaped to serve capital and state.⁵⁹ But we have seen that he was in fact acutely aware that the common law, and legislation, reflected the pressures of capitalist needs and ideologies in the eighteenth century, and in the twentieth. Deciding what ‘rule of law’ meant was always decided by *political* struggle. The institutions that supposedly preserve civil liberties and the rule of law—juries, independent judges, parliamentary oversight—would do so only if the public valued them, and understood their historical importance. Otherwise the security state would progressively subvert them—and the judges and parliament and civil service and police would be the co-conspirators. The argument has resonance today.

For his Marxist critics, the theoretical arguments were about three things: whether law could ever restrain the power of a ruling class, since it was the creation of that class; whether a basis/superstructure argument explained law; whether law was only conceivable in capitalism, and would not exist in a truly socialist (‘Communist?’) future state. Implicit in all three was a judgement about the justifications (if any) for revolutionary violence. Thompson thought all three issues were contaminated and confused by a new enthusiasm for old dogmatic Marxist positions, expressed in obscure and pretentious theoretical language by a Paris-based circle with growing influence on the British left, including on Perry Anderson, who published a book that was an all-out attack (sometimes respectful, sometimes unfair) on Thompson’s politics, history and theory, including his view of law.

Anderson protested that ‘A tyranny can perfectly well rule by law: its own laws.’⁶⁰ Thompson had made the point himself with respect to South Africa and the Communist bloc, and in all his histories. In his polemic against the ‘Parisian cabal’ (whom he believed largely Althusserian) he slyly suggested that their theories, irrelevant to England, were *perhaps* more germane to ‘Other Countries.’⁶¹ Thompson put the English jury at the very heart of his defence of law: what was

⁵⁸ Horwitz, ‘Rule of law’; Mieville, *Between Equal Rights*; Peter Gabel, Duncan Kennedy, et al., ‘Critical legal studies symposium’ (1984) 36 *Stanford Law Review* 1- 674; Roberto Unger, *The Critical Legal Studies Movement* (Cambridge MA; London: Harvard University Press, 1986) and 2nd ed. (London: Verso, 2015). The legal realist Karl Llewellyn provided a classic inventory of 111 opposing techniques of doctrinal interpretation facilitating enormous judicial discretion in common law judgements: *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), pp. 77-91, 521-35. Cf. Thompson’s apparent belief that ‘rules of law ... are exactly defined’ (below, ‘Conclusion’).

⁵⁹ See also the economist Joseph Stiglitz, *The Price of Inequality* (London: Penguin, 2012), pp. 238, 258: ‘those with wealth will use their political power to shape the rule of law to provide a framework within which they can exploit others.’ Thompson in 1963 referred to American ‘ruthless celebration of a human nature red in tooth and law.’ *Poverty of Theory*, pp. 55-6.

⁶⁰ Anderson, *Arguments*, pp. 69-73, 197-215.

⁶¹ Anderson defended Althusser, but with criticisms, and argued that Thompson ironically made similar, if opposite, theoretical errors. He declared Althusser no Stalinist; for Thompson it was

enforceable law in England was defined in significant measure by popular consent, and popular participation. ‘Other Countries’, we notice, did not have the jury.⁶² And it was with such institutions as the jury, habeas corpus appeals, and coroners’ inquests that ruling-class outrages had been contested over the centuries: law was a site of struggle, not a thing.

Thompson had always intensely disliked the ‘Marxist’ idea that law was only ‘superstructural’, a sort of epiphenomenon of an economic, mode-of-production ‘basis.’ It was an article of faith for Stalinists, but ambiguous in Marx. Thompson quoted instead Marx’s statement in the *Grundrisse* that

In all forms of society it is a determinate production and its relations which assign every other production and its relations their rank and influence. It is a general illumination in which all other colours are plunged and which modifies their specific tonalities. It is a special ether which defines the specific gravity of everything found in it.⁶³

Law, like all institutions, was bathed in the light of a mode of production—feudal or capitalist or socialist—not mechanically determined by it. But there was no really apposite metaphor. Critically, Thompson argued that law also necessarily *shaped* economic class relations. Law determined the bounds of markets, ownership, property relations—it was in fact ‘everywhere’, at every level, in the economic relations of society.⁶⁴ There, too, it could lead to resistance. This repudiation of the basis/superstructure metaphor had great political as well as analytic importance for Thompson. Vulgar Marxist denigration of bourgeois law as secondary to economic class relations led inexorably, for Stalin and Stalinists, to denigration of all those civil liberties gained and extended by popular, not just aristocratic or bourgeois, resistance over centuries. For Stalinists law was (simply) an expression of class power—bourgeois law under capitalism, proletarian law under Soviet Communism.⁶⁵ Thompson never forgot the bitter experience of Stalinist apologetics and its contempt for ‘bourgeois’ law.

enough that Althusser was long an ideologue and apologist of the French Communist Party, and conceded his intellectual debt to Stalin: Anderson, *Arguments*, pp. 113ff; Thompson, *Poverty of Theory*, pp. 271-2 and *passim*. Thompson thought Anderson himself was not an Althusserian, although he had adopted some of his ‘concepts and modes’: Abelove et al. (eds.), *Visions of History*, p. 17.

⁶² Or imported the manly English model only to emasculate it: Bernard Schnapper, *Voies nouvelles en histoire du droit: la justice, la famille, la répression pénale (XVIème – XXème siècles)* (Paris: Presses Universitaires de France, 1991); James M. Donovan, *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries* (University of North Carolina Press: Chapel Hill, 2010).

⁶³ *Poverty of Theory*, pp. 39, 52, 79ff; ‘Class struggle without class’, pp. 151-2; *Customs in Common*, pp. 73, 84.

⁶⁴ *Whigs and Hunters*, p. 261; *Poverty of Theory*, p. 288; *Persons and Polemics*, p. 222.

⁶⁵ Christine Sypnowich, *The Concept of Socialist Law* (Oxford: Oxford University Press, 1990), pp. 17-23.

Part of Thompson's dislike of the basis/superstructure model was his distrust of models *tout court*. His Marxist critics said he was erecting straw men, living in the past, that vulgar Marxism of the Stalinist variety had been entirely superseded by a nuanced understanding of the relationship of law to productive relations, notably in the notion of the 'relative autonomy' of law. And they accused Thompson of ignoring the ineluctable ties of law to the mode of production—feudal, capitalist, and 'truly' socialist.⁶⁶ His reply was that abstract models needed testing in historical research, research that had not been done by the 'new Cartesians' and other dogmatists. Not only Marxists, but also enthusiasts for capitalist 'modernization theory' (which he derided as imperialist propaganda) abandoned early, or did not even begin, the work necessary to validate their models. Attempts to salvage basis/superstructure under the guise of Poulantzas's 'relative autonomy' did not impress him.⁶⁷ Models were both abstract and static—yet economies, class relations, and political contexts were in constant movement, and only close historical work could discover, and perhaps explain, their movement and interaction. To pretend there was a magic theoretical key was self-delusion. He deplored the slight of hand by which Althusserian structuralism retained economic determinism in the theory while allowing absolute contingency in practice (empirical, historical) without ever doing any history. He excoriated Althusser's ignorant dismissals of actual historical practice, exemplified by such statements as 'The truth of history cannot be read in its manifest discourse, because the text of history is not a text in which a voice (the Logos) speaks, but the inaudible and illegible notation of the effects of a structure of structures.'⁶⁸ Any politics based on delusion and over-simple models had been shown, in Stalinism, to be a moral and human disaster. He did find Gramsci's idea of hegemony fruitful (but was told by some on the left that he misunderstood it.) And he never abandoned his belief that historical materialism was the only foundation for socialist analysis, as Marx held.⁶⁹

On the third theoretical issue, whether there would be law in a classless society, Thompson had no doubts. William Morris had believed that law would wither away with the state under Communism, that the end of private property, and shared abundance, would end the need for formal law. Thompson never thought so, probably because the abandonment of legal norms had so often been a pernicious escape from having to justify means as well as ends under Stalinism and fascism. In the late twentieth century to abandon such norms was 'a desperate error of intellectual abstraction.' It would never be wise, or possible, to 'dispense with the negative restrictions of bourgeois legalism.' Of such 'utopian projections', he declared, an historian 'can

⁶⁶ E.g. Merritt, 'The nature and functions of law'.

⁶⁷ *Poverty of Theory*, pp. 78, 260, 288ff, 404.

⁶⁸ *Reading Capital*, p. 17, quoted in *Poverty of Theory*, p. 207. See 'An open letter to Leszek Kolakowski' in *Poverty of Theory*, pp. 139, 141, and Ellen Meiksins Wood, 'Falling through the cracks: E.P. Thompson and the debate on base and superstructure', in Harvey J. Kaye and Keith McClelland, eds., *E.P. Thompson: Critical Perspectives* (Cambridge: Polity, 1990), ch.5 pp.125-152; Wood, 'Entre las fisuras teóricas: E. P. Thompson y el debate sobre la base y la superestructura' (1994) 18 *Historia Social* 103-124.

⁶⁹ Bryan D. Palmer, *E.P. Thompson: Objections and Oppositions* (London: Verso, 1994), chap. 4.

bring in support of them no historical evidence whatsoever.⁷⁰ That some ‘utopians’ were also apologists for revolutionary violence was probably important to him. Not only sectarian left groups but the Parisian ‘cabal’ (and hence their English admirers) were guilty. He was incensed by Jean-Paul Sartre’s preface to Frantz Fanon’s *Les damnés de la terre* (1961).⁷¹ What are we to make, he demanded, of its ‘emotional parasitism on the drama of revolution, its refurbishing of neo-Sorelian mystiques of violence? Of its preoccupation with mammoth intellectual apologias?’ He pointed to Belsen, Stalinist labour camps, the invasion of Budapest, and the atrocity of nuclear warfare. What might be relevant to a colonial resistance movement was dangerously misleading for British (and French) socialists.⁷² In 1978 he wrote, in words echoing his stance in 1956, ‘As a Marxist (or a Marxist-fragment) in the Labour Party [which he had rejoined in 1978], I have always tried to envisage a politics that will enable us, in this country, to effect a transition to a socialist society ... without rupturing the humane and tolerant disposition for which our working class has been noted.’⁷³

The argument in *Whigs and Hunters* is hardly mentioned, certainly not engaged, by many Marxist critics of Thompson’s work. Over the years many were more preoccupied with whether he understood Trotskyism (he saw it as an ‘anti-popery’ to Stalinism, and loathed its supporters’ tactics), or whether (as they said) he was a deluded enthusiast of Popular Front rather than ‘proper’ class politics, or was uncomradely in accusing Althusser of Stalinism, or had ditched the economic explanation of class for a ‘culturalist’ one, or had been bested by Perry Anderson in explaining England’s class history and the allegedly defective British inheritance of socialism, or had (perhaps) come to practise a Gramscian structuralism while denouncing the Althusserian variety. And Thompson’s appeals from 1956 on for a ‘socialist humanism’ were almost always passed off as deluded romanticism. He believed Althusser was particularly and personally dismissive, although others also stressed Thompson’s roots in the English romantic tradition, and cited his failure to reconcile Morris and Marx, or find a strategy in the 1960s to emulate the Popular Front of the 1930s. Often the rule of law passage is mentioned only in passing, in a hasty summary of his historical writing that betrays lack of knowledge of English history, or of

⁷⁰ *Whigs and Hunters*, p. 266. Sypnowich, *Concept of Socialist Law* presents a sustained argument, citing Thompson at several points, for the continued necessity of law in any future classless society. See also her ‘Utopia and the rule of law’ and ‘The left and wrongs: Marxism, law and torts,’ in Michael Lobban and Julia Moses (eds.), *The Impact of Ideas on Legal Development*, vol. 7, *Comparative Studies in the Development of the Law on Torts in Europe* (Cambridge: Cambridge University Press, 2012).

⁷¹ Translated, with the preface by Sartre, as *The Wretched of the Earth* (London: Macgibbon & Kee, 1965; Harmondsworth, Mddx: Penguin Books, 1967).

⁷² ‘Where are we now?’ memo written for the *New Left Review* meeting at which Thompson left the journal, April 1963, quoted in Scott Hamilton, *The Crisis of Theory: E.P. Thompson, the New Left, and Postwar British Politics* (Manchester: Manchester University Press, 2011), p. 103 and printed in E.P. Thompson, *E.P. Thompson and the Making of the New Left: Essays and Polemics*, ed. Cal Winslow (London: Lawrence & Wishart, 2014). See also McCann, pp. 61-71.

⁷³ *Writing by Candlelight*, p. 185.

the varieties of historical materialism. And for those wedded to a basis/superstructure explanation of law, Thompson was now simply a bourgeois liberal.⁷⁴

Ultimately, Thompson abandoned Marxist polemics after 1979, when a rancorous debate at a History Workshop conference emphasized these differences. Perhaps more important was the wider political context. He had hoped through the late 1960s and the 1970s that the ‘new left’ could make civil liberties a way to confront an increasingly authoritarian state, and he had actively collaborated with the National Council for Civil Liberties, and such groups as State Research during the notorious ‘ABC trial’ (1978) of three journalists under the *Official Secrets Act 1911*.⁷⁵ Through the 1970s and Thatcher’s victory (1979) and government, his conviction grew that Britain increasingly resembled the Weimar Republic, with a government that was destroying civil liberties and waging class war, while the sectarian Marxist left was consumed by dogmatic abstractions and tempted toward violence.⁷⁶ And the danger of nuclear annihilation made all else moot. In the 1980s he devoted almost all his energy to the European movement for nuclear disarmament, while remaining supportive of the struggle for civil liberties in Britain. At the end of his life he turned back to his long-neglected study of Blake, and Blake’s indictment of the laws of both religions and states for denying human justice.⁷⁷ Thompson, some say, was at heart, like Blake, a visionary rather than a vanguardist. Or a modern Muggletonian who struggled with the unresolvable antinomies of law and justice throughout his life.⁷⁸ In the 1976 postscript to *William Morris* he wrote

‘Marxism’, on its own, we now know, has never made anyone ‘good’ or ‘bad’, although a faith, arising from other sources but acclaimed as Marxism, has sustained epic courage, and a bad faith, arising from other sources but acclaimed as Marxism, has defiled the first premises of Marx. So what Marxism might do, for a change, is sit on its own head a little in the interests of Socialism’s heart.⁷⁹

Conclusion

⁷⁴ Thompson, ‘Socialist humanism’ (1957) 1 *New Reasoner* 105-143; *Poverty of Theory*, pp. 321-6; Christos Efstathiou, *E.P. Thompson: A Twentieth-Century Romantic* (London : Merlin Press, 2015). On Trotskyism and Popular Front politics see *Poverty of Theory*, pp. 76, 122, 124; Flowers and McIlroy, 1956, pp. 410ff.

⁷⁵ Christopher Moores, *Civil Liberties and Human Rights in Twentieth-Century Britain* (Cambridge: Cambridge University Press, 2017), pp. 145, 150-151, 166, 210, 211, 214.

⁷⁶ Palmer, *Thompson: Objections and Oppositions*, pp. 123-125 suggests his willingness to debate Marxist theory was ebbing, and ended with the History Workshop debate of 1979; Hamilton, *Crisis of Theory*, pp. 160-63 emphasises Thompson’s huge dismay at Indira Gandhi’s authoritarian rule during a visit he made in 1977-78; Koditschek, ‘The possibilities of theory’, p. 94 n.33 sees it in the categories of *Customs in Common* (1991).

⁷⁷ *Witness Against the Beast*.

⁷⁸ Hamilton, p. 194; Bob Fine, ‘The rule of law and Muggletonian Marxism: The perplexities of Edward Thompson’ (1994) 21 *Journal of Law and Society* 193-213.

⁷⁹ *William Morris*, p. 807.

In the early twenty-first century, more than two decades after Thompson's death, the spectre of fascism—rather than Stalinism—again informs the debate. It was not only a Stalinist Marxism that made the forms and rules and procedures of law a fraud—so too did Nazi Germany, and apartheid South Africa, to name only two where the facade of formalist law was preserved—and where the judiciary, for the most part, played their ideological roles—and preserved the interests of their class.⁸⁰

To those anxious to recruit him to the rule of law brigade, or to Marxist abstractions that he distrusted, Thompson's reply was that old institutions such as the jury

...have been the locus of intense historic struggles, the swaying to-and-fro motions of the contest between social classes. Each precedent signifies a contest between privilege and liberty, lost, gained, or held in the balance; and certain precedents have been signed in blood.... They are rules which may sometimes seem to trammel and limit us, but at the same time they limit the powers of those who would rule us and push us about. They are at one and the same time rules of conduct and the places where we fight about those rules.

... There is no such abstract entity as the Rule of Law, if by this we mean some ideal presence aloof from the ruck of history, which it is the business of judges to 'administer' and of policemen to 'enforce'. That is all ideology. It used to be the ideology of kings and despots. It is now the ideology of the authoritarian state.

If I have argued elsewhere that the rule of law is an 'unqualified human good'...I have done so as an historian and a materialist. The rule of law, in this sense, must always be historically, culturally, and, in general, nationally specific. It concerns the conduct of social life, and the regulations of conflicts, according to rules of law *which are exactly defined and have palpable and material evidences*—which rules attain toward consensual assent and are subject to interrogation and reform. That this itself is an ideal definition, which takes little account of social and ideological determinants of property and class, *and which has never been matched by social reality*, does not mean that the aspiration towards that state is not a human good.⁸¹

The weight one gives to each of those italicized passages (my emphases) will determine, for most readers, whether Thompson made a convincing case. He did make one other clarification:

⁸⁰ Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (1987; Cambridge MA: Harvard University Press, 1991); Meierhenrich, *Remnants of the Rechtsstaat*; Michael Lobban, *White Man's Justice: South African Political Trials in the Black Consciousness Era* (Oxford: Clarendon Press, 1996), pp. 252ff; Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge: Cambridge University Press, 2008), pp. 112-174. In both his studies Meierhenrich uses and expands Ernst Fraenkel's concept of the dual state.

⁸¹ *Writing by Candlelight*, p. 230.

‘Everything we have witnessed in this century suggests that no serious socialist thinker can suppose that a rule of some kind of law—albeit, socialist law and not capitalist law—is not a profound human good.’⁸²

END

⁸² Ablove et al. (eds.), *Visions of History*, p. 9.