

COMMUNIST ANARCHISM AS AN ALTERNATIVE TO THE RULE OF CRIMINAL LAW [1]

HAROLD E. PEPINSKY

The rule of law (or deterrence of crime by law) and communist anarchism are symbiotic. Progress toward one will only be made in conjunction with progress toward the other.

The logic of the rule of criminal law is so straightforward. It seems that it ought to work. Never mind the extended, recent arguments of American theorists like Van den Haag [2] and Wilson [3]. Beccaria's [4] short book, first published in 1764, makes the case neatly and compellingly. Make criminal law penalties just severe enough, and apply them swiftly and surely, and practically everyone should be deterred from committing any crime at all. If Americans in particular are inflicted with the disease of rising crime rates, and if there is no indication that imprisonment acts as a cure [5], the fault lies not with the theory of law-imposed deterrence, but with a flawed application of the theory. Americans are simply not devoting sufficient resources to making imposition of the sanctions swift and sure.

Some argue that Beccarian logic itself is flawed, in that crime is really caused by class oppression, of which the rule of law is but an instrument [6]. If law can be seen as a cause at all, law causes, not prevents, crime, by defending the injustice of private ownership. Those holding this position do so as fallaciously as would the proponent of the view that blood pressure cannot be controlled by bio-feedback because blood pressure is in reality controlled by the autonomic nervous system. Even if class oppression is granted to be a cause of crime, and if one grants the moral argument that the real harm is done by the oppressors rather than by those treated as criminals, there is still no reason to question the logic that the all-powerful oppressors can keep the oppressed people from violating the terms of the law by applying the law swiftly, surely and severely enough. One can posit that the spirit of oppressed people is indomitable, but the proponents of Beccarian logic need only respond that this remains to be seen, just as it remains to be seen whether class oppression can be transcended.

On the other hand, Beccaria's logic is no refutation of the neat, compelling logic – preeminently of Berkman [7] – that to eliminate government and its laws, and to permit people to partake of goods and services regardless of what they do in return, would also largely eliminate the injuries people do to one another – currently known as crimes. Communist anarchism is, even in theory, no easier to perfect than the rule of law, but the logic of communist anarchism has no more been impeached by proponents of the rule of law than have proponents of communist anarchism impeached the logic of the rule of law. And yet, in part no doubt because the two strategies are diametrically opposed means to the end (among others) of preventing crime, proponents of each side are viscerally opposed to one another.

Their opposition to one another is ill considered. Progress toward the rule of criminal law and progress toward communist anarchism are symbiotic. One will not happen without the other. The failure of each set of proponents to support the success of its counterpart strategy of crime control is an impediment to its own success. The partisans of the rule of criminal law and of communist anarchism are locked in a mixed-sum not a zero-sum game. Analyzing the issue in the American context, this essay is directed to showing that it behooves legalists and communist anarchists to cooperate with one another to achieve progress in crime control.

More Means Less: The Paradox of Perfecting the Rule of Criminal Law

Throughout the United States, as this essay is written, Americans are caught up in the latest flood of attempts to perfect the rule of criminal law. The watershed from which these attempts flow is a decade old: the report of the President's Commission on Law Enforcement and Criminal Justice [8], a grand attempt – as an element of building the Great Society – to set the agenda for American crime control. Since then, scholars and researchers have set about helping localities, states and the federal government make application of the law swift, sure and severe enough to deter crime. Criminal and juvenile codes have been revised in many states. Not to be out-done, the federal government first enacted the Omnibus (imagine!) Crime Control and Safe Streets Act in 1968, and now appears to be on the verge of enacting a comprehensive recodification of federal criminal law. Educational and training standards for all manner of criminal justice functionaries have been increased. New programs have proliferated to fill gaps in the old. Personnel and hardware (and now even software) have been added to make application of the law swifter and surer. Systems analysts and social science evaluators have been employed to rationalize criminal justice operations. The federal

government, especially through the agency of the Law Enforcement Assistance Administration, has lavished funds on finding and attempting to solve problems of perfecting the rule of criminal law. State and regional planning agencies have been established to apply these funds. Together with their federal counterparts, the state and regional planning agencies have in most cases made religious use of the scriptures from the latest Presidential commission: the National Advisory Commission on Criminal Justice Standards and Goals [9]. Recent scholarly reinventions of Beccarian logic have gained tremendous popularity.

For all this effort, crime rates have in general continued to increase, if anything faster than ever. So glaring has the failure been to make application of American criminal law swift, sure and severe enough to deter crime, that (again as this essay is written) even the Law Enforcement Assistance Administration is rumored to be on the brink of an ignominious demise. All this occurs just as victim data are becoming regularly available, which show the amount of crime in need of criminal justice management to be as much as ten times as great as had been revealed in police data.

The faster Americans go in trying to perfect the rule of criminal law, the more behind they get.

Why?

The rule of criminal law will fail for want of any of its three elements: swiftness, sureness or severity. Imagine each of these elements to be the south pole of a magnet, and imagine further the problem of perfecting the rule of criminal law to be like the problem of drawing these poles of all three magnets together, and you have a fair approximation of the paradox of the rule of criminal law. Strengthen the field of any of the magnets, and it will repel the others further than ever. Make criminal justice functionaries apply the law more swiftly, and the capacity to apply the law surely (without error) to every crime will grow more remote. The more severe the sanction to be imposed, the greater the complexity of review of that imposition – the American extremes being the summary imposition of traffic fines and the elaborate trial and appellate procedures for review in capital cases. The more complex the review of the imposition of a sanction, the longer the delay in imposing the sanction. It has repeatedly been found that raising sanctions lowers the propensity of officials to arrest and prosecute (as happened following enactment of the “Rockefeller drug law” mandating life sentences for drug sale in New York State [10]), while lowering the severity of penalties makes arrest and prosecution surer (as happened following the reduction of statutory penalties for marijuana possession in Nebraska [11]). Ross [12] and Wilson [13], too, find an inverse relation between sureness and severity. Swiftness, sureness and severity are mutually exclusive.

If the magnets are to rest closer to each other, their fields must be

weakened. Similarly, if the rule of criminal law is to be approached, the force with which swiftness, sureness and severity of imposition of criminal sanctions is pursued must be reduced. This is reflected in experimental and quasi-experimental findings on deterrence. It is where the severity of sanctions is lowest, in traffic law, that sporadic campaigns of swift, sure enforcement have been found to have temporary deterrent effects on parking and moving violations. The campaigns are bound to be sporadic, and the effects only temporary, because swift and sure enforcement cannot be routinely sustained. The magnet analog: weaken the field on one of the magnets to a bare minimum, suddenly push the magnets together, and you will succeed in bringing them close, but you will have trouble holding them long without somehow losing your grip.

(As it happens, it has been found in research on learning that the magnitude of a reinforcer has much less to do with the rate of response than do the swiftness and sureness of reinforcement [14]. Beccaria himself emphasized the waste of making penalties more severe than minimally necessary, which in part contributed to his argument against capital punishment. Americans would do well to note that Scandinavian countries and the Netherlands appear to be doing relatively well at crime control with, by American standards, remarkably low-level sanctions.)

To sustain an approximation of the rule of criminal law, to sustain deterrence of crime, as in bringing the magnets closer by weakening their fields, the force with which law is applied must be reduced. In theory, in any community, the fewer the resources invested in applying the law to any form of behavior, the more effectively the rule of criminal law will operate to deter that behavior from occurring. Practically speaking, this means that the lower the rate – by population of the community – at which criminal justice agencies take jurisdiction over a kind of crime, the less likely it will be that that kind of crime will occur.

Note that this relationship is the same that would be predicted, but interpreted differently, by proponents of communist anarchism. As Berkman puts it:

The truth is that what is called 'law and order' is really the worst disorder, as we have seen in previous chapters. What little order and peace we do have is due to the good common sense of the joint efforts of the people, mostly in spite of the government . . . the interference of any government or authority can only hinder their efforts [15].

Is the bottle half empty or half full? Whether one concludes that the most effective deterrent is the one that needs invoking least, or that if people get along it is because they are left alone, the result is the same. In either case, the criminal justice system works best where it works least.

This is consistent with the findings of a number of recent studies, notably those conducted by American economists, interpreted to indicate that

severer and surer criminal sanctions deter crime more [16]. Literally, the findings are that the more rarely the criminal justice system takes jurisdiction over an offense, i.e. the more rarely an offense appears in police offense reports or in arrest figures, the likelier and severer the sanctions imposed for that offense will be. This is interpreted to indicate that sure, severe sanctions reduce the likelihood of crime. Now it also happens generally that the more rarely officials report an offense, the more serious the offense is in the eyes of the community. At extremes, disorderly conduct is commonly reported and regarded as a trivial offense, while assassinations of popular political figures and multiple murders are rarely reported and are (perhaps, in part, therefore) regarded as especially heinous. Restated, the findings of the so-called deterrence studies are intuitively obvious: community sentiment will most probably support successful prosecution of crimes and imposition of heavy sanctions in the relatively rare instances in which the criminal justice system is mobilized to respond to what, in that community, will be regarded as especially heinous crimes. That is, the criminal justice system responds most surely and severely to those forms of behavior that – for whatever reason – seldom occur and receive the weight of official attention. The government best deters those acts which people are least likely to commit in the first place. Or, the more rarely the law is applied to a form of behavior, the better it deters.

Thus, the findings of deterrence studies are consistent with the logic of the magnet analog to deterrence, which supports the communist anarchist premise that the less the government reacts to people's behavior, the better people behave. If perfection of the rule of criminal law is to be pursued with apparent success, it will only be as communities manage their affairs with less resort to criminal justice intervention. Those who would arrange for the law to be a stronger deterrent to crime had best help develop community mechanisms which disengage the communities from utilization of criminal justice services, lest the burden of crime control impede the swift, sure, severe application of the law.

I will return to a sketch of some ways in which a communist anarchist program for strengthening the rule of criminal law might be implemented. Meanwhile, let us consider the corollary argument that progress toward communist anarchism requires that criminal justice workers be made freer to perform their functions as they see fit.

The Ambiguous Status of the Communist Anarchist's Criminal Justice Worker

American governments employ a large and rapidly growing number of criminal justice workers. In 1971, the criminal justice labor force [17] grew

to more than one percent of the total American labor force, including nearly three million armed forces personnel [18]. The number of criminal justice workers passed the million mark in 1973 [19]. The total American labor force grew just over eight percent from 1970 to 1974 [20], while the criminal justice labor force grew more than twenty-eight percent [21]. As of October 1975, there were reported to be 1,128,569 criminal justice employees in the country [22], of which 97,623 worked for the federal government, 274,319 worked for state governments, and 756,627 (half a million of them in law enforcement) for local governments [23].

Criminal justice workers are becoming unionized and occasionally even striking for better pay and job conditions. Even grassroots criminal justice workers can wield considerable political power. About five years ago, a reformist commissioner of corrections was appointed, with strong words of gubernatorial endorsement, in the politically liberal State of Minnesota. The commissioner announced his intention to close down the reformatory in the town of St. Cloud. The community rose in anger; the community kept its reformatory and its members their jobs, while the commissioner resigned his. Criminal justice workers are a large, rapidly growing political force with which to be reckoned in planning crime control strategy.

Workers are the hero(in)es in the communist anarchist scenario. At the heart of the communist anarchist revolution is the workers' expropriation of the industries in which they work. "In expropriating, . . . you *stay* on the job and you put the boss out. He may remain only on equal terms with the rest: a worker among workers" [24]. Berkman emphasizes the "constructive" nature of this aspect of the revolutionary process. Presumably, the workers continue producing, having now become their own bosses.

What if the product of the workers happens to be arrests, prosecutions, confining inmates or the like? Literally, as Berkman puts it, ". . . anarchism means doing away with the state or government altogether" [25]. The enigmatic position of government workers whose product is force or violence had presented itself by the time Berkman wrote (most of all in the case of professional soldiers in standing armies), but Berkman and (as far as I can see) every other communist anarchist writer has overlooked the problem. The writer who has come closest to addressing the matter is Godwin, first published in 1793:

If juries might at length cease to decide, and be contented to invite, if force might gradually be withdrawn, and reason trusted alone, shall we not one day find, that juries themselves, and every other species of public institution, may be laid aside as unnecessary? Will not the reasonings of one wise man, be as effectual as those of twelve? Will not the competence of one individual to instruct his neighbours, be a matter of sufficient notoriety, without the formality of an election? [26].

"At length," perhaps. For the time being, it would be difficult to get

criminal justice workers out of the habit of giving orders, or to get citizens to interpret official invitations as devoid of coercion. There is no particular indication that the mass of criminal justice workers would readily be accepted as sages in their communities. Until communism were sufficiently perfected that former criminal justice workers could maintain decent standards of living without earning their pay, criminal justice officials who gave up coercion would be hard pressed to make their livelihood.

Suppose the problem were resolved in favor of trying to dispense with criminal justice workers. To get to know criminal justice workers – especially those in lower status occupations, e.g. police officers and prison guards rather than judges and prosecutors – is to find the view prevailing among them that a major effort is required to defend against this very treatment. Many criminal justice workers see themselves as engaged in a struggle against much of the citizenry for their professional survival. The defense is quite reasonable and fairly straightforward: organize, make oneself more desperately needed, and proliferate. Parkinson's Law aside [27], defense against attacks on their social standing encourages criminal justice workers to help swell their own ranks into a larger fighting force.

The most potent political weapon criminal justice workers have is the authority they are given to define the size of the crime problem they are called upon to manage. As long ago as 1858, the police in New York City discovered that if they made more arrests, they could show thereby that they had a bigger problem to manage and hence required an enlarged budget [28]. A little more than a century later, the same police force revised its offense reporting practices and arranged for the overall offense rate to increase 72 percent between 1965 and 1966 [29]. In the courts, case backlogs can be extended to support the call for increased resources. In prisons, complaints by inmates can serve as a basis for lobbying to enlarge facilities and staffs. Probation and parole revocation proceedings can be used as evidence that more personnel are needed to give greater attention to clients. Just as the species, like the rabbit, that are most heavily preyed upon breed the fastest, and as the human beings that are most destitute tend to reproduce at the highest rates in order to survive, so the species of worker – in criminal justice – that is especially heavily criticized proliferates in order to survive. Communist anarchists and others who seek to defeat the criminal justice system by attacking it defeat their own purposes instead, for the criminal justice bureaucracy expands in response.

The phenomenon is familiar. Bomb the British in London or the Vietnamese in Hanoi, and you have more British and more Vietnamese fighting for their cause with greater determination than ever. Try to take heroin away from those who depend on it, and the supply and demand for heroin is apt to increase. Communist anarchists in general and Berkman in particular are especially sensitive to the self-defeating character of com-

pulsion. The fundamental principle of communist anarchism – that people who themselves are liberated from force and compulsion will be least likely to use force and compulsion against others – suggests that criminal justice workers will most readily give up their use of force when, instead of being attacked and threatened with loss of livelihood and community respect, they are entrusted with the management of their own pursuits and given respect and dignity.

There is some indication that the granting of respect can be effective in diverting criminal justice workers from acts of compulsion. It is a common feature of American traffic enforcement that a show of respect to a police officer is the best way for the motorist to avoid a traffic citation [30]. Criminal justice workers can – and do – rationalize that the respect they want for their own sakes is the best indicator they can get that persons whom they meet in the course of their work are inclined to respect and follow the law itself. From the vantage point of the criminal justice worker, the better s/he is treated, and the less conflicts s/he encounters, the less serious “the crime problem” appears.

Part of the insecurity that criminal justice workers suffer is the threat of job curtailment or of salary increases insufficient to maintain current standards of living for him/herself or – more especially in many cases – for his/her dependents. If all criminal justice workers were given life tenure in the manner of federal judges and guaranteed that their incomes would minimally keep pace with the cost of living, they would not have reason to go to the trouble of drumming up more business and creating a pretext for public support. There would be greater reluctance to authorize new positions in the criminal justice system if each involved a lifetime commitment to keep someone’s standard of living safe against inflation, and so the growth of the criminal justice labor force would be further retarded. Life tenure with high enough pay increments would also serve to delay retirement of criminal justice workers. Younger police officers I rode with used to tell me what a problem it was that veteran officers stopped enforcing the law with vigor and enthusiasm. There is probably a general tendency for criminal justice workers, with age and experience, to become more jaded about their capacity to reform others. From the point of view of relieving the citizenry from compulsion and intervention, it would be so much the better if the criminal justice system grew to be composed mainly of easygoing service veterans. Such a work force would be especially amenable to helping turn its business back over to communities for their self-management.

Absent the threat of doing themselves out of jobs, the workers would respond to any extra pay incentive to reduce their caseloads, although this incentive would have to be kept low enough so that the capacity of private persons to manage their own affairs could keep pace with reduction in the

force of crime control. Otherwise, the panic people suffered at being suddenly denied the criminal justice protection they had thought they had would set a self-fulfilling prophecy in motion: Fear of vulnerability to violence would promote exaggerated, violent acts of self-defense, against which people would have to defend themselves more forcefully than they had previously needed to do, and so on until – like Germans forty years ago – Americans panicked by the threat of social chaos welcomed a political order that promised control through terror if necessary.

Berkman recognizes the importance of the thrust of a communist anarchist social revolution's being "not destruction but construction" [31]. He argues that extensive preparation, particularly of workers learning to practice communist anarchist principles among themselves, is a necessary precondition of the social revolution he seeks [32]. In these days in the United States in which corporate ownership of the means of production of goods and services has so far replaced private ownership and in which the middle class is so preponderant now that the distinction between workers and owners has become blurred, one wonders how preparation for the sudden, dramatic social revolution could proceed far enough for the revolution to succeed unless success had already been achieved by the preparation itself. For the time being, at least, the insecurity of people inside and outside the criminal justice system needs to be recognized and attended to. The increased security that leads criminal justice workers to give up their use of force must lead them to do so gradually, or the insecurity of the citizenry will reproduce backlash that will eventually make government more tyrannical than ever. In the interest of progress toward communist anarchism, respect must be afforded the security and protection symbolized by criminal justice workers.

"Let's be Realistic," or "Optimization in Defense of Idealism is No Vice"

It is a tribute to the abiding optimism of Americans that so many of them can respond to their mounting crime problem with such naive romanticism. Were Berkman alive today, he might well be encouraged by the failure of Americans to be discouraged into nihilism by the growing levels of violence and predation they suffer at one another's hands. Instead, many Americans confidently proclaim that an ideal that has never come close to being achieved in practice can indeed be attained – deterrence of crime by perfection of the rule of law.

Communist anarchists are themselves often accused of naive romanticism for believing that what has at most been achieved for short periods in small communities could be achieved enduringly in large societies. They, too, should be commended for their enduring optimism.

But to be practical, proponents of the rule of law and of communist anarchism should recognize that as purists, rejecting one another's positions out of hand, they only make their own ideals more elusive than ever. If the rule of law is ever to move from fantasy into practice, people must learn to get along without government. If communist anarchism is ever to move from fantasy into practice, people must give dignity and respect to those who work to serve them in their government. Rule-of-law and communist-anarchist proponents make progress together or not at all. Although on their face the establishment of the rule of criminal law and the abolition of government protection of rights (basically of property holdings and entitlements) are antithetical, the strategy that optimizes progress toward both objectives also maximizes progress toward each.

The basic principle upon which the mutual progress toward the rule of law and communist anarchism rests is simple: regardless of whether people in society happen to work in government, if they have the courage to trust, respect and dignify one another for their ability to get along together fairly, the prophecy will tend to fulfill itself, while if people act out of fear and distrust for one another, their fears will be realized instead. At the societal level, as manifested in the growth of crime, and at the individual level, as manifested in what Lemert describes as "paranoia and the dynamics of exclusion," [33] the course of distrust and fear is all too familiar to Americans. Given Americans' history, interpersonal fear and distrust are established both "empirically" and "objectively" for them, regardless of ideological persuasion. Practically all Americans share the view that progress requires that some personal enemy be destroyed. Whether their particular enemy happens to be anarchists, capitalists, communists, conservatives, criminals, jews, liberals, hippies, Indians, mafiosi, men, Nixon, owners, politicians, rednecks, rulers, or others, Americans are remarkably united in the wisdom – yea, even the necessity – of pursuing a self-defeating strategy to achieve social harmony: "they" must be subjugated by whatever weapons (the grander the better) that "we" may develop.

If Americans are to make progress toward crime control, they must learn to subjugate their own distrust, not that of other people, and empower those they now fear to act fearlessly. This is no more or less practicable than is progress either toward the rule of law or toward communist anarchism. If American criminal justice workers, whose job currently is to distrust the citizenry, cannot afford to trust and empower them instead, and if the citizenry cannot afford to trust and empower their criminal justice workers, then they deceive themselves by believing that either the rule of law or communist anarchism is approachable.

Except for tenure and guaranteed pay increments for criminal justice workers, a set of concrete proposals for optimizing deterrence and anarchism

appears elsewhere [34]. Besides tenure with assured cost-of-living pay increases, it is proposed that criminal justice workers be given bonuses for not filing official reports of any kind (not just selected reports as was done with police in Orange, California [35]). To encourage private settlement of disputes without resort to official arbitration, it is proposed that state mediation services be established, which would be forbidden (a) to set conditions on initiation or termination of client contact, (b) to keep files of otherwise unavailable information, (c) to act as legal representatives for clients, or (d) to take any action on clients' behalf outside of their physical presence, lest the mediation turn into another form of arbitration. I would add that mediation workers could be given pay bonuses for declines in arrest rates (which would signify reduced entry of cases into the criminal justice process).

To encourage the private sector of the community to stabilize its relations, thereby having less occasion to resort to government intervention in people's affairs, it is proposed that a tax/subsidy mechanism be established to encourage employers to profit most by decreasing class disparities in their society. Employers would qualify for the subsidy by *simultaneously* employing more full-time workers and raising the income of their lowest paid full-time workers faster than the rate of inflation. Otherwise, they would be taxed. This would reward and dignify employers for making progress toward communism, while increasing the respect, dignity and material welfare of workers. The challenge of optimizing progress toward the rule of law and communist anarchism is to empower and dignify all citizens equally, whether they work in or out of government, and whether or not they manage production. In place of the impotence Americans now feel that tends to make everyone believe that the solution of social problems must be someone else's responsibility, everyone must be made freer to take her/his social position and survival for granted as s/he helps and allows others to pursue their own interests more freely.

Whether, as proponents of the rule of law, they look to written standards of fair exchange for their salvation, or as proponents of communist anarchism, they look instead to the obsolescence of standards of exchange, Americans are misled by assuming a dualism between what Kalven and Zeisel [36] refer to as a government of law and a government of men. The two are symbiotic. Law rules more the less it is imposed, and law is imposed less the more its agents are respected. Were the rule of law to become absolute, people would have ceased reckoning the equation of value given and value received among themselves, as deterrence perfected made referral to formal standards of exchange obsolete.

Proponents of the rule of law and of communist anarchism are equally correct in their diagnosis: the growth of crime reflects both a failure of

deterrence and a failure to leave people free to tend their own affairs. On the other hand, the treatment prescribed by both sides is equally wrong, for increasing the force of criminal justice and generating resistance to criminal justice workers both promote crime. Americans would do well to accept the twin diagnoses and have confidence in the promise underlying two romantic and as yet remote visions of how to control crime. If Americans have enough faith in deterrence to help people to act without government intervention, and enough faith in freedom from government compulsion to give dignity to government workers, crime will become less of a problem for them.

Notes

- 1 This was to be a revision of a paper, "Anarchist-Communism as an Alternative to Due Process," delivered at the Society for the Study of Social Problems Meeting, New York, 1976. As it turns out, the spirit is the same but the content is entirely different. Special thanks for criticism through versions of both papers go to Jill Bystydzienski, Drew Humphries, John Laub, Barton Parks, Pauline Pepinsky, Vic Streib, an anonymous anarchist in New York City, and from *Contemporary Crises*, Bill Chambliss and anonymous reviewers. Special thanks for typing this and the remainder of the pile I have recently laid on, go to Martha Geter and Donna Littrell.
- 2 Van den Haag, E. (1975). *Punishing Criminals: Concerning a Very Old and Painful Question*, New York: Basic Books.
- 3 Wilson, J. Q. (1975). *Thinking About Crime*, New York: Basic Books.
- 4 Beccaria, C. (H. Paolucci, trans.) (1968). *On Crimes and Punishments*, Indianapolis: Bobbs-Merrill.
- 5 Von Hirsch, A. (1976). *Doing Justice: The Choice of Punishment*, New York: Hill and Wang.
- 6 As, for instance, has R. Quinney (1974). *Critique of Legal Order: Crime Control in Capitalist Society*, Boston: Little, Brown.
- 7 Berkman, A. (1971, originally published in 1929). *ABC of Anarchism*, London: Freedom Press.
- 8 President's Commission of Law Enforcement and Administration of Justice (1967). *The Challenge of Crime in a Free Society*, Washington, D.C.: United States Government Printing Office.
- 9 National Advisory Commission on Criminal Justice Standards and Goals (1973). *Courts. Corrections. Police* (3 reports), Washington, D.C.: United States Government Printing Office.
- 10 *New York Times* (September 5, 1976). "Study Backs Critics of New York Drug Law," pp. 1, 40.
- 11 Galliher, J. F., J. L. McCartney and B. Baum (1974). "Nebraska's Marihuana Law: A Case of Unexpected Legislative Innovation," *Law and Society Review*, 8: 441-455.
- 12 Ross, H. L. (1976). "The Neutralization of Severe Penalties: Some Traffic Law Studies," *Law and Society Review* 10: 403-413.
- 13 Wilson, J. Q. (1975), op. cit.
- 14 Rachlin, H. (1970). *Introduction to Modern Behaviorism*, San Francisco: W. H. Freeman.
- 15 Berkman, A. (1971), op. cit.
- 16 See Palmer, J. (1977). "Economic Analyses of the Deterrent Effect of Punishment," *Journal of Research in Crime and Delinquency* 14: 4-21.
- 17 National Criminal Justice Information and Statistics Service (1976). *Trends in Expenditure and Employment Data for the Criminal Justice System: 1971-1974*, Washington, D.C.: United States Government Printing Office, p. 18.
- 18 United States Bureau of the Census (1974). *Statistical Abstract of the United States: 1974*, Washington, D.C.: United States Government Printing Office, p. 336.
- 19 National Criminal Justice Information and Statistics Service (1976), op. cit.
- 20 United States Bureau of the Census (1974), op. cit.
- 21 *Ibid.*, p. 156.
- 22 National Criminal Justice Information and Statistics Service (1976), op. cit.

- 23 National Criminal Justice Information and Statistics Service (1977). *Expenditure and Employment Data for the Criminal Justice System: 1975*, Washington, D.C.: United States Government Printing Office.
- 24 Berkman, A. (1971), op. cit., p. 60.
- 25 Ibid., p. 11.
- 26 Godwin, W. (1971). "Enquiry Concerning Political Justice." pp. 3–41, in S. Schatz (ed.), *The Essential Works of Anarchism*, New York: Bantam Books.
- 27 Costello, A. E. (1885). *Our Police Protectors: History of the New York Police from the Earliest Period to the Present Time*, New York: author's edition, as reported in J. A. Inciardi (1976), "Criminal Statistics and Victim Survey Research for Effective Law Enforcement Planning." pp. 177–189, in Viano, E. (ed.), *Victims and Society*. Washington, D.C.: Visage Press, pp. 179–180.
- 28 Villaume, A. C. (1977). "Parkinson's Law and the United States Bureau of Prisons." *Contemporary Crises* (forthcoming) makes the case that Parkinson's Law operates in the federal corrections bureaucracy, as it probably operates elsewhere.
- 29 Weinraub, B. (1967). "Crime Reports Up 72% Here in 1966: Actual Rise is 6.5%," *New York Times* (February 21).
- 30 Pepinsky, H. E. (1976). *Crime and Conflict: A Study of Law and Society*, London: Martin Robertson and New York: Academic Press, pp. 64–65.
- 31 Berkman, A. (1971), op. cit., p. 41.
- 32 Ibid., pp. 50–62.
- 33 Lemert, E. M. (1962). "Paranoia and the Dynamics of Exclusion." *Sociometry* 25 (March): 2–25.
- 34 Pepinsky, H. E. (1976), op. cit., pp. 119–132.
- 35 Greiner, J. M. (1974). *Tying City Pay to Performance: Early Reports on Orange, California, and Flint, Michigan*, Washington, D.C.: Labor-Management Relations Service of the National League of Cities, National Association of Counties, United States Conference of Mayors.
- 36 Kalven, H., Jr., and H. Zeisel (1966). *The American Jury*, Boston: Little, Brown, p. 8.

Comments of Reviewer A

I do not think that this should be published in *Contemporary Crises*.

It is an interesting paper but mainly because it is a different proposal as to how to control "crime". There is not much analysis of the notion of crime. In this respect it would be an interesting piece if he could argue, tightly and coherently, why a lessening of the criminal justice system would reduce "crime" (as some of the Dutch have done) – but then it would not be appropriate for your journal. However, it is difficult to tell whether he is advocating communist anarchism as such or as a weapon in the fight against crime.

He uses two notions of crime without distinguishing them: 1) crime as something defined by the criminal law – in which case the anarchists are right when they say that less law will mean less crime – and 2) "real crime" – something moral which everyone hates (a version of *mala in se*) – which is what anarchists tend to talk of when they talk of crime.

In any case his proposals for lessening the activity of the criminal justice system seem to imply more and more scope for administrative discretion. He doesn't seem to have mentioned the literature on the horror that that causes.

Comments of Reviewer B on Earlier Draft

An extremely interesting paper in many ways (especially interesting to me personally as I have been toying for some years with the possibility of developing an anarchist theory of social control). It's full of provocative arguments – particularly in the last section (from p. 10) when the author starts on proposals for optimizing social control strategies.

As a whole, though, the paper is uneven and not very convincingly presented – especially for those not familiar with this debate. Specifically:

1. There should be an introductory paragraph stating the point of the exercise. As it stands, the first paragraph is very weak and I am not sure how much the author really knows about the anarchist tradition. Anarchism is *not* “an American epithet”; Woodcock’s identification of this school of thought as “anarchist communism” is somewhat misleading and many who would identify themselves with this tradition would certainly not “eschew political violence . . . etc.”.
2. A central criticism obviously: I really don’t see how the anarcho-communist model for controlling interpersonal conflict can simply be compared to the due process model: (para. two, p. 1) without putting either of them in some sort of context – historical or sociological. This is not comparing like with like and there are all sorts of important variations in both models.
3. Consequently, the comparisons (pp. 2–4) are somewhat misleading and at times (I find, at least) inexplicable, e.g. on Element number six.
4. Again consequently, the criteria set up (pp. 5–8) for judging the failure of the due process model are somewhat simplistic – or at least make a lot of assumptions about the degree to which all this is worked out in the anarchist model, e.g. point (c) on p. 7: this issue of ending regular employment is really not that clear.
5. The author concedes (pp. 8–9) problems such as that of romanticism in the anarchist model – but the author leaves these problems in the air, and simply asserts rather than argues the case that the anarchist communist model can be used as a realistic basis for criticizing due process.
6. The last section, as I said, is good but some theoretical lines get redrawn here. “While one side points to the dangers of the growth of legal bureaucracy” (p. 10). Are these the sides? The second side is perfectly compatible, with other positions the author does not refer to, e.g. a type of Illich deprofessionalization or Nils Christie’s attack on experts.

I think that the author has hit on an interesting idea. But the argument is a little thin in parts and the very last sentence (about the “unities of manifestly differing social control perspectives”) gives up too easily.

I would encourage the author to revise, but I would not accept it as it is.

Comments of Reviewer B

I enclose the re-written paper which you sent me on 21st July.

With a copy of my original comments (but not the paper itself) I'm afraid that my first reaction is that the paper is now in a much worse state! None of the six points I originally made seem to have been attended to properly, and this version is even more uneven than the first. The author poses in his/her opening line the question of whether the proponents of the "rule of law" or those of "communist anarchism" make the better case for law to control crime. But not only does he never compare these positions (as he began to do in Version One – and I suggested that he should do it better) but he doesn't, aside from the odd references to Berkman, ever say what this "communist anarchist" theory of crime control actually looks like. I *still* cannot see (p. 322 and elsewhere) how giving security and protection to criminal justice workers has anything to do with anarchist theory. Some of the arguments en route (e.g. p. 319 about assassinations being *rarely* reported) seem a bit nutty to me. As do statements such as those on p. 323 about the proposals designed to optimize deterrence and anarchism.

You should get a second opinion – I might be just missing the wavelength, but it seems a real mess to me and not publishable.

29 September 1977 Letter by Chambliss to Pepinsky

I have a problem with your paper on anarchism. I think the best way to handle the problem is to send you the two reviews which have come in and let you respond to them. I like the paper more than the other editors have. I was particularly sorry that the person who was most favorable on the first round was less enthusiastic this time. Let me know what you think of the reviews and what you think we should do. Don't be modest.

4 October 1977 Letter by Pepinsky to Chambliss

Thanks for the invitation to comment – immodestly – on the reviews of "Communist anarchism as an alternative to the rule of criminal law." The preceding round of reviews was telling, and the earlier draft of the paper much in need of revision. This time, I think the reviewers' points are ill taken and that the second draft is damned good. To elaborate:

(a) The reviewer who suggests I work on my argument as to why a lessening of the criminal justice system would reduce crime misses the point of the paper. I think I understand the issue the reviewer raises. Unless I'm

wrong, it's the very issue I wrestled with throughout *Crime and Conflict*. But for this paper, I'm only incidentally interested in how to lessen crime itself. Instead, my purpose (as the title of the paper indicates) is to show that two, ostensibly dialectically opposed, theories of crime control cannot succeed *in their own terms*, by their own logic, without succeeding together. I think it's worth pointing out that proponents of these two theories defeat their own purposes by fighting each other, without my arguing over whether their purposes are the good, the true and beautiful. In lawyer's terms, in the battle between proponents of anarchist communism and those of the rule of law over how to control crime, I'm arguing that each side should be stopped from attacking the other by virtue of its own logic, and the issue of what constitutes "real" crime control, or control of "real" crime, is *dictum*: it need never be reached.

Is the issue I address important? Is it more than a simple debate within the discipline? Yes, because if the thesis of my paper is correct, then it is untenable for someone either to advocate marshalling more criminal justice resources in the name of deterrence or to advocate simple abolition of criminal justice jobs in the name of communist anarchism. It is also a waste for ideologues of either position to spend time attacking each other's premises or motives. Wipe these impediments away, and you free us students of crime control to work on the problems of reducing crime in new ways that might hold promise instead of defending bankrupt positions. I acknowledge that the paper is an exercise in pure iconoclasm and – given the current investment of so much criminological brainpower in knee-jerk defense of these essentially bankrupt positions – I think pure iconoclasm has a substantial contribution to make to the growth of knowledge in the field of crime control. As Karl Popper has argued well enough to persuade me, refutation of established truths has a vital role to play in scientific inquiry, and that's what I'm up to.

Is the paper appropriate for your journal? I take you at your word, that the journal is dedicated to propagating and expanding radical thought about crime. I happen to believe that it is not very radical to assume the defense of any established school of thought, including communist anarchism. In my view, being radical requires injection of all orthodoxies – left and right – and attempting to create new ideas about the way the world is or could be. By this criterion, I take my paper to be radical in that I am laying groundwork for new theories of crime control to be generated without having to bow to the demands and requirements of orthodox theorists of the left or right.

(b) As to the second reviewer, the one with the six points, I made a special point of trying to overcome his/her objections, and I'd like to think the points have been attended to properly. Let's take each point in turn:

1. “There should be an introductory paragraph stating the point of the exercise.” I have written a paragraph of abstract doing precisely that. Checking *Contemporary Crises*, I now see that you do not print abstracts. My apologies. I had thought the abstract would meet the objection. I now suggest that the first two sentences of the abstract be substituted for the first sentence of the text. Okay?

By the way, for whatever it’s worth, if I do have a chance to have an abstract, I prefer it to foretell what’s in the paper and to let the beginning of the text seduce the reader rather than repeating the point of the exercise.

2. The reviewer doesn’t see how communist anarchism can simply be compared to the rule of law. I don’t see the problem in the revised version. I think the distinction between strengthening government and laws, and eliminating government and laws, commending each as a means to crime control, is clear. If, as the reviewer originally suggested, I’m ignoring important variations in the two positions, I suggest that the burden is on her/him to suggest what at least a couple of these variations might be.

3. I have eliminated the comparisons that appeared on pp. 2–4 of the first draft. Thus, they can no longer be misleading or inexplicable.

4. I agreed with the reviewer that my original criteria for judging the due process model a failure were inadequate. Hence, I no longer use those criteria.

If the communist anarchist position, as stated by Berkman, that government should suddenly be abolished come the revolution – and that gradualism or compromise on this point is intolerable – does not imply kicking criminal justice officials out of their jobs, I’ll eat my hat.

5. I no longer use communist anarchism as a basis of criticism of the rule of law. Instead, I use research findings and a little common sense about the logic of making punishment swift, sure and severe. It just happens that the conditions requisite to deterrence turn out to be the same as the conditions requisite to communist anarchism.

6. The conclusion of the revision is entirely different from that of the first draft. Do I now redraw theoretical lines? I think not.

As to what the communist anarchist theory of crime control looks like, what else do I need to tell that is germane to the argument, besides the information given in the first sentence of the third full paragraph on p. 315, and on p. 320? I don’t think my argument rests on, or would be changed by, anything further in what I have seen of the literature. Besides, this half of my argument is directed to communist anarchists, who presumably know what their theory is. Those who want to read a complete statement of the theory are referred to Berkman. What’s the point of repeating what he said if it doesn’t bear on my argument?

As to what giving security and protection to criminal justice workers has

to do with anarchist theory, am I not clear? I argue that the grant of security and protection is a necessary precondition to abating, let alone eliminating, government activity in the realm of crime control. Eliminating government activity is to anarchists a necessary condition for crime control. Hence, a grant of security and protection to criminal justice officials is necessary to getting where the anarchists want to go, and besides is a measure practically dictated by the anarchist principle of giving power and dignity to the working class, which includes most criminal justice officials.

Is it that hard to understand what I mean by assassinations being rarely reported? How often do assassinations get called to officials' attention, as contrasted to, for instance, burglaries? Answer: rarely.

The reviewer fails to state what bothers him/her about the proposals on p. 323, and I cannot read his/her mind. They are simply intended to illustrate that what serves the cause of the proponents of the rule of law serves the cause of proponents of communist anarchism.

(c) I suggest that if the paper is to be appreciated, it takes a sense of humor to do so. If those attracted to either school I attack cannot laugh at themselves, I stand no chance of successful iconoclasm no matter what I write. I aim to be outrageous and nutty in orthodox terms in order to make sense in radical terms.

(d) What do I think you should do? I believe in the Burkean view of representation. I see an editor as chosen to represent associates and advisers by exercising his/her own judgment based on advice and information given. I don't see the point of going on and looking for favorable reviews. You see what the reviewers say. You see what I say. Now, I suggest that you rest on your own evaluation of the relative merits of the paper and of the criticisms.

For what it's worth, I'm usually diffident about these matters, but I was confident that you would accept the paper. And I take it as testimony to my success with my brand of radicalism that even other radicals will more often be pissed than delighted by what I have to say.

13 October 1977 Letter by Chambliss to Pepinsky

Tell you what I would like to do. I would like to put together your article with an editorial telling of the controversy generated and incorporating the reviews (the last ones especially and perhaps a little of the first ones will be necessary to make sense of the package) and your response to the last reviews as per your October 4 letter. Is this ok with you? Of course some of the October 4 letter is irrelevant to this but much of it could be included. With that in mind would you like to rewrite any part of the October 4 letter

or just let me take it *au naturel*? Would you be willing to make up such a package to be appended to the article when it appears?

18 October 1977 Letter by Pepinsky to Chambliss

I'm flattered and delighted by the proposition in your last letter. I have put together the package as you suggested. This letter to you is my last entry into the package. Could I make one additional suggestion? I have had a chance to prepare my last words with the knowledge that all this is going into print. The reviewers have not had a similar opportunity. How about giving them one more chance to reply to what I have said? (I promise to ask for no further right of reply myself.)

Note that I left the abstract and the first line of the text as they were, with lines drawn through portions we agreed should be deleted so as to incorporate the abstract into the text. This should help your readers to understand part of the exchange between me and reviewer B.

I see that I failed to respond to reviewer A's last point: that my proposals imply broader administrative discretion. I doubt it. As I have argued through the first four chapters of *Crime and Conflict*, the discretion of American criminal justice officials is broad and growing broader precisely because of the size and detail of the law under which officials operate, with attendant insecurity imposed on officials.

At any rate, in this paper, my proposals to make officials more secure are directed toward communist anarchists and rest on their logic. Making officials more secure amounts to lifting the threat of government coercion from them. If we cannot trust people to treat each other well when the threat of government coercion is lifted from them, then the vision of the anarchists is fundamentally flawed, and we need to give officials more – not less – coercive power. Giving greater security to officials is indicated either way.

Two noteworthy events have occurred in the several months since I wrote the paper. In the paper, I say that victimization figures are becoming regularly available. Not any longer. In September, it was announced that the National Criminal Justice Information and Statistics Service would not be incurring the expense of victim surveys for the immediate future. The major source of American victimization data may have been cut off. It's as American as apple pie to invest heavily in a new program and then quickly tire of it and abandon it. Victim surveys have apparently had their heyday.

In the paper, I also assert that crime is rising out of control. Recently, however, police departments all over the country have been reporting declines in rates of most serious offenses. (Rape, which is enjoying another

American fad in reporting and prosecution, is a notable exception.) The widespread declines in offense rates deserve closer scrutiny than I have given them, but I suspect I know how the declines have been brought about. After suffering criticism of its other funding priorities, as for police hardware, the Law Enforcement Assistance Administration has taken to funding police departments for experimental attempts to prevent crime. LEAA requires evaluation of the projects it funds, and the conventional way for a police department to evaluate its success at crime prevention is by trends in its offense rates. In effect, then, LEAA has been paying police departments to report fewer offenses. This is close to my proposal to pay officials to file fewer reports, which reviewers of *Crime and Conflict* have singled out for particular ridicule. I haven't yet heard anyone suggest that the apparently LEAA-bought decreases in offense rates are not "real." And now, as I also proposed, LEAA is calling for proposals to establish community mediation services. I'll have to confess that I never expected to agree so much with LEAA's crime control policy.

I nonetheless keep the faith. I'm willing to bet that LEAA policy is but another passing American fad, and that American crime rates will soon be climbing again as LEAA turns back to feeding bureaucratic appetites for bigger, better law enforcement. We shall see.

At the risk of sounding self-serving, I think it is terrific that controversies between reviewers and authors are making their way into a social science journal. True to the mission of *Contemporary Crises*, it is a radical step forward to move from contrived editorial consensus to open display of honest disagreement over what deserves publication.