

CHAPTER TWO:
THEORIZING STATE AGENCY AND THE LAW

Introduction

In this chapter I delineate the theoretical compass that gives direction to the present investigation. I begin with a critical review of previous sociological efforts at theorizing the state. I find similar problems with the two broad perspectives that have dominated sociological discourse on the political for a large part of the twentieth century, the “society-centered” and “state-centered” paradigms. In particular, I find that certain assumptions in both of these paradigms tend to lead to one-sided conceptions of political institutions and, quite often, to an untenable reductionism as well.²⁴

To avoid the one-dimensional and determinist predilections of the society-centered and state-centered approaches, a framework that is

²⁴ My criticisms of earlier state theorizing are nothing new (e. g. Jessop, 1990; Steinmetz, 1999a: 12-20; Tomlins, 1993: xi-xiv). I retread ground here because I feel the current character of state theorizing is best understood against this historical background.

explicitly more dialectical in nature is adopted here.²⁵ Specifically, I use the conceptual framework provided by Jessop's (1990) "strategic-relational" approach to state analysis. This approach recognizes the historically variable and contradictory relationships that exist between state structures, political actors and societal forces. I conclude the chapter with a brief discussion on the distinctive character of law and legal discourse within the state institutional system.

The Interregnum in Sociological Theorizing on the State

After a prolonged hiatus, the state once again returned to a prominent analytical position within the sociological project during the 1980s and 1990s (Evans et al., 1985a; Jessop, 1990: 338). Prior to this return, many sociologists in the United States and elsewhere had deemed issues of state to be either outside the discipline's purview or of little relevance for understanding the dynamics of contemporary social life (Badie and Birnbaum, 1983; King, 1986). Even specialists in "political

²⁵ If forced to label myself, I would say that my theoretical positioning is somewhere in between what is called "historical institutionalism" (e. g. Immergut, 1998; Steinmo et al, 1992) and certain strands of British Marxist sociology (e. g. Jessop 1990; Thompson 1975; and Woodiwiss 1990). I will elaborate on these influences as the chapter proceeds.

sociology", the disciplinary sub-field explicitly devoted to the analysis of "power in its social context" (Bottomore, 1979: 7), conspicuously neglected one of the central sites of institutionalized power in modern capitalist democracies. As one observer summarized, "[a] general feature of political sociology in a lengthy period following the classical theorists was the absence of a concern with the state" (King, 1986: 2).

This ironic neglect of the state by political sociologists and others in the discipline is only partially attributable to the intellectual heritage of sociology's classical tradition. Marx, for example, while not underestimating the significance of the political sphere, never "set out a comprehensive and systematic theory of the state" (Miliband, 1983: 3; see also Jessop, 1982: 1). The same can be said of Durkheim, who often addressed the social role of politics (e. g. Giddens, 1986), but ultimately relegated the state to a secondary position within his theoretical framework (Badie and Birnbaum, 1983: 11-17). Overall, these two founders set a pattern that was to be followed by their theoretical descendants in the Marxian and functionalist schools of sociology, respectively.

Of the classic tradition's leading triumvirate, Weber exhibited the most concern for matters of state (Giddens, 1972; Strinati, 1982: 2-3).

Issues of power and authority were central to the Weberian problematic, a focus so salient that some deem Weber "the true fountainhead of modern political sociology" (Badie and Birnbaum, 1983: 17). Indeed, as I will discuss below, Weber's definition of the state serves as a necessary starting point for nearly all later sociological analyses of the political. However, despite providing some reliable conceptual markers for later sociologists, Weber, like his two classical counterparts, also failed to systematically theorize the nature of state institutions.

Society-Centered Theories of the State

The influence of intellectual heritage aside, the widespread neglect of the state and other political institutions by many sociologists throughout most of the twentieth century is probably more directly attributable to the persistent hegemony of "society-centered" paradigms within the discipline (Skocpol, 1985: 3-7). Central to such paradigms was the assumption that political practice and institutions were ultimately determined by broader social forces. In particular, such phenomena as universal cultural values, a rationalized division of labor,

or important economic classes were seen as having causal priority in shaping human affairs. Consequently, at least until the 1970s, the state was not "taken very seriously [by sociologists] as an independent actor" (Skocpol, 1985: 4).

Despite a shared failure to systematically theorize the state, society-centered approaches do nonetheless vary widely in their precise conceptualizations of the political realm. In this regard, some lines of thought have more utility than others for present-day analysis. More important is the fact that an intellectual reaction to society-centered perspectives eventually emerged in the guise of the "state-centered" theories of the 1970s and 1980s, a development that has more direct implications for the approach I will present here. For these reasons, society-centered theories merit some review before proceeding.

The Liberal Tradition

The Liberal and Marxist traditions of sociology have each been long marked by relatively rigid society-centered perspectives on contemporary social life. Liberal theorizing has dominated American sociology in

general, and the field of political sociology in particular, under two different guises (Skocpol, 1985: 4). One is in the form of “structural-functionalism”, the orthodoxy of postwar sociology that permeated nearly all corners of the discipline. A second form is that of “pluralism”, the theoretical creed of political sociology proper, but which also finds expression in other quarters (Skocpol, 1980: 157). Given their mutual grounding in Liberal domain assumptions, these two variants mesh together well, with structural-functionalism's "sociology of differentiation" providing the macro-level complement to pluralism's more micro-oriented "sociology of democracy."²⁶

Structural-functionalist and pluralist theorizing converge in the predilection to treat the state as relatively unproblematic. With the former, for example, conceptions of the state are derived from a broader analytical concern with processes of social differentiation. Specifically, the emergence and growth of political institutions is depicted as a consequence of the increasing societal division of labor (e. g. Parsons,

²⁶ Badie and Birnbaum (1983: 25-64) use the term ‘sociology of differentiation’ to characterize structural-functionalist political sociology. The term ‘sociology of democracy’ is drawn from King's (1986: 1-29) discussion of postwar pluralist political sociology.

1966; 1969; 1971).²⁷ Since this differentiation process is assumed to be inherently rational and progressive,²⁸ the state is deductively imbued with these same characteristics as well. As noted by Badie and Birnbaum (1983: 27), in the functionalist view:

[T]he state is one aspect of the rationalizing process that takes place in all societies undergoing modernization... Accordingly, the state is an evolutionary development...and the welfare state is the end result toward which political development leads in all societies.

The assumption that the democratic welfare state typical of Western industrialized societies is at the apex of evolutionary progress serves to mitigate the impetus for more critical theoretical analysis. Though the aberrant need for institutional fine-tuning might arise, the modern state complex is taken as fundamentally legitimate and as functioning beneficially for the societal whole. This being the case, structural-functionalists often turn their theoretical attention to societies deemed less "politically developed".²⁹ The rationale is that the political

²⁷ For assessments of Talcott Parsons' contributions to political sociology in general and state theory in particular, see Badie and Birnbaum (1983: 25-64) and Buxton (1985).

²⁸ As it is in the works of Parsons and other structural-functionalists (e. g. Huntington, 1968) who selectively meld elements of the Durkheimian and Weberian metanarratives.

²⁹ Two examples of structural-functionalist theories of "modernization" or "political development" include Almond et al. (1973) and Eisenstadt (1966).

progression of nations along the evolutionary scale can be partially accelerated through social engineering. Yet even these efforts spend little intellectual energy theorizing the state per se. Rather, the focus is primarily on processes of differentiation, industrialization, and other broad preconditions necessary for "nation-building" and democratization (Badie and Birnbaum, 1983: 27-48).

If structural-functionalists lose sight of the state because of the breadth of their theoretical vision, pluralists do likewise because of their more limited analytical scope. The earlier work of Lipset (e. g. 1959) provides a case in point.³⁰ Though concurring that the modern democratic welfare state is the pinnacle of political development, Lipset departs from his more macro-oriented counterparts within the Liberal tradition by setting his theoretical sights on the internal processes of contemporary capitalist democracies. The primary focus thus moves from the societal prerequisites for democratization to more derivative phenomena such as voting behavior, political party dynamics, and interest group formation within existing democracies. Ultimately, then,

³⁰ Lipset's approach exemplifies the close intellectual affinity between pluralism and structural-functionalism. Specifically, the evolutionary metanarrative of the latter can be said to serve as the ontological backdrop for the empirical studies of the former (Buxton, 1985: 220-235; King, 1986: 8-16).

pluralist political sociology becomes no more than a historically specific and substantively limited "sociology of democracy" (King, 1986: 1-29).

Despite its narrower focus, the pluralist approach of Lipset and others (e. g. Dahl, 1961; 1967) shares with structural-functionalism the tendency to insufficiently theorize the state. For most pluralists the democratic welfare state is taken as an a priori of modernity. That is, the state is portrayed as a relatively neutral institutional framework, the conscious product of broad public consensus and equally accessible to all special interest groups, regardless of their societal grounding. Yet, Skocpol (1980: 157) charges that pluralist political sociology:

offers little that would help explain major institutional transformations in history.....[Furthermore] pluralists fail to offer (or seek) well-developed explanations of how economic and political institutions variously influence [interest] group formation and intergroup conflict.

Ultimately, most pluralists devote their analytical attention not to the state itself, but to the political processes taking place within it.³¹

³¹ In many instances, the state not only remains unquestioned but recedes almost entirely from view. Localized "community power structure" research (e. g. Dahl, 1961; Hunter, 1963) is a case in point. For a critical overview of this strain of pluralist analysis, see Mollenkopf (1975).

The Marxist Tradition

Historical developments in Marxist state theorizing parallel those of the Liberal tradition. Specifically, most Marxists also have long exhibited either one of two tendencies: the systematic neglect of the political sphere or the subordination of the state under what are viewed as more fundamental social forces. Indeed, perhaps Marxists have more difficulty escaping the hegemony of society-centered thinking than those adhering to functionalist or pluralist viewpoints. The centrality of class relations within the Marxian paradigm frequently leads to the attribution of causal primacy to these same relations when it comes to interpreting other facets of social life, the political realm included.

As noted earlier, Marx never systematically developed a theory of the state (Jessop, 1982: 1; Miliband, 1983: 3). However, Marx can still be held partially responsible for the theoretical tendencies of his intellectual descendants, for he left ample textual fodder that allowed for numerous constructions of a plausible "Marxist state theory" (Jessop, 1990: 25-29). Indeed, this post-Marx exegetical free-for-all spurred Lefebvre (1969: 123) to proclaim thirty years ago that no "other aspect of Marxian thought has been so greatly blurred, distorted, and befogged" as

that concerning the role of the state. Regardless of the many interpretive possibilities, however, most analysts have now reached a consensus that Marx's writings are best characterized as exhibiting the embryonic elements of not one but two visions of the political state (e. g. Badie and Birnbaum, 1983: 3; Held, 1983: 1-55; Miliband, 1983).

One of these can be labeled the “instrumental view”, the more theoretically crude, yet more widely received, of the two visions. Marx and Engels' ([1848] 1967: 82) often-quoted statement that “[t]he executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie” captures the instrumentalist view most succinctly. Specifically, the state is conceptualized as a mechanism or tool strategically employed by the capitalist class to ensure its continued hegemony (also see Marx and Engels [1846] 1977: 79-80). In effect, political rule is treated as subordinate to class rule.

However, elements of another theory of the state are also found within the writings of Marx. What is here deemed the “dialectical view” exhibits both a greater sensitivity to historical variation and is less reductionistic in terms of explanation. Importantly, this conception recognizes that the political sphere may at times have significant autonomy vis-à-vis the economic substructure, yet at other junctures

may be strongly constrained by class relations. In effect, the nature and character of politics and the state become historical questions that cannot be definitively captured once and for all.³²

The later intellectual development of these two differing Marxist conceptions of the state has been historically uneven. In particular, the more sophisticated dialectical view has long suffered neglect in favor of the more simplistic instrumentalist view. Of course, even the latter view was significantly ignored in the first few decades after Marx's death. This result primarily occurred because Marxist theorizing increasingly fell under the pall of positivistic epistemology during the late nineteenth and early twentieth centuries. Marx's longtime colleague Engels can in part be blamed for this positivistic movement (e. g. Callincos, 1983: 61; Lichtheim, 1961: 238), for his version of "dialectical materialism" coupled a rigid scientific method with a strict evolutionary determinism. This hybridization resulted in the "dogmatic metaphysical system" that ultimately became the orthodoxy of many later Marxists (McLellan, 1979: 9).

³² The dialectical conception can be found in *The Eighteenth Brumaire of Louis Bonaparte*, for example, where Marx ([1852] 1963: 122-123) observes that "[o]nly under the second Bonaparte does the state seem to have made itself completely independent". Also see Marx ([1850] 1978: 587; [1875] 1972).

The theoretical consequences of this epistemological shift were most clearly manifested in the works of Second International Marxists.³³ Their intellectual products were typically caricatures of Marx's thought, often taking the form of a strict economic reductionism buttressed by a rigid historical metanarrative professing the inevitability of socialist revolution. During this period, two polar movements served to lessen the importance of the state as an object of theoretical concern. On the one hand, the "orthodox" wing of the Second International uncritically adopted the instrumentalist position that the state was a tool of the capitalist class. Since the state's bourgeois nature was assumed a priori, and its eventual destruction historically assured, there was little cause to devote much theoretical attention to the matter.³⁴ Those within the Second International's "revisionist" wing, on the other hand, felt that socialist advances could be made within the existing political framework. Thus, revisionist Marxists focused the bulk of their analytical energies on

³³ The Second International covers the period from 1889 to 1914 (Kolakowski (1978: 1-2).

³⁴ The work of Karl Kautsky (1910, 1983) exemplifies the orthodox position within Second International Marxism.

the nature of reformist politics occurring within existing state structures, not on the nature of the state per se.³⁵

The economic determinism of the Second International cast a long shadow over later Marxist theorizing on the state. Indeed, the instrumentalist view eventually became accepted as the Marxian theory of the state. As Lenin ([1918] 1943: 9; emphasis in original) confidently asserted:

According to Marx, the state is an organ of class domination, an organ of oppression of one class by another; its aim is the creation of "order" which legalises and perpetuates this oppression by moderating the collisions between classes.

Lenin's selective interpretation effectively obscures the existence of Marx's dialectical view of the state. Perhaps more importantly, Lenin's ubiquitous intellectual and historical influence virtually suspended Marxist theorizing on the state for several decades, since many considered the political issue essentially resolved.

The effects of Lenin's narrowing of Marxist discourse on the state become most manifest a half-century later in the debate between Ralph

³⁵ The work of Eduard Bernstein ([1909] 1961) exemplifies the revisionist branch of Second International Marxism.

Miliband and Nicos Poulantzas.³⁶ For his part, Miliband (1969) elaborated a theory of the state that focused on the class interests of individual state managers. He asserted that the state acted at the behest of capital because the “state elite” (1969: 54) were recruited directly from the capitalist class and/or from social backgrounds that generated interests dove-tailing with those of the bourgeoisie.³⁷

Ironically, Poulantzas ([1968] 1973: 241) attacked Miliband's theory for ultimately being “non-Marxist”. He charged that Miliband's voluntarist and empiricist tendencies involved moving on to the “epistemological terrain” of Liberal bourgeois ideology. Poulantzas ([1969] 1973: 242; emphasis in original) asserted that a true Marxist theory perceived “social classes and the state as objective structures... whose agents, 'men', are in the words of Marx, 'bearers' of [these structures]”. This being the case, “if the function of the State in a determinate social formation and the interests of the dominant class coincide, it is by reason of the system itself: the direct participation of

³⁶ The exchanges between these two and the works that sparked the debate (e. g. Miliband, 1969, 1970, 1973; Poulantzas, 1968 [1973], 1969, 1976) served as catalysts for the plethora of state analyses, Marxist and non-Marxist alike, of the 1970s and 1980s.

³⁷ Miliband's argument is very similar in form to that of American “power elite” theorists such as Mills (1956) and Domhoff (1967; 1970; 1979).

members of the ruling class in the State apparatus is not the cause but the effect..." (Poulantzas ([1969] 1973: 245; emphasis in original).

While focusing on a different causal mechanism,³⁸ Poulantzas does concur with Miliband that the primary function of the capitalist state is the reproduction and maintenance of capitalist social relations. Both accounts are thus reductionistic, albeit they diverge over the relative importance of economic structures and the agency of the capitalist class. Most importantly, by the early 1970s Marxist discourse on the state had been narrowed to such an extent that theoretical debate and elaboration occurred primarily within the instrumentalist paradigm only. Marx's more dialectical insights into the state and political power had effectively been forgotten.

Though the theories of Miliband and Poulantzas may have been old wine in new and more elaborate bottles, their exchange proved pivotal for later state theorizing in two respects. First, the debate sparked a remarkable proliferation of state analyses within the Marxist tradition throughout the 1970s and 1980s. While some of these later efforts represented only minor variations on earlier works, they served to

³⁸ This divergence over the importance of agency and structure is also reflected at a broader level within Marxist theorizing, specifically in E. P. Thompson's (1978) critique of Louis Althusser's (e. g. 1969) interpretation of Marx as a structuralist. For a useful overview of both debates and their importance for state theory, see Alford and Friedland (1985: 275-279; 325-328).

entrench the state within the theoretical purview of Marxism and eventually laid the necessary groundwork for the development of more fruitful approaches.³⁹ Second, the debate also gave impetus to another movement within sociological theorizing on the state: "state-centered" theories.

State-Centered Theories of the State

Zeitlin (1985: 16; emphasis in original) summarizes the corpus of society-centered thinking on the state, Liberal and Marxist alike, quite succinctly:

[W]e find [only] two basic conceptions of the state...[e]ither the state appears as an arena within which contending social groups strive to impose their wills, or as a functional entity performing necessary tasks of coordination and conflict resolution which are beyond the capacity of the individual social actors, whether to the advantage of a dominant class or of a broader public interest.

As I argued above, such paradigmatic proclivities led to sociology's long neglect and persistent under-theorization of the state. Against this

³⁹ As for the wide array of Marxist theories of the state produced in more recent decades, see Carnoy (1984), Gold et al. (1975) and Jessop (1982, 1990) for critical overviews.

intellectual backdrop, however, a concerted effort emerged during the 1970s and 1980s that aimed to “bring the state back in” to sociological analysis and discourse.

Skocpol and Block

Theda Skocpol (e. g. 1979, 1980) was arguably one of the most recognized and forceful proponents of state-centered thinking. Asserting that “an intellectual sea change [was] under way”, Skocpol (1985: 4) posited a drastic “paradigmatic shift” in a wide array of social scientific disciplines. In particular, Skocpol argued that the society-centered perspectives of the 1950s and 1960s had been undermined by “a fundamental rethinking of the role of states in relation to economies and societies” (Skocpol, 1985: 7). Though emanating from a variety of quarters, these reassessments of the causal significance of political organizations coalesced into a more or less coherent “state-centered paradigm” that dominated much of the macro-comparative social analyses of the 1970s and 1980s. Indeed, as Skocpol (1985: 6) then

noted, “it [had become] fashionable to speak of states as actors and as society-shaping institutional structures.”

Skocpol (1985: 7-9) traces the roots of state-centered thinking to two early twentieth century German intellectuals, Max Weber and Otto Hintze. Specifically, a selective combination of insights from these thinkers provided the conceptual foundation necessary for delineating the state’s potential for autonomous agency vis-à-vis other social forces. The conceptual notion that states are “compulsory associations claiming control over territories and the people within in them” (Skocpol, 1985: 7) is derived from Weber (e. g. 1947). Added to this are Hintze’s insights on the Janus-faced nature of the modern state. As summarized by Skocpol (1985: 8), Hintze’s view is that along with the pressures and exigencies of the internal, domestic arena, “historically changing transnational contexts...impinge on individual states through geopolitical relations of interstate domination and competition, through the international communication of ideals and models of public policy, and through world economic patterns of trade, division of production activities, investment flows, and international finance.” Ultimately, it is this strategic social position and dual orientation that allows the possibility for independent or autonomous state activity.

In delineating her own views on the nature of state autonomy, Skocpol focuses on two related, yet distinct, elements. First, a pivotal precondition for the development of state autonomy is the ability of state managers to “formulate and pursue goals that are not simply reflective of the demands or interests of social groups, classes or society” (Skocpol, 1985: 9). Indeed, such independent goal formation is the sine qua non of state autonomy, and the Weberian-Hintzian depiction of the state allows insight into this process. Skocpol (1985: 9) elaborates:

The linkage of states into transnational structures and into international flows of communication may encourage leading state officials to pursue transformative strategies in the face of indifference or resistance from politically weighty social forces. Similarly, the basic need of states to maintain [domestic] control and order may spur state-initiated reforms (as well as repression).

Aside from the possibility of formulating their own distinct agendas, the ability of state managers to achieve these interests is a separate matter entirely. Such “state capacities” are the second element of state autonomy focused on by Skocpol. What she refers to here is the state’s organizational and/or structural powers to realize specific political and social agendas. According to Skocpol (1985: 16), these capacities include, but are not limited to, the following:

Obviously, sheer sovereign integrity and the stable administrative-military control of a given territory are

preconditions for any state's ability to implement policies. Beyond this, loyal and skilled officials and plentiful financial resources are basic to state effectiveness in attaining all sorts of goals.

Skocpol (1985: 16) adds that “[c]ertain of these resources come to be rooted in institutional relationships that are slow to change and relatively impervious to short-term manipulations”, a point which alludes to the historical variability and problematic nature of state capacities for goal realization.⁴⁰

While Skocpol's elaboration on the nature of state autonomy is certainly valuable, some contend that she at times goes too far in her efforts to 'bring the state back in'. Fred Block (1987: 20), for example, contends that “there is both a soft and a hard version of Skocpol's position.” The former version still retains an emphasis on the importance of non-state forces in shaping political and social life while simultaneously arguing for a greater focus on the independent effects of the political. The latter, and more prevalent, version tends to be more extreme with respect to the causal priority of the state. As noted by Block (1987: 20), the “harder version of Skocpol's argument...claims that state-centered variables are more important than society-centered variables in explaining particular historical outcomes.” Furthermore:

⁴⁰ I will address this pivotal issue in more detail later in this chapter.

This version appears in a number of her case studies of particular policy outcomes, so there is ambiguity as to whether the superiority of state-centered variables is specific to these cases or is being invoked as a more general principle. But either way, she is in the position of arguing that for these cases, [society-centered] accounts are not just incomplete; they are simply wrong..." (Block, 1987: 20).

Thus, Skocpol can sometimes be construed as positing a simplistic state determinism, with other social phenomena depicted as secondary to the political. In effect, the mono-causal character of the society-centered paradigm has been inverted.

Block's own view of state autonomy converges with what he labeled Skocpol's "soft version". He depicts state actions and policies as the product of a triadic web of conflict "among three sets of agents--the capitalist class, the managers of the state apparatus, and the working class" (Block, 1987: 52). While his view of the relationship between capitalist and working classes follows that of traditional Marxism, his view of the state departs significantly from crude instrumentalism. Block specifically posits a division of labor in the capitalist rationalization process, with the state assuming the pivotal task of reproducing the economic and political order. In effect, the state maintains the social conditions necessary for capital accumulation to

continue, because no specific members of the capitalist class can or are willing to do this themselves.⁴¹

State managers fulfill this maintenance function not because they are themselves bourgeoisie or because they are instrumental pawns of the dominant class. Rather, the power and position of state managers themselves are contingent on the continuation of the existing capitalist system. Specifically, state managers are dependent on a healthy capitalist economy materially, for financial resources, and ideologically, for purposes of continued legitimacy (Block, 1987: 58). Thus, state managers act to maintain favorable conditions for capital accumulation, or what Block (1987: 59) labels “business confidence”, because it is typically in their own specific interests to do so.

While Block’s theory may appear to fall back into society-centered thinking because of its emphasis on the structural requirements of capitalism, he does leave open the possibility for a more fundamental state autonomy at two junctures. First, given their role as “ideal collective capitalists”, to borrow Offe’s (e. g. 1972, 1975) term, state managers have substantial leeway in terms of what political and economic interests are met with respect to particular policies and

⁴¹ This view is similar to that of Claus Offe (1972; 1975). See Carnoy’s (1984: 217-219) discussion of the link between the two theorists.

activities. The state thus has discretion in terms of what concessions are to be made with respect to various capitalist or working class demands. Second, state managers may at times be in a position to virtually ignore the majority of society-based interests and pursue their own strategic agenda. For Block (1987: 66), however, such instances are quite exceptional, occurring only in “certain periods--during war time, major depressions, and periods of postwar reconstruction--in which the decline of business confidence as a veto on government policies doesn’t work.”

Moving Beyond Society-Centered and State-Centered Theorizing

Though providing a necessary corrective to the one-sided analyses of earlier society-centered theories, many state-centered theories suffered many of the same critical flaws as their predecessors. At a general level, for example, Zeitlin (1985: 30) notes that for those thinkers in the state-centered paradigm:

[S]tates [either] are essentially instruments in the hands of a politically defined ruling elite, or...they are the functional products of the need for domestic order and political authority created by the impossibility of escaping a Hobbesian state of nature in the international arena.

Recall that I quoted Zeitlin earlier as leveling a similar charge against Liberal and Marxist thinkers of the society-centered tradition. Indeed, Zeitlin (1985: 16-25) contends that both paradigms ironically put forth similar conceptions of the state, depicting it as either an institutional “arena” for interest group struggles or as a “functional” response to environmental contingencies.

I think two pivotal problems account for this convergence of the seemingly antithetical paradigms. These problems, while evidenced in both society-centered and state-centered analyses, are most visible in the work of the latter however. This occurs because state-centered theorists, having explicitly brought the political ‘back in’ to sociological discourse, also devote substantially more attention to the detailed character of state institutions. For this reason, I use their works as the primary examples in the discussion below.

The first problem inheres in the conceptualization of state agency. Both Block (1987: 52-58) and Skocpol (1985: 9), for example, frequently portrayed state managers as a more or less homogenous group with their own convergent interests vis-à-vis other groups in society.⁴² This convergence was typically characterized as the product of bureaucratic

⁴² A view also sharply evidenced by instrumental Marxist perspectives.

positioning and/or of the careerist orientations of many government officials. Furthermore, while in pursuit of their distinct interests, state managers were also depicted as having relatively unproblematic access to the state's organizational resources. In effect, "the state" is often viewed as a coherent, singular political agent.

This view of the state "as essentially an actor, with the coherence, agency, and autonomy this term presumes" (Mitchell, 1999: 84), proves both theoretically crude and empirically untenable. Given that state-centered theorists recognize the historical variability of state capacities, and to a lesser extent that of state independence from other social forces (e. g. Block, 1987: 66), it should logically follow that the coherence of state agency itself, and the coordinative integration of its institutional components, would be contingent as well. As elaborated by Zeitlin (1985: 30):

Since states are not 'real historical subjects' or unitary, rational actors, but complex associations of many individual agents, there can be no presumption that they will produce coherent, decisive policies without some definite institutional mechanism for resolving conflicts between competing decision-centres. The forms and effectiveness of such mechanisms are a product of each state's individual history and therefore differ considerably from case to case.

Unfortunately, Skocpol and Block failed to systematically develop their analyses with respect to this point, continually attributing state actions

and policies “to the state as an originating subject” (Jessop, 1990: 9; emphasis in original). In effect, state-centered theorists fail to ask what should be a pivotal question for any sociological theory of the state: how does the “state” attain a level of coherence and unity that allows it to appear as an autonomous and distinct “actor” or “agent” within a particular social formation?

The second problem area follows from the first and involves the hypostatization of the distinction between “state” and “society”. While this dichotomy may have a long intellectual history both within and outside the discipline of sociology, the emergence of explicit “state-centered” analysis in the 1980s served to reinforce and exacerbate the conceptual division. Though Block’s distinction between a triad of state managers and two economically-constituted social classes ultimately has the same effect, Skocpol’s position appears to be more extreme. As asserted by Jessop (1990: 286), Skocpol aims:

to drive a wedge between state and society as analytical categories and thereby rule out any derivation of the state from the mode of production and/or from class dynamics. In particular, [Skocpol tends] to present ‘state’ and ‘society’ as separate, polar opposites, thereby denying the presence of classes and class struggle within the state as well as the idea that the state could serve class interests.

Overall, Jessop (1990: 278-288) ultimately contends that Skocpol and other “statists” are essentially engaged in an “anti-Marxist” effort, with the demonstration of consistent and powerful state autonomy being a primary means to achieve this end.

Whether or not Skocpol and other state-centered theorists are actually engaged in such an effort is not particularly relevant here. What is significant is the continued maintenance of a dichotomy that proves detrimental to a fuller sociological understanding of the nature and role of political institutions in contemporary social life. A marked conceptual distinction between “state” and “society” presupposes reified boundaries between spheres that can be depicted as specifically “political” and those that are specifically “social”. Given the complexity of modern nation-states, delineating such boundaries clearly entails a large degree of arbitrariness.

More important, even assuming such a separation can be tentatively made, the boundaries between “state” and “society” would need to be perpetually redrawn because the myriad relationships between the two spheres are constantly changing.⁴³ Zeitlin (1985: 30)

⁴³ As I will discuss later, even if the conceptual distinction between ‘state’ and ‘society’ is retained merely for purposes of exposition, it is necessary to speak of a plurality of relationships between the two spheres. Specifically, both state and society are to be conceptualized as heterogeneous entities whose numerous articulations can vary in both degrees and directions of influence.

contends, for example, that the state's "relationship with civil society", like the state's unity and coherence, also varies over time. The end result of this historical variability is a concrete and empirical melding of the social and political arenas, a melding which cannot be adequately captured from a theoretical vantage point that grounds itself on a state versus society dualism. As Zeitlin (1985: 31) continues:

Whether this blurring of the line between state and society results from formal constitutional structures or the informal realities of power...it then becomes essential to supplement a [state-centered] approach with insights drawn from society-centred theories which draw attention to the limits of executive authority and the penetration of social forces into the state machinery itself.

Quite simply, if maintaining the state/society dualism is not empirically viable, then neither is the adherence to a strictly state-centered or society-centered theoretical perspective.

Two recent movements in the social sciences explicitly aim to avoid the problems associated with conceptualizing state agency and the state/society distinction that I have outlined above, and each thus serves to propel the present investigation. One is historical institutionalism, arguably the most original and useful variant of the "new institutionalism" that swept sociology, political science and related disciplines in the United States during the later 1980s and 1990s (e. g.

Immergut, 1998; Turner, 1991: 222). Historical institutionalists, by explicitly recognizing that political actors are simultaneously "objects" and "agents" of history (Thelen and Steinmo, 1992: 2), are acutely aware of the problematic nature of political strategies. Thus, for the historical institutionalist, the question of state agency is best addressed empirically rather than abstractly. Furthermore, with a primary focus on actual social institutions in their historical contexts, historical institutionalists avoid the pitfalls of perspectives that are strictly society-centered or state-centered by recognizing the variable nature of "the institutional arrangements that structure relations between" state and society (Thelen and Steinmo, 1992: 10).

A second theoretical movement influencing the current research is more heterogeneous and less cohesive in nature, with the main unifying thread being an emphasis on the relationship between cultural and political practice. The recent volume edited by Steinmetz (1999a) brings several of these studies together, and I find the contributions of Bourdieu (1999), Jessop (1999), Mitchell (1999), and Steinmetz (1999b) to be particularly useful. Indeed, as I will delineate in the next section, it is the earlier work of Jessop (1990) that provides many of the conceptual markers for the present investigation. For now, let me simply quote at

length a passage from Mitchell (1999: 84) that captures not only how the cultural approach deals with the twin problems of state agency and the state/society distinction, what he jointly labels the "state effect", but also how state-centered approaches are misdirected:

[T]he state is no longer to be taken as essentially an actor, with the coherence, agency, and autonomy this term presumes. The multiple arrangements that produce the apparent separateness of the state create effects of agency and partial autonomy, with concrete consequences. Yet such agency will always be contingent on the production of [cultural] difference--those practices that create the apparent boundary between state and society. These arrangements may be so effective, however, as to make things appear the reverse of this. The state comes to be seen an autonomous starting point, as an actor that intervenes in society. Statist approaches to political analysis take this reversal for reality.

A Strategy-Centered Approach to the State

I delineate below a more fertile theoretical approach for the sociological investigation of contemporary state institutions, one that takes explicit measures to avoid the problems inherent in rigid society-centered or state-centered perspectives. Building specifically on the work of Jessop (1982; 1990), who at times has labeled his position "strategic-

relational" or "strategic-theoretical" (e. g. Jessop, 1990: 248-277), I loosely characterize this approach as a "strategy-centered" perspective. However, though relying heavily on Jessop's conceptual template, I attempt to go beyond his work in two key respects. First, and most important, the possible roles that law and legal institutions can play with respect to particular state strategies are more fully developed. Second, I make an effort to mitigate some of the latent structuralist tendencies evident in Jessop's framework by adopting an orientation that is more explicitly dialectical. Overall, this strategy-centered approach lays the theoretical moorings for the present study's investigation of state labor law practices and union crises in Great Britain and the United States.

The State as Political Strategy

Jessop's strategic-relational theory of the state is less about what the state is and more about how it comes to be a concrete, societal force. To this end, he is quite reluctant to precisely define "the state", a task

deemed both conceptually impossible and theoretically counter-productive. Indeed, Jessop (1990: 340-341) declares that:

[I]t is not a proper job for state theorists to offer a definition which specifies once and for all the abstract, formal characteristics of the state. Instead, it is their task gradually to build up an understanding of the state as a form-determined social relation through a steady spiral movement from abstract to concrete and from simple to complex.

In effect, such definitional or conceptual endeavors invariably result in a static and exaggerated reification of “the state”, which in turn may lead to the reductionistic and dualistic reasoning evidenced by the various society-centered and state-centered theories discussed above.

This being said, Jessop (1990: 341-342) nevertheless does provide a broad characterization of “the state” for heuristic purposes.

Encompassing “state discourse as well as state institutions”, Jessop’s (1990: 341) “general definition” is as follows:

The core of the state apparatus comprises a distinct ensemble of institutions and organizations whose socially accepted function is to define and enforce collectively binding decisions on the members of a society in the name of their common interest or general will.

While converging with the Weberian conception (i. e. the state as enforcer of collectively binding decisions), Jessop’s view also entails, as he terms it, a “neo-Gramscian” component. Specifically, he contends that

the emphasis on political discourse regarding the ‘common interest or general will’ as “a key feature of the state system...[distinguishes the state] from straightforward political domination or violent oppression” (Jessop, 1990: 341).⁴⁴ Thus, the state’s ideological or “hegemonic” ruling practices are recognized as having parity with those practices that are more material or directly coercive in nature.

Jessop (1990: 342) stresses that several “qualifications are required if [his] definition is to be useful in organizing research.” By means of these caveats Jessop strives to avoid the two problems noted earlier that hamper both society-centered and state-centered theorizing. With regard to the state/society dualism, for example, Jessop (1990: 342) emphasizes that “[s]tates never achieve full closure or complete separation from society and their precise boundaries are usually in doubt.” Furthermore, “[society]...should no more be interpreted as an empirical given than the state” (Jessop, 1990: 342). Ultimately, then, the existence of either “state” or “society” should not be taken a priori.

If the existence of a distinctly political, or state, sphere is itself problematic, the notion of state agency, another key problem in state theorizing noted above, must also be at issue. Indeed, Jessop’s strategy-

⁴⁴ For a more recent discussion on state practices and the construction of a universal or general "societal interest", see Bourdieu (1999: 68-72).

centered approach successfully avoids the pitfall of hypostatizing or reifying state agency as well. Being an ‘ensemble of institutions and organizations’, the state system has no pre-given organizational unity, no permanent center of power, and no predetermined relationship with the broader social formation. As Jessop (1990: 341) notes, for example, “not all forms of macro-political organization can be classed as statelike, nor can the state simply be equated with government, law, bureaucracy, a coercive apparatus or another political institution.” Overall, these common structural features of most state systems are historically constructed and socially contingent, and it is the particular articulation of the institutional ensemble at a specific juncture that provides the raw materials necessary, but not sufficient, for state agency.

To gain further insight into the state’s contextual variability and the conditions sufficient to constitute state agency, Jessop (1990: 260) more narrowly conceptualizes the state as a “political strategy”. Specifically, he argues that the state is best viewed as “a social relation which can...be analysed as the site, the generator and the product of [political] strategies” (Jessop, 1990: 260). With regard to the state being both a product and site of political strategies, Jessop is referring to the aforementioned historical constitution and structural configuration,

respectively, of the state system. In effect, as a variably integrated institutional ensemble, any existing state system has been shaped by the political strategies of earlier groups and is currently more receptive to particular strategic endeavors rather than to others.⁴⁵

I will return to what Jessop (1990: 260-261) terms the “strategic selectivity” of the state shortly. The notion of the state as a “generator” of political strategies is presently of critical significance, for herein the problem of state agency is specifically addressed. Jessop (1990: 261) points out, for example, that “one cannot understand the unity of the state system without referring to political strategies; nor can one understand the activities of the state without referring to political strategies.” More to the point, the generation of such strategies within the state system itself gives rise to and allows for coordinated state action. As Jessop (1990: 261) elaborates, if one wants an answer to the question “of how the state comes to act, if at all, as a unified political force”, then “we must examine the different strategies and tactics which state managers develop to impose a measure of coherence on the activities of the state.”

⁴⁵ Thelen and Steinmo (1992: 28) make a similar observation, noting that state institutions “are the product of political conflict and choice but...at the same time constrain and shape political strategies and behaviors.”

State Projects

In referring to the strategic activities of state managers, Jessop (1990: 9) uses the term “state project”, an idea whose “essential theoretical function is to sensitize us to the inherent improbability of the existence of a unified state and to indicate the need to examine the structural and strategic factors which contribute to the existence of ‘state effects’”. More to the point, a ‘state project’ refers to the political agenda of a particular group of state actors as they engage in “explicit attempts to coordinate the action of different organizations, structures and systems to produce specific results” (Jessop, 1990: 360). Ultimately, then, state projects give the state “a certain organizational unity and cohesiveness of purpose”, effectively bonding together the “institutional building blocks” of the state system and setting them in motion (Jessop, 1990: 353). Only with this coupling of state structures and a particular

strategic state project can the state be described as an actor with the potential to impact on other societal spheres.⁴⁶

Jessop (1990: 9; emphasis in original) is clear in his emphasis, however, that even when speaking of “state agency” in this specific sense, “state actions should not be attributed to the state as an originating subject but should be understood as the emergent, complex resultant of what rival ‘states within the state’ have done and are doing on a complex strategic terrain.” In effect, the coupling or articulation of concrete state structures and a particular political strategy does not make the state, even temporarily, a completely integrated and homogenous entity with uniform interests. Rather, the state is always marked by contradictory and uneven levels of unity and purpose because it is perpetually in formation as ‘states within the state’ continually struggle (Jessop, 1990: 9). This relatively constant condition of flux is in part the product of other strategic endeavors simultaneously emanating from “outside” and “inside” the state system.

With respect to other political strategies elaborated from within the state, Jessop (1990: 9) notes that there is never “a moment when a

⁴⁶ As Jessop (1990: 353) further adds: “A state without these properties is a state only in name. It does not exist.” For a similar argument on the creation of the “state effect”, see Mitchell (1999: 84).

single state project becomes so hegemonic that all state managers will simply follow universal rules to define their duties and interests as members of a distinct governing class.” In essence, there are multiple state projects in existence within the state system at any given time, with each trying to unite and mobilize political resources in particular directions.⁴⁷ Through this struggle, the project of a specific collectivity of state managers may become dominant, at which point a tentative agenda for state action is temporarily settled upon. Nevertheless, given the continuing existence of different state projects, the execution of particular policies by the dominant bloc of state managers still remains exceedingly problematic. Specifically, whether because of their own strategic interests or their positioning within the state system, particular state managers may be unwilling or unable to realize the goals of the hegemonic state project. Furthermore, the inherited configuration of state institutions and practices may also pose or create unforeseen problems. Overall, then, even once the conditions for a more cohesive state agency are tentatively in place, the realization of the state’s agenda

⁴⁷ As March and Olsen (1989: 65) put it, “[u]nderstanding the transformation of political institutions requires recognizing that there are frequently multiple, not necessarily consistent, intentions” at play within the state system.

will continue to face resistance from various quarters and may produce unintended consequences (Jessop, 1990: 359; also see Zeitlin, 1985: 37).⁴⁸

When examining the generation of strategic state projects from within the state system, recognition that the state is both a site and product of political strategies is important. It is here that Jessop's (1990: 9-10) concept of 'strategic selectivity', alluded to earlier, is most relevant.⁴⁹ Because of historical and ongoing formation by a variety of strategic forces, at any given juncture the state system will be "more open to some types of political strategy than others" (Jessop, 1990: 260).

As Jessop (1990: 260) elaborates:

Thus a given type of state, a given state form, a given form of regime, will be more accessible to some forces than others according to the strategies they adopt to gain state power; and it will be more suited to the pursuit of some types of economic or political strategy than others because of the modes of intervention and resources which characterize that system.

Hence, at any given historical juncture, not all political strategies are equally viable or have the same potential for success.

⁴⁸ This problematic conception of state agency obviously precludes any simplistic instrumentalist vision of the state, Marxist or otherwise.

⁴⁹ Jessop (1990: 260; emphasis in original) uses the term strategic, rather than structural, "because it brings out the relational character of this selectivity". Specifically, it is "the relation between state structures and the strategies which different forces adopt towards [them]" that is important, not state structures, or for that matter political strategies, by themselves (Jessop, 1990: 260).

However, the idea of strategic selectivity does not imply that only certain types of political strategies or agendas can be directed at, or realized through, a state system at a particular place and time. Rather, strategic selectivity serves the sensitizing function of bringing to light what kind of political strategies are likely to be generated in a given social context and which ones might likely achieve enough resonance for successful realization. Hence, concrete political strategies and actions are both the products and producers of the state system. To say that only particular political strategies are structurally viable would in effect involve reifying the state as a self-contained entity with a specific core essence. I emphasize this point to make clear that though the possibility of falling into structural determinism can result from giving undue attention to the state's strategic selectivity, such an outcome is not inherent in the approach itself.

State Strategies and the Law

Thus far, the concept of “law” has been implicitly subsumed under a broader treatment of the political state. While such treatment is often

theoretically predicated in many society-centered and state-centered perspectives, I have done so here solely for purposes of exposition. In light of the strategy-centered perspective delineated above, “the law” and its articulation with other political institutions and practices should no more be viewed in reified and reductionist terms than the “the state”. Despite frequently committing this error, society-centered and state-centered paradigms have however made contributions to theorizing law and thus they merit brief review.

Legal Fetishism and Instrumentalism

Like "the state" itself, "the law" has received relatively scant sociological attention throughout much of the twentieth century (McIntyre, 1994: 1-5; Schur, 1968: 5-8). On the one hand, the reasons for sociology's recurrent neglect of the legal parallel those pertaining to the discipline's frequent neglect of the political more generally. Specifically, the historical predominance of society-centered paradigms effectively relegated law to an analytical position of secondary and peripheral importance. On the other hand, sociological theorizing on the law also

has its own distinctive genealogy that sometimes diverges sharply from theoretical currents specifically regarding the state. A closer look at broad visions of law within the Liberal and Marxist traditions helps illuminate this point.⁵⁰

Integral to the Liberal conception of law is “the belief that legal systems are an essential component of social order and civilization” (Collins, 1982: 10; also see Selznick, 1969: 3-34).⁵¹ In this view, the social and legal orders are frequently treated as coterminous, if not identical phenomena. The primary assumption is that “if laws and legal institutions were abolished anarchy would immediately break out” (Collins, 1982: 11). In other instances, however, the two dimensions are partially uncoupled, with the legal order treated as a material expression of the underlying and more fundamental social order. Durkheim’s position that types of law reflect a morally-based collective conscience, along with Weber’s idea’s on the spread of rational-legal authority, each more or less exemplify this perspective (Schur, 1968: 5).

⁵⁰ As will also become evident, the distance between these two traditions is much less marked with respect to legal theorizing than it is with respect to state theorizing in general.

⁵¹ Collins (1982: 10) labels this belief “legal fetishism”, a term loosely adopted here to describe theories in the Liberal tradition as well as some in the Marxist tradition.

Given the central importance of law to the overall social formation, it is not surprising that the state, narrowly conceptualized as an institution for the exercise of political power, is frequently treated by Liberal social theorists as subordinate to, indeed fully constituted by, a broader legal and social order. The notion of the “rule of law” is pivotal in this respect. As Price (1989: 275) describes it:

The rule of law entails that the actions of government in general...are constrained by authoritative sources of law such as statutes and common law precedents. The rights and entitlements specified by the law therefore exist apart from the arbitrary will of government officials who interpret and administer the law. Government officials must obey the law in carrying out government activities...

In effect, “political power should be exercised according to rules announced in advance”, rules which are legally mandated and apply equally to all within the social order (Collins, 1982: 12).

Liberal theorists are not alone in emphasizing the foundational and constitutive nature of law and legal institutions. Many in the Marxist tradition put forth similar conceptions. The work of Evgeny Pashukanis (e. g. 1980) is perhaps most relevant here. Pashukanis developed what has been labeled a “commodity theory of law”, whereby the structure of bourgeois legal systems is depicted as isomorphic with

the structure of capitalist commodity relationships. Specifically,

Pashukanis argued that:

[T]here is an homology between the logic of the commodity form and the logic of the legal form. Both are universal equivalents which in appearance equalize the manifestly unequal: respectively, different commodities and the labour which produced them, and different political citizens and the subjects of rights and obligations (Beirne and Sharlet, 1980: 3).

Further, the primary function of bourgeois law is that of ideological complement, for legal relations “devolve upon society a measure of formal impartiality, equality, and freedom...[and thus] serve to mystify the substantive unfairness, inequality, and alienation inherent in capitalist economic relations” (Sypnowich, 1990: 8).

Essentially, then, Pashukanis depicted bourgeois law as a necessary overlay for the material relations of capitalism. While converging with the legal fetishism⁵² of the Liberal tradition in terms of the structure of his argument, Pashukanis diverges markedly in terms of his recognition of the contingent and ideological content of law. Indeed, many Marxist and Liberal theorists differ significantly with respect to the content of law. Whereas many in the former tradition assert a uniquely capitalist

⁵² In the case of Pashukanis, the use of the term “legal fetishism” can be confusing, since he often talked of a correspondence between the “commodity fetish” and the “legal fetish”. As noted earlier, I am using the term legal fetishism in a broader sense.

character for legal practices and institutions, the latter tradition “does not require that the laws should have any particular kind of content, but simply that they should constrain the weak and powerful alike” (Collins, 1982: 12).

Most Marxists also depart from Liberal legalism when characterizing the relationship between the law and institutionalized political power.⁵³ Specifically, rather than the law having priority over the state as in the Liberal tradition, with many Marxists the law is subsumed under politics and indeed “is usually relegated to the position of a relatively unproblematic sector of the State...” (Collins, 1982: 10). More significantly, state managers are often depicted as simplistically manipulating law for their own ends. The law thus becomes a pliable tool that political elites or the capitalist class can use directly, and with little difficulty, to buttress their positions of dominance (Fraser, 1978: 148; Thompson, 1975: 259).

The view that state actors can use the law instrumentally is not solely the property of Marxist theorizing however. Indeed, there is a line of thought that emerges out of, and tentatively breaks away from, the

⁵³ Of course, early Marxists, particularly during the Second International, rarely differentiated between state and law, since the two spheres were relegated to an epiphenomenal “superstructure” that would “wither away” after the inevitable socialist revolution (Synowich, 1990: 1-27).

fetishistic reification of law characteristic of most Liberal approaches and provides a bridge between the two broader intellectual traditions. Legal Realism, “the most influential school of American legal thought in the 1920s and 1930s” (Price, 1989: 279), asserted that judicial practice was to a large degree shaped by informal social and political considerations, not just by the logical interpretation of formal rules of law. As Schur (1968: 43; emphasis in original) puts it, for Legal Realists:

[J]udges make law rather than find it. The judge always has to choose. [They have] to decide which principle will prevail and which party will win...judicial precedent and legal doctrine can be found or developed to support almost any outcome. The real decision is made first--on the basis of the judge’s conceptions of justness, determined partly by his predilections, personal background, and so forth...

Consequently, like Marxist instrumentalism, the Legal Realist approach tends to treat law as a malleable and manipulable entity almost entirely subject to the influence of particular social and political interests (McIntyre, 1994: 111-112; Schur, 1968: 43-50).⁵⁴

On the insights of the Legal Realists, a more recent wave of Marxist legal theorizing was built. The Critical Legal Studies (CLS) movement of the past few decades incorporates elements of both Legal Realism and

⁵⁴ While moving in a critical direction in recognizing the social determination of law, Legal Realists remained firmly rooted within the Liberal framework. In particular, they advocated a “policy-oriented social science” approach to legal practice that was situated within existing institutional structures (Price, 1989: 280).

earlier Marxist theories in recognizing the instrumental potential of legal institutions and practices. At the same time, however, many CLS proponents take pains to emphasize the more constitutive functions of law that may simultaneously enable or constrain the instrumental manipulation of law. In effect, to a certain degree they return to the Liberal idea that there may at times indeed be a “rule of law”. Below I render a more detailed explication of this view of law in general, and of its relationship to state projects in particular.⁵⁵

Contradictions between Law and State

Law, like the state, can best be conceptualized as simultaneously being a site, generator, and historical product of socially grounded strategic action. Indeed, in many instances law and its institutional embodiments are inextricably intertwined with, and in fact are often indistinguishable from, any number of political strategies enacted within or toward the state ensemble. Specifically, elements of the legal arena

⁵⁵ For general overviews of the CLS movement, see Kairys (1982), Price (1989) and Unger (1986). It should be noted that while some of the argument below builds directly on CLS theorists (e. g. Klare, 1978), it also incorporates the work of other Marxist legal scholars who are not properly categorized as belonging to the CLS tradition (e. g. Thompson, 1975; Woodiwiss 1990a).

may provide the particular institutional launch pad for a given bloc of state managers, or they may serve as part of the structural terrain on and through which various state projects are enacted. Effectively, then, practices and institutions of law can become imperceptibly melded with those of the broader state formation, and in this respect are fundamentally no different from other elements of the state, such as military organizations, administrative bureaucracies, and other branches of government.

Because of their historical constitution and strategic positioning, legal practices and institutions may achieve a relative immunity from direct instrumental manipulation by state managers and other actors. This is one sense, then, in which the law may attain a partial autonomy, a type of independence potentially common to all state institutions and practices. Nevertheless, there are specific characteristics of law that also serve to sharply distinguish it from all other elements of the state complex. This uniqueness allows the law to achieve a partial autonomy from state managers and their political strategies in a second sense.⁵⁶

⁵⁶ This is not to say that state institutions such as the military or administrative bureaucracies do not achieve their own unique autonomy as well, for indeed they do. The point is that, like the law, each does so in part because of characteristics ingrained in their specific institutional *modus operandi*.

Anthony Woodiwiss (e. g. 1985; 1990a; 1990b) has most systematically developed the idea that it is the ideological and discursive nature of law that might make it immune from direct instrumental manipulation. Overall, while Woodiwiss's framework remains firmly rooted within Marxian soil, it simultaneously branches out to incorporate key elements of the Liberal conception of law as well. Specifically, he makes the argument that a 'rule of law' does indeed partially exist, namely because legal conceptions are in fact simultaneously constitutive of the capitalist social order as well as reflective of it.⁵⁷ This dual nature, however, does not necessarily preclude successful attempts at an instrumental manipulation of law by political agents. Rather, it simply points to the problematic and contradictory character of historically grounded legal relations and activity. This point bears brief elaboration.

In developing his view of law, Woodiwiss takes his lead from two earlier twentieth century Marxists, Karl Renner (1949) and the aforementioned Pashukanis (1978). While each thinker stressed the broader ideological functions of legal relations in capitalist society, each also went tentatively beyond the simplistic reductionism of orthodox

⁵⁷ Critical legal theorist Karl Klare (e. g. 1978; 1979) also emphasizes that the law is simultaneously constitutive and reflective of the broader social order.

Marxism. Renner, for example, recognized that the implementation of bourgeois law generally reflected and justified capitalist social relations, but also emphasized that this correspondence was mediated through the state and through the "abstract and neutral" character of formal legal concepts themselves (Woodiwiss, 1990b: 101). Pashukanis, in his 'commodity theory of law', asserted that although the legal and economic spheres were isomorphic with one another, each had an independent existence and each served to partially constitute the other (Woodiwiss, 1990b: 105). Overall, then, the contributions of these earlier theorists stem from:

Pashukanis' insistence that law has a reality of its own and is not simply epiphenomenal, and Renner's insistence that law has some autonomy in relation to the economy. These are two seminal ideas and they both remain important in the quest for a more adequate Marxist conceptualisation of the law. The major problem with their original expressions was that they then existed separately and in opposition to one another...(Woodiwiss, 1985: 64).

Accepting these insights, Woodiwiss (1990a: 7) goes on to delineate how the autonomy of law in part derives from "the particularities of its discourse." Here, Michel Foucault's (1979) ideas on the disciplinary nature of discourse become quite relevant. Foucault (1979: 92) attributes the effectiveness of particular disciplinary discourses to their "intrinsic technology"; that is, "what they need in order to function, the

tactics they launch, the power effects that underpin them and that they carry." Essentially, then, an 'intrinsic technology' gives a specific discourse its 'power' and ability to affect social practice, and it hence also gives a particular discourse its partial or relative autonomy from those that it disciplines.

What is the intrinsic technology inherent in bourgeois legal discourse that gives the law its ideological power, its ability to both constitute and justify capitalist social relations? Woodiwiss characterizes it as "consistency"; that is, consistency in the application, interpretation, and enforcement of law. The notion that consistency is the pivotal component of legal discourse is nothing new, for as Woodiwiss (1990b: 108) elaborates:

Both the liberal and Marxist traditions have long agreed that legal discourse in democratic capitalist societies is marked by an internally dominant concern to achieve consistency. What they disagree on is why this should be. The liberal suggestion is that it reflects the law's social neutrality, whilst the Marxist one is that it reflects the law's capital-serving role.

Regardless of these differing substantive connotations, there is consensus that because of the discursive drive for consistency, a "rule of law" does indeed exist to some extent in democratic capitalist societies.

Of course, given the problematic social and historical context in which it is intertwined, complete consistency throughout all legal practice is an ideal that can never be achieved (Woodiwiss, 1990b: 109-110). Why then continually strive for consistency if it cannot be attained? As Woodiwiss (1990b: 117-118; emphasis in original) elaborates, the answer has less to do with subjective aspirations and more to do with discursive intrinsic technology:

[L]aw is characterized by an inherent strain towards consistency because of its own systemic requirements as a discourse in a determinate social location....for the law to have even its background ideology-effect it must be committed at least to the goal of internal consistency as well as be consistently invoked and consistently enforced according to consistent criteria, even if only in limiting (that is, appealed) cases; otherwise it will be treated with contempt or pass into desuetude.

E. P. Thompson (1975: 263; emphasis in original) put forward the same idea regarding law's intrinsic technology of consistency as follows:

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. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.

Overall then, consistency is necessary for law to continue to operate as an ideological or disciplinary discourse. More importantly for my

purposes here, the struggle for consistency can also render the law autonomous vis-à-vis other political and social institutions.⁵⁸

To reiterate, law and legal practice achieve autonomy from other social dimensions in at least two different senses. First, "institutional autonomy" potentially characterizes all organizations in the state system. Second, "discursive autonomy" results from the law's unique reliance on the logic of internal consistency to be successful as a mechanism for the exercise of political power. This dual potential for autonomous development clearly complicates and problematizes intra-organizational relations within the legal sphere itself. For example, different courts, at similar or differing hierarchical levels, may provide contradictory interpretations of the same statute or overrule decisions of one another. Further, legislative initiatives may be deemed unconstitutional, ignored, or differentially implemented by various judicial agents.

The opportunity for conflict and contradiction is greatly compounded at the level of inter-organizational relations between various legal institutions and others in the state system. For example,

⁵⁸ Tomlins (1993: 294; emphasis in original) develops a similar view, noting that while the "pursuit of consistency...demonstrates law's responsiveness to its context; the achievement of consistency simultaneously reinforces law's claim to authority over that context—its claim to tell the truth."

particular historical junctures may produce a striking opposition between "the law" and "the state", wherein a hegemonic state project emanating primarily outside of the legal arena faces concerted opposition from social and political forces purporting to uphold the "rule of law" (e. g. Spitzer, 1983: 110-112). Such instances, however, are more the exception than the norm. More frequently, hegemonic state projects will not face extremely strong and systematic resistance from the legal arena (nor any other political sphere for that matter), since it is the establishment of relative dominance and/or the mobilization of wide support that allows for hegemonic status in the first place.

Though legal and other state institutions are more often in relative sync with one another, rather than in marked opposition, this does not imply that state managers can simply use the law to realize a particular strategic agenda. Regardless of the degree of coordination, cooperation, or congruence between the legal and other political sectors, successful realization of state initiatives remains problematic along several fronts. As noted above, even within the narrowly conceived legal arena, relations and practices are subject to varying degrees of conflict and contradiction because of differing potentials for autonomous development. Moving to a broader level, specifically the state system as a whole, recall that even

when a particular state project achieves hegemonic status, the dominance of a particular bloc of state actors is never totally complete. Thus, a given state project is invariably implemented on a strategic terrain ripe with opposition and historical impediments, including various legal structures and actors.

Ultimately, then, strategic manipulations of the law prove to be exceedingly problematic for political actors. This is true not only of large scale legislative projects aimed at constructing new legal frameworks, but also of more modest attempts at tweaking or reforming existing structures and practices. In either instance, state-initiated legal changes are likely to fall short of their intended effects because of active resistance, structural impediments, and/or other unforeseen circumstances. Such attempts are also likely to produce unanticipated and contradictory outcomes as legal changes are put into practice and incorporated into existing discursive formations. Furthermore, and as I will make clear in later chapters, the successful realization of state legal initiatives is often hampered by the incomplete, inconsistent, and incessant reformulation of state projects themselves. Even in light of these caveats, however, strategic manipulations of law by state actors do sometimes achieve remarkably high degrees of success. That is, specific

political goals may at times be realized in part or nearly in whole, and particular policies may more or less have their intended effects.

The Present Study

As I noted in Chapter One, a broad purpose of this study was to follow Robinson's (1988: 42-49) advice on conducting more productive sociological research on union decline in the 1980s. Recall that he specifically suggested that sociologists and others 1) "take more seriously the causal importance of political factors" (Robinson, 1988: 42) and 2) exemplify a more explicit "commitment to detailed cross-national comparisons" (Robinson, 1988: 49). I feel that the detailed theoretical discussion on the state and the law presented in this chapter was a necessary prologue for following Robinson's first recommendation. Further preparation is still needed along this line however. In particular, I need to hone or "operationalize" the present research, specifically in terms of the independent variable, 'political factors', and the dependent variable, 'union decline'. And in terms of addressing Robinson's second recommendation, I need to explicitly delineate the comparative

methodological strategy that I have utilized to structure the current investigation. I now turn to both of these issues in Chapter Three.