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Gramsci, Hegemony, and the Law

*Douglas Litowitz**

I. INTRODUCTION

Hegemony is a Marxist concept derived largely from the work of Antonio Gramsci.¹ It emerged as a central theme during the heyday of the Critical Legal Studies movement,² and it remains popular in contemporary legal studies,³ albeit within a somewhat narrow cir-

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1. See Anne Showstack Sassoon, *Hegemony*, in A DICTIONARY OF MARXIST THOUGHT 201 (Tom Bottomore ed., 1983) (“[Hegemony’s] full development as a Marxist concept can be attributed to Gramsci. Most commentators agree that hegemony is the key concept in Gramsci’s *Prison Notebooks* and his most important contribution to Marxist theory.”); ROBERT BOCOCK, HEGEMONY 21 (1986) (“The concept of hegemony was the central, most original, idea in Gramsci’s social theory and philosophy.”).

2. Some important Critical Legal Studies articles dealing with hegemony include Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982); Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 1982); Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304 (David Kairys ed., 1982); Duncan Kennedy, *Antonio Gramsci and the Legal System*, in 6 ALSA F. 32 (1982); and Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265, 268 (1978).

3. An excellent collection of essays on law and hegemony can be found in CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE (Mindie Lazarus-Black and Susan F. Hirsch eds., 1994) [hereinafter CONTESTED STATES]. A heated exchange on the concept of hegemony can be found in Brook Thomas, *Michael Grossberg’s Telling Tale: The Social Drama of an Antebellum Custody Case*, 23 L. & SOC. INQUIRY 431 (1998), and Michael Grossberg, *How to Tell Law Stories*, 23 L. & SOC. INQUIRY 459 (1998). Recent uses of the concept of hegemony include Larry Cata Backer, *The Many Faces of Hegemony: Patriarchy and Welfare as a Woman’s Issue*, 92 NW. U. L. REV. 327 (1997) (reviewing MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES (1996)); Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L. J. 2473, 2507 (1998); Satvinder Juss, *Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence*, 11 HARV. HUM. RTS. J. 311, 335 (1998); and Anthony Walsh, *“The People Who Own the Country Ought to Govern It:” The Supreme Court, Hegemony, and Its Consequences*, 5 L. & INEQ. J. 431 (1987). In addition, a great many articles use the term “hegemony” in an offhand way without explanation.

cle of law-and-society scholars.⁴ The concept of hegemony deserves broader consideration from the legal academy because it is a critical tool that generates profound insights about the law's ability to induce submission to a dominant worldview. The purpose of this article is to introduce Gramsci's work to a wider audience by explaining, critiquing, and revitalizing his notion of hegemony as it applies to law.

This article is not merely a description of Gramsci's influence. I also want to take issue with the direction taken in recent legal scholarship on hegemony. Gramsci spoke about hegemony in the singular as a large-scale national phenomenon (e.g., the hegemony of a single dominant group over all others), and that is what made his theory powerful—he was describing a phenomenon that permeated all of our lives. Recent legal scholarship eschews Gramsci's notion of an overarching hegemony in favor of the idea that hegemony occurs only at discrete and disconnected sites such as race, age, disability, and gender.⁵ The statement of a leading scholar is instructive of this new approach: "Instead of an overarching hegemony, there are hegemonies. . . . Law cannot be view as hegemonic or not as a whole."⁶ Much of the recent legal scholarship on hegemony builds on this post-Gramscian approach to hegemonies,⁷ which is noteworthy for its reliance on historical studies of hegemony⁸ and cross-

4. The concept of hegemony has never been treated exclusively in a full-length law review article. So far, articles dealing at length with Gramsci's writings on law have been oriented toward a specialized audience of socio-legal scholars and political theorists. See Mark Benney, *Gramsci on Law, Morality, and Power*, 11 INT'L J. SOC. L. 191 (1983); Maureen Cain, *Gramsci, The State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE 95 (D. Sugarman ed., 1983).

5. See, e.g., Michele L. Bergeron, *Hegemony, Law and Psychiatry: A Perspective on the Systemic Oppression of "Rogue Mothers"* in In Re Aaron S., 4 FEMINIST LEGAL STUD. 49 (1996); Katherine Franke, *Cunning Stunts: From Hegemony to Desire: A Review of Madonna's Sex*, 20 N.Y.U. REV. L. & SOC. CHANGE 549, 559 (1993) (referring to "male hegemony"); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L. J. 2249 (1998).

6. Sally Engle Merry, *Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court*, in CONTESTED STATES, *supra* note 3, at 35, 54.

7. See Susan F. Hirsch & Mindie Lazarus-Black, *Performance and Paradox: Exploring Law's Role in Hegemony and Resistance*, in CONTESTED STATES, *supra* note 3, at 1.

8. The most influential historical accounts of hegemony are EUGENE D. GENOVESE, ROLL, JORDAN, ROLL (1976), and E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975). An excellent discussion of hegemony in the historical context is provided by T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985). Recent use of the concept in legal history can be found in the

cultural examples of domination and resistance.⁹ Many of these scholars have tacitly abandoned the search for an overarching hegemony at work in the current legal system.

Against this line of scholarship, I will argue in favor of the continuing relevance of Gramsci's notion of hegemony in the singular. In particular, I will argue that the current legal system is hegemonic in the Gramscian sense in that it induces people to comply with a dominant set of practices and institutions without the threat of physical force and that this hegemony is overarching because it encompasses people of diverse races, classes, and genders. The law induces passive compliance in large measure through its function as constitutive of social ontology—it provides rules for the proper construction of authorized institutions and approved activities, such as setting up corporations, buying and selling real estate, drafting wills, hiring employees, and so on; it is a hegemonic *code* that replicates the social ontology in much the same way that a genetic code replicates a biological organism.

Part II of this article focuses on Gramsci's use of the term hegemony and the concept's implications for legal doctrine and practice. Part III traces the impact of hegemony as a critical concept in legal scholarship over the last twenty years and then proceeds to a sustained critique of recent scholarship on hegemony. The final part, Part IV, draws from literary works to support my reformulation of hegemony as the dissemination of a dominant code composed largely of unchallenged background assumptions that undergird the law. Part IV presents a revised conceptualization of hegemony that does away with Gramsci's notion that law is the hegemonic tool of a dominant *class* in favor of the notion that law represents a dominant *code* or *map* that perpetuates the status quo and its attendant inequalities, oppressions, and disaffections. This reformulation of Gram-

work of Michael Grossberg, *Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict*, in *CONTESTED STATES*, *supra* note 3, at 153, and GWENDA MORGAN, *THE HEGEMONY OF THE LAW: RICHMOND COUNTY, VIRGINIA, 1692-1776* (1989).

9. Perhaps the most influential analyses of hegemony in a cross-cultural context come from Jean and John Comaroff. See JEAN COMAROFF & JOHN COMAROFF, *1 OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA* 23 (1991) (“[W]e take hegemony to refer to that order of signs and practices, relations and distinctions, images and epistemologies—drawn from a historically situated cultural field—that have come to be taken-for-granted as the natural and received shape of the world and everything that inhabits it.”).

sci's concept of hegemony captures fresh insights about the law's ability to induce submission and paralysis while avoiding Gramsci's reliance on orthodox Marxist categories that are no longer tenable. Still, hegemony remains a critical and negating tool, not a positive concept. That is, the recognition of hegemony is a tool to raise one's consciousness: it clears away the distortions and artificial boundaries that insulate the existing legal framework, but it cannot provide a blueprint for a better system. This means that Gramsci's work provides important insights for understanding how the law sustains unequal power relations, but it offers scant direction for reforming the law.

II. THE CONCEPT OF HEGEMONY

Gramsci was the Secretary of the Italian Communist Party and an active labor leader; he was elected to the Italian Parliament, only to be imprisoned by Mussolini from 1926-37. While in prison, he produced the hugely influential series of essays posthumously assembled as the *Prison Notebooks*.¹⁰ It was in the *Prison Notebooks* that Gramsci developed the concept of hegemony to describe a condition in which the supremacy of a social group is achieved not only by physical force (which Gramsci called "domination" or "command") but also through consensual submission of the very people who were dominated (a phenomenon that Gramsci variously called "leadership," "direction," or "hegemony").¹¹ Gramsci's statement about these two axes of domination is classic:

[T]he supremacy of a social group manifests itself in two ways, as "domination" and as "intellectual and moral leadership". A social group dominates antagonistic groups, which it tends to "liquidate", or to subjugate perhaps even by armed force; it leads kindred and allied groups. A social group can, and indeed must, already exercise "leadership" before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to "lead" as well.¹²

10. SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds., 1971) [hereinafter PRISON NOTEBOOKS].

11. For an instructive discussion of Gramsci's terminology, see *id.* at 55 n.5.

12. *Id.* at 57-58. A useful summary of hegemony has been prepared by Gwyn Williams:

Any long-lasting social control requires power at both of these levels, which Gramsci elsewhere describes as “force and . . . consent, authority and hegemony, violence and civilisation.”¹³ The first type of domination is commonly associated with coercive state action by the courts, the police, the army, and the national guard. The second type of control (“hegemony” proper) is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture. Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.

A. The Evolution of Hegemony

Hegemony is a Greek term that originally designated the power of a single state over other states in a confederacy, for example the power of Athens over the Greek city-states.¹⁴ This meaning of the term continued through the centuries, for example, to describe the power of Prussia over the various German states or the power of France over its colonies.¹⁵ This is the sense of the term used by Marx and Engels on those rare occasions when they spoke of hegemony.¹⁶ Outside of a narrow circle of critical theorists who have adopted

By “hegemony” Gramsci seems to mean a sociopolitical situation, in his terminology a “moment,” in which the philosophy and practice of a society fuse or are in equilibrium; an order in which a certain way of life and thought is dominant, in which one concept of reality is diffused throughout society in all its institutional and private manifestations, informing with its spirit all taste, morality, customs, religious and political principles, and all social relations, particularly in their intellectual and moral connotations. An element of direction and control, not necessarily conscious, is implied. This hegemony corresponds to a state power conceived in stock Marxist terms as the dictatorship of a class.

Gwyn Williams, *Gramsci’s Concept of “Egemonia,”* 21 J. HIST. IDEAS 586, 587 (1960).

13. PRISON NOTEBOOKS, *supra* note 10, at 170.

14. *See* 7 OXFORD ENGLISH DICTIONARY 105 (2d ed. 1989).

15. *See id.*

16. The University of Colorado maintains a searchable database of the collected works of Marx and Engels, indicating that they used the term hegemony on very few occasions, primarily in scattered notes and letters. *See Marxist.org Internet Archive* (visited Mar. 25, 2000) <<http://csf.colorado.edu/mirrors/marxists.org/>>.

Gramsci's subsequent reformulation of the term, the original Greek meaning remains the common meaning of the term. In particular, one finds the term used quite often in the international arena to describe the hegemony of Western culture.¹⁷ In this straightforward usage, the defining condition for hegemony is control by one state over another, whether by physical force, cultural leadership, or otherwise. By analogy, the term can be extended to describe other instances of domination, such as control by a single social class or control of a single person over an institution or practice (such as the hegemony of Freudian theory in the field of psychology).

At the time when Gramsci began writing, the term hegemony was gaining currency in both Russian and Italian circles, although it is unclear which strand influenced Gramsci since he had links to both countries—he was an Italian intellectual who spent several years in Russia as a representative to the Third International prior to his return to Italy, election to Parliament, and eventual imprisonment and death.¹⁸ Perhaps he found the term in both languages. For his own part, Gramsci claimed that the concept was created by Lenin,¹⁹ but this assertion has proven erroneous.²⁰ It is possible that Gramsci encountered the term in the writings of a nineteenth century philosopher named Vincenzo Gioberti, who wrote about the power of one province over others, specifically about the power of Piedmont over the rest of Italy.²¹ On the Russian side, the term was clearly in use long before Lenin, who probably picked it up from his association with the Russian Social Democrats before he split off with the Bolsheviks.²² From the work of Lenin and others, the term found its way into the documents surrounding the Third International, and somehow it filtered into Gramsci's usage.²³

17. See WILLIAM I. ROBINSON, *PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION AND HEGEMONY* (1996).

18. See *BIOGRAPHICAL DICTIONARY OF THE COMINTERN* 151 (Branko Lazitch ed., 1986).

19. See *PRISON NOTEBOOKS*, *supra* note 10, at 381; WALTER L. ADAMSON, *HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI'S POLITICAL AND CULTURAL THEORY* 172 (1980).

20. See Perry Anderson, *The Antinomies of Antonio Gramsci*, 100 *NEW LEFT REV.* 5, 15 (1976).

21. See ANTONIO GRAMSCI, *PRE-PRISON WRITINGS* xxvii (Richard Bellamy ed., 1994) [hereinafter *PRE-PRISON WRITINGS*].

22. See BOCOCK, *supra* note 1, at 25.

23. See *PRE-PRISON WRITINGS*, *supra* note 21, at xxvii.

For the Social Democrats and for Lenin, the term designated something akin to broad-based support for the revolutionary class, which can rise to power more smoothly by brokering alliances with other classes, thus creating a broad power base. The basic notion was that for a class to come to power (specifically, the proletarian class as the class that represents all other classes) the class must make strategic alliances with other factions, such as peasants, the petty bourgeoisie, intellectuals, and civil servants. This would ensure that the revolution was not a mere seizure of the state apparatus by the revolutionary party without popular support (e.g., a coup d'état) but that the revolution occurred with the support of the various social groups in the state.

In Gramsci's early writings, hegemony is used in Leninist fashion to designate the socialist strategy by which the proletarian class rises to a secure position of power by making concessions to other groups: the dominating class assumes power by representing itself as the agent for other classes. A classic example of Gramsci's early use of the term can be found in his essay, *Some Aspects of the Southern Question*, where he noted that the Italian government (seated in the north) could never establish nationwide control without the support of the social groups in southern Italy.²⁴ From this observation he draws the strategic conclusion that the proletarians must avoid rising to power without popular support from all other subaltern groups: "For the proletariat to become the ruling, the dominant class, it must succeed in creating a system of class alliances which allows it to mobilize the majority of the working population against capitalism and the bourgeois State."²⁵

The theme of national unification behind a single party recurs in Gramsci's later works, most notably in his detailed historical analysis of the failure of the Italian unification movements to achieve control in Italy due to the absence of popular support.²⁶ For the communists to avoid this mistake, the Party must become "Jacobian," it must enjoy widespread support akin to the French Revolution.²⁷ At times Gramsci seems to imply that revolution will succeed only if the proletarian class becomes the vanguard for other groups:

24. *Id.* at 313.

25. *Id.* at 316.

26. See PRISON NOTEBOOKS, *supra* note 10, at 66.

27. See *id.* at 322.

The metal-worker, the joiner, the builder, etc., must not only start thinking as proletarians and not as metal-workers, joiners, builders, etc.; they must also take a further step forward. They must think as workers who are members of a class that aims to lead the peasants and the intellectuals: a class that can only win and only build socialism if it is aided and followed by the great majority of these other social strata.²⁸

Latent in this passage (and others like it) is a message that would continue in Gramsci's later work: effective domination requires concession and universality. The dominant group must concede to the needs of other groups so that their interests are aligned, and at the same time it must promote its parochial interests as representative of the interests of all social groups. In these pre-prison writings, hegemony is not an undesirable thing, nor does it have ominous overtones. Indeed, the goal was to create an alternative hegemony (a counter-hegemony) to replace the bourgeois hegemony. Yet, in light of Gramsci's later critical comments on hegemony, his early endorsement of hegemony seems slightly odd.²⁹

Gramsci's view of hegemony took a darker turn after his arrest and trial, which was noteworthy for the demand of the chief prosecutor: "We must stop this brain working for twenty years!"³⁰ Whereas Gramsci's previous focus had been on the optimistic struggle to replace the existing hegemony with a proletarian hegemony, there was now a pessimistic recognition that the very people who were exploited by capitalism and Italian fascism were often the strongest supporters of capitalism and fascism and that they willingly consented to their own exploitation. This phenomenon called for an explanation. Gramsci came to believe that the dominant group was able to disseminate its values in churches, schools, and popular culture, which meant that physical force was only one aspect of domination, the other being persuasion, or leadership, which always entails some form of voluntariness. While Gramsci still looked toward the

28. PRE-PRISON WRITINGS, *supra* note 21, at 322.

29. Interestingly, the use of hegemony as a positive term is enjoying a resurgence in Europe, but this time with a twist—the term that flourished in Marxist circles is now being bandied about by conservative groups who seek a new hegemony in support of right-wing ideologies that would have been abhorrent to Gramsci. See Rob Van Craenenburg, *Whose Gramsci?: Right-Wing Gramscism*, UNDERCURRENT 6 (visited Mar. 25, 2000) <<http://darkwing.uoregon.edu/~ucurrent/uc6/6-gramsci.html>>.

30. PRISON NOTEBOOKS, *supra* note 10, at xviii.

establishment of a proletarian hegemony, he developed a new respect for the depth of the existing hegemony.

There is no single essay in the *Prison Notebooks* devoted exclusively to hegemony, nor did Gramsci provide an analysis of the various mechanisms by which the existing regime in Italy had become hegemonic. The lack of a straightforward approach can perhaps be explained by the circumstances under which the *Prison Notebooks* were written. Gramsci was a hunchback with a host of physical ailments, and he suffered terribly in jail. Denied the basic texts of Marxism, he resorted to code words and indirect expressions to evade the prison censors. And since he died very shortly after his release, he did not have time to re-articulate his position in an uncensored forum. So instead of a single essay on hegemony, we must suffice with snippets from his essays on intellectuals, philosophy, education, Machiavelli, and Italian history, among other topics. At times the *Prison Notebooks* can appear scattered and even contradictory, but when the various letters and articles are weighed together and organized by topics, a relatively coherent concept of hegemony begins to emerge.

The starting point of the analysis is Gramsci's central insight that the power of a social group is maintained not only by direct acts of forced compliance (via the criminal law imposed by the police and the national guard) but also by taking control of the private sector long referred to by Hegel and Marx as "civil society"—the vast network of contacts, associations, families, churches, and informal gatherings in which people move from day to day without direct involvement from the state. At one point Gramsci provides a useful description of hegemony as

[t]he "spontaneous consent" given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically caused" by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.³¹

Hegemony as described above is one aspect of control, the other being physical force. When both modes of domination are working at full steam, the system amounts to what Gramsci characterized as a

31. *Id.* at 12.

“Centaur,” half human and half animal, corresponding to the dual poles of force and consent, state and civil society.³² If this is so, we cannot look for domination solely in the state but must seek it also in the popular imagination, the education system, the work of intellectuals, religion, art, and even in the mundane reaches of common sense.³³ Thus, he concludes that “[t]he foundation of a directive class . . . (i.e. of a State) is equivalent to the creation of a *Weltanschauung*,”³⁴ a dominant worldview.

If Gramsci is correct, domination need not take the physical form described by Orwell: “If you want a picture of the future, imagine a boot stamping on a human face—forever.”³⁵ By contrast, domination is increasingly a matter of colonizing the internal world of the dominated classes, a feat that cannot be accomplished by force but only through messages, codes, and the dissemination of images and information. After all, brute force still leaves the individual free to harbor rebellious thoughts, but complete control is both external and internal.³⁶ This does not mean that physical force is replaced by reeducation camps but rather that control is exercised increasingly at the level of popular belief through the dissemination of a dominant outlook. It stands to reason that the decline in physical force is related to the increasing use of persuasion and conformity as mechanisms of social order. Here we are reminded of William Burroughs’ quip, “A *functioning* police state needs no police,”³⁷ meaning that when domination has been completely internalized and naturalized there is simply no need for external coercion.

32. *See id.* at 170.

33. *See id.* at 419.

34. *Id.* at 381.

35. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 220 (1977).

36. *See* UMBERTO ECO, TRAVELS IN HYPERREALITY 135 (William Weaver trans., 1986). The move away from centralized state power as the instrument of domination was nicely captured in Umberto Eco’s statement:

Not long ago, if you wanted to seize political power in a country, you had merely to control the army and the police. Today it is only in the most backwards countries that fascist generals, in carrying out a coup d’etat, still use tanks. If a country has reached a high level of industrialization the whole scene changes. The day after the fall of Khrushchev, the editors of *Pravda*, *Izvestiia*, the heads of the radio and television were replaced; the army wasn’t called out. Today a country belongs to the person who controls communications.

Id.

37. WILLIAM S. BURROUGHS, NAKED LUNCH 34 (1990).

Gramsci's insistence that relations of domination were replicated in popular culture made him a leading precursor to the emerging field of cultural studies, which involves the analysis of popular codes and symbol-systems such as advertising, clothes, and movies.³⁸ This line of inquiry perhaps finds its paramount expression in Roland Barthes' claim that a dominant ideology is symbolically mediated through cars, toys, advertising, food, news, and entertainment.³⁹ This can be seen in Barthes' analysis of a cover of *Paris Match*, which depicted a black soldier saluting the French flag: this is a simple depiction of an actual event, but it is also the symbolic dissemination of a political stance that justifies colonialism on the grounds that black people give their consent to French rule and therefore do not suffer oppression.⁴⁰ This type of analysis is the logical extension of Gramsci's insight that domination is not merely physical but also symbolic and that all political struggles are simultaneous struggles of art, media, and communication.

For Gramsci, the establishment of a ruling worldview requires the mechanisms of universalization, naturalization, and rationalization. By universalism, the dominant group manages to portray its parochial interests and obsessions as the common interests of all people.⁴¹ This can take place in subtle ways. On one level, the ruling group may try to bring dissenting or out-groups within its umbrella, as takes place when the existing political parties try to convince feminists, gays, environmentalists, and others that their goals can be achieved through alliance with the existing parties (thus obviating the need for a labor party in America). More abstractly, a dominant system of advertising, movies, and products tends to promote consumption and atomism, lessening the chance for popular protest or cultural critique. This outlook goes hand in hand with the general sentiment that people are naturally acquisitive and that the existing system is merely the fulfillment of that innate desire.⁴²

38. See Simon During, *Introduction in THE CULTURAL STUDIES READER 5* (Simon During ed., 1993); DAVID HARRIS, *FROM CLASS STRUGGLE TO THE POLITICS OF PLEASURE: THE EFFECTS OF GRAMSCIANISM ON CULTURAL STUDIES* (1992).

39. See ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers trans., 1972).

40. See *id.* at 116.

41. See Chantal Mouffé, *Hegemony and Ideology in Gramsci, in GRAMSCI AND MARXIST THEORY* 168, 195 (Chantal Mouffé ed., 1979).

42. See Greer, *supra* note 2, at 305.

In the strategy of naturalism, a given way of life becomes “reified”⁴³ to the point where “culture” is confused with “nature” at every turn, which induces quietism because there is no point in fighting against nature.⁴⁴ As for the strategy of rationalization, Gramsci points out that every ruling group gives rise to a class of intellectuals who perpetuate the existing way of life at the level of theory. Here, Gramsci uses the term “intellectual” in the broadest possible sense to include lawyers, professors, politicians, scientists, and journalists. Gramsci’s point is that domination can be found at many levels of a cultural totality—at the levels of politics, education, entertainment, news, and common sense. This means that domination is a much more complicated and multi-leveled phenomenon than previously supposed by Marxists who focused exclusively on the public sphere (the factory, the parliament) as the locus of oppression.⁴⁵ Gramsci tends to equate physical force with the public sphere denoted as “political society”⁴⁶ and hegemony with the private sphere which he calls “civil society,” yet he cautions that the separation of public and private is purely methodological, since both spheres form parts within a totality, an ensemble of social relations that are economic, moral, political, religious, commercial, and artistic.⁴⁷

Gramsci believed that the public and the private are complementary spheres of domination, and, indeed, some instances of hegemony in the private sphere are only possible through public protection by the state. For example, government agencies will grant television licenses to stations that run approved programming, and the governmental authorities reserve the right to approve textbooks for use in public schools. These relations are maintained by force in the last instance (the police will shut down a “pirate” television station or remove a book from the shelves of a school library). However, the actual content of the approved shows and the approved textbooks induce submission without physical force (i.e., in a hegemonic fashion) by suggesting a dominant mode of life or through failure to depict alternative lifestyles. But notice how the two aspects of domina-

43. See GEORG LUKACS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 83 (Rodney Livingstone trans., 1971).

44. See BARTHES, *supra* note 39, at 11.

45. See CHRISTINE BUCI-GLUCKSMANN, GRAMSCI AND THE STATE 5 (David Fernbach trans., 1980).

46. See PRISON NOTEBOOKS, *supra* note 10, at 12.

47. See *id.* at 160.

tion are complementary: every instance of hegemony in the private sphere is backed by physical force on some level, and every act of physical force is also a symbolic performance and a hegemonic statement about the legitimacy of the state. For example, when police officers arrest a suspect, they wear official uniforms with the emblems of the state, not merely for identification, but also to establish their authority and legitimacy. An arrest is an act of physical force as well as a symbolic performance demonstrating the bounds of acceptable behavior in the eyes of the state. In this way, the dialectic of power and resistance is played out in public and private, with raw force and with symbols.

Gramsci is often heralded for breaking with orthodox Marxism by recognizing the presence of domination in the private lives and thoughts of ordinary people. According to a well-respected biographer of Gramsci,

Gramsci's originality as a Marxist lay . . . in his argument that the system's real strength does not lie in the violence of the ruling class or the coercive power of its state apparatus, but in the acceptance by the ruled of a conception of the world which belongs to the rulers. The philosophy of the ruling class passes through a whole tissue of complex vulgarizations to emerge as common sense: that is, the philosophy of the masses, who accept the morality, the customs, the institutionalized rules of behavior of the society they live in.⁴⁸

To credit Gramsci with this insight is perhaps an overstatement, since we can find passages where Marx pointed to the presence of domination within everyday beliefs, for example, when he ridiculed the masses for believing that their meager existence was a “concession from heaven.”⁴⁹ Perhaps a clearer point of originality on Gramsci's part can be found in his rejection of Marx's base-superstructure model⁵⁰ in favor of the multicausal notion of a “historical bloc.”⁵¹

48. GIUSEPPE FIORI, *ANTONIO GRAMSCI: LIFE OF A REVOLUTIONARY* 238 (1970).

49. Karl Marx, *Contribution to the Critique of Hegel's Philosophy of Right: Introduction*, in *THE MARX-ENGELS READER* 11, 14 (Robert C. Tucker ed., 1972).

50. See Karl Marx, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859), reprinted in *THE MARX-ENGELS READER*, at 3 (Robert C. Tucker ed., 1972).

51. *PRISON NOTEBOOKS*, *supra* note 10, at 377. Gramsci is less than clear on the exact relationship between economic relations and superstructural elements such as law and morality. For example, he sometimes speaks of a “reflective” relationship: “Structures and superstructures form an ‘historical bloc.’ That is to say the complex, contradictory and discordant *ensem-*

Whereas Marx and Lenin espoused a deterministic causality from the base (relations of production) to the superstructure (law, morality, and ideology), Gramsci introduced the historical bloc to designate a situation where elements of the base and superstructure are united in a single way of life and where the elements reflect and build off each other. This brilliant addition to Marxist theory draws attention to areas neglected by Marxists as epiphenomenal (art, common sense, education, religion), but it also captures the degree to which a dominant order is reflected at multiple levels. The resulting structure (the historical bloc) forms a giant system that is internalized as “common sense,” which Gramsci saw as a ragtag and often contradictory set of basic beliefs and presuppositions that reflect the existing arrangement.⁵² The idea of a historical bloc and its internalization as a matter of common sense helps to account for the tenacity of an existing way of life. For Gramsci, domination becomes encoded at all levels of a system, resulting in a kind of multilevel homeostasis where a dominant group (or a particular class of people) controls the repressive power of the police force as well as the intellectual means of production, namely the schools, news media, entertainment, and other mechanisms for the molding of popular culture.

Gramsci’s movement away from Marxist “economicism”⁵³ marked a major advance in the understanding of power and oppression. Put simply, domination requires the establishment of an entire way of life as standard and expected, the identification of the dominated with the dominators, and the subtle establishment of the prevailing ideology as natural and inevitable, indeed commonsensical. When domination reaches the internal world of the actors, resistance is almost unthinkable. This is captured nicely by Raymond Williams’ insight that hegemony extends to “a whole body of practices and expectations, over the whole of living. . . . It thus constitutes a sense of reality for most people in the society.”⁵⁴ Gramsci’s notions of historical bloc and common sense seem to support our impression that the

ble of the superstructures is the reflection of the *ensemble* of the social relations of production.” *Id.* at 366 (emphasis in original). At other times he privileges the economic sphere in Marxist fashion: “[F]or though hegemony is ethical-political, it must also be economic.” *Id.* at 161.

52. *See id.* at 419. The complex issues raised by “common sense” are discussed nicely by Eve Darian-Smith, *Power in Paradise: The Political Implications of Santos’s Utopia*, 23 L. & SOC. INQUIRY 81 (1998).

53. PRISON NOTEBOOKS, *supra* note 10, at 165.

54. RAYMOND WILLIAMS, MARXISM AND LITERATURE 110 (1977).

power holding people to the existing system is deep and multileveled, and that we often obey as a matter of reflex for the simple reason that our very identities are formed by the dominant framework to the extent that we are powerless to do anything else. As Duncan Kennedy observed regarding hegemony: “We all feel it. It’s an aspect of all of our lives that we ourselves are trapped within systems of ideas that we feel are false, but can’t break out of.”⁵⁵

Gramsci seemed to think that hegemony manifested itself at varying levels within the individual, appearing as both habit (that is, lived experience) and belief (that is, in a coherent body of beliefs supporting the dominant ideology). Thus, in some passages he refers to hegemony as “spontaneous consent,” but in other passages he argues that hegemony is secured by intellectual beliefs.⁵⁶ Various scholars have identified hegemony with either habit or belief but rarely with both. For example, in an influential analysis of Gramsci, Raymond Williams identifies hegemony as something that is largely unconscious,⁵⁷ as opposed to ideological belief structures that can be consciously articulated and contested; on this approach, hegemony is so deeply ingrained that it can scarcely be brought into the open and challenged. Yet in the hands of other thinkers, hegemony is virtually indistinguishable from ideology. Admittedly, hegemony and ideology have a substantial overlap and can be difficult to distinguish in many cases, but this problem of classification can perhaps be solved by saying that hegemony encompasses ideology because it also includes patterns of submission that lack structure as “ideas.”⁵⁸ In any event, the result is the same: individuals consensually internalize a set of beliefs and/or practices that are alienating and oppressive. George Orwell captured this internalization when one of his characters commented on his parents: “[H]aving no money, they still lived mentally in the money-world—the world in which money is a virtue and poverty is a crime . . . [t]hey had accepted the money-code, and by that code they were failures.”⁵⁹ This attitude represents a kind of degree zero of hegemony, where the individual’s self-understanding merges with the dominant understanding.

55. Kennedy, *supra* note 2, at 33.

56. PRISON NOTEBOOKS, *supra* note 10, at 12.

57. See WILLIAMS, *supra* note 54.

58. TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 112 (1991).

59. GEORGE ORWELL, KEEP THE ASPIDISTRA FLYING 44 (1936).

B. The Role of Law

Gramsci wrote almost nothing about law in the *Prison Notebooks*, but his few comments can be seen as moving toward an understanding of the dual status of law, corresponding to the two axes of power, namely physical force and hegemony.⁶⁰ To put the matter differently, the law is at the same time both repressive and constitutive.⁶¹ The repressive aspect of the law should be clear enough from the presence of police, prisons, courtrooms with armed bailiffs, and the ever-ready national guard, which is called out to restore the status quo when a social disturbance arises.

Quite apart from the state's monopoly on physical force, it also has the power to authorize and legitimate—indeed, to produce—a set of social institutions and practices. That is, the law authorizes a particular arrangement by enabling a certain way of life, for example, by legitimating marriage and monogamy, by allowing employment at will and inheritance, or, more superficially, by enforcing a set of zoning restrictions that give rise to, for example, cookie-cutter housing developments and strip malls. Indeed, the bulk of the law is not devoted to matters of physical force by the state and its instrumentalities but rather concerns itself with the types of voluntary enterprises and institutions that will be recognized. For example, the law will recognize and regulate the relations of people who have formed together as a corporation or as a limited partnership, but it will not enforce the relations of people who have gathered as a commune. There is no criminal ban on communes, but the state will not go so far as to lend its legitimation to the practice, so there is a tacit disapproval, and the law will recast such relationships in terms that it finds palatable, such as partnership, joint venture, joint tenancy, tenancy in common, contract, and so on. This explains Gramsci's quizzical comment about the State's role in legislation as "educational,"⁶² by which he meant that law performs a nonrepressive function of leadership and direction by suggesting a mode of life as "legal," as approved by the state. By seeing law as a constitutive force in this fashion (as productive instead of merely coercive), Gramsci was an early

60. See Cain, *supra* note 4, at 102.

61. See PRISON NOTEBOOKS, *supra* note 10, at 246.

62. See *id.* at 247.

precursor of the social constructionist position that is gaining ascendancy in legal studies.⁶³

III. HEGEMONY FROM CRITICAL LEGAL STUDIES TO POSTMODERNISM

After Gramsci's death, the *Prison Notebooks* were assembled and began to circulate within Marxist circles, where they proved extremely influential. Perhaps most notably, many of his ideas were reworked by French Marxist Louis Althusser, who forged a distinction between the "repressive state apparatus" (the courts, army, police, prisons) and the "ideological state apparatuses" (schools, churches, the media, popular culture), a distinction corresponding rather closely to Gramsci's treatment of force and hegemony as the two poles of domination.⁶⁴ Also, the theme of hegemony seemed to complement much of the work circulating during the 1950s, 1960s, and early 1970s from the Institute of Social Research (the "Frankfurt School").⁶⁵ There was an especially strong link between Gramsci's notion of hegemony and Herbert Marcuse's claim that the capacity for criticism had been co-opted by the dominant system, resulting in a one-dimensional society.⁶⁶ This point was also expressed in Theodor Adorno's diagnosis that late capitalism was characterized by "identity-thinking" that could not break out of endless replication of the status quo.⁶⁷ The common link between these writers and Gramsci was their collective impression that hegemony had taken hold of the masses in Western industrialized nations, where there was widespread submission to the dominant way of life and very little hope for nonconformity and social reform.

63. See Peter Fitzpatrick, *Distant Relations: The New Constructionism in Critical and Socio-Legal Studies*, in *SOCIO-LEGAL STUDIES* 145 (Philip A. Thomas ed., 1997).

64. See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 142 (Ben Brewster trans., 1971).

65. For a discussion of these connections, see DOUGLAS KELLNER, *CRITICAL THEORY, MARXISM, AND MODERNITY* 12 (1989); Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory*, 26 *FLA. ST. U. L. REV.* 701 (1999).

66. See HERBERT MARCUSE, *ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964).

67. See THEODOR W. ADORNO, *NEGATIVE DIALECTICS* 5 (E.B. Ashton trans., 1995).

A. Critical Legal Studies

Many of the ideas associated with Gramsci and the Frankfurt School found their way into the writings of thinkers associated with the Critical Legal Studies movement (“CLS”).⁶⁸ Throughout the late 1970s and early 1980s, prominent CLS thinkers such as Duncan Kennedy, Robert Gordon, Peter Gabel, and Karl Klare looked to Gramsci’s notion of hegemony in an effort to capture the entrenched quality of existing legal doctrine and practice. Two different notions of hegemony emerged in the work of these thinkers. On the one hand, many CLS thinkers borrowed somewhat directly from Gramsci’s emphasis on law as a class-based phenomenon, while others saw hegemony as a structural phenomenon, focusing on the artificial strictures that constrain permissible legal discourse without making a direct appeal to class conflict. Often these two versions competed in the work of a single author. For example, Robert Gordon provided a clear description of hegemony that borrowed directly from Gramsci’s focus on class:

This is Antonio Gramsci’s notion of “hegemony,” *i.e.*, that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are. So Gramsci says, and the “critical” American lawyers who have accepted his concept agree, that one must look closely at these belief-systems, these deeply held assumptions about politics, economics, hierarchy, work, leisure, and the nature of reality, which are profoundly paralysis-inducing because they make it so hard for people (including the ruling classes themselves) even to *imagine* that life could be different and better.⁶⁹

Then later in the same essay, Gordon shifts to a more structural approach where the law is seen as a mechanism for reifying the existing social ontology:

Law, like religion and television images, is one of these clusters of belief—and it ties in with a lot of other nonlegal but similar clusters—that convince people that all the many hierarchical relations

68. The various influences on CLS (including Gramsci) were recognized by Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 215 (1984).

69. Gordon, *supra* note 2, at 286-87.

in which they live and work are natural and necessary. . . . Now, the point of the work . . . that some of the “critical” lawyers are doing is to try to describe—to make maps of—some of these interlocking systems of belief. Drawing here on the work of such “structuralist” writers as Lévi-Strauss and Piaget, they claim that legal ideas can be seen to be organized into structures, *i.e.*, complex cultural codes. The way human beings experience the world is by collectively building and maintaining systems of shared meanings that make it possible for us to interpret one another’s words and actions.⁷⁰

The tension between these competing conceptions of hegemony (namely, hegemony as class versus hegemony as structure) was never resolved in the CLS literature, perhaps because the entire concept of hegemony underwent a radical challenge in the 1980s with the arrival of the intellectual movements of postmodernism and post-structuralism.⁷¹ The shift brought about by postmodern theory was gradual yet profound, and, by the end of the decade, socio-legal scholar Alan Hunt noticed that “Marx, Gramsci, Habermas and Freud have been displaced by Nietzsche, Derrida and Foucault.”⁷² This intellectual change, of course, brought a complete rethinking and reinterpretation of Marxist notions, including hegemony.

B. Postmodernism

Postmodern and post-structuralist thinkers like Michel Foucault, Fredric Jameson, Gilles Deleuze, Jacques Derrida, and Pierre Bourdieu rejected the Marxist insistence on class as the single font of oppression in favor of a broader conception of power as diffused at

70. *Id.* at 287. In a subsequent article, Gordon continues the structural approach by examining a single case decision on a question of contract law, nicely tracing the background assumptions that shape the court’s reasoning about law, bringing to light the hidden commitments and conflicts that haunt the deep structure of contract law without making an explicit appeal to dominant and subservient classes. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987). This movement from *class* to *structure* has obvious affinities with my argument later in this article that the law forms a hegemonic code that is not necessarily the imposition of a dominant class. In this light, the law in a given area (such as contract law) is more fruitfully understood as a melange of conflicting commitments than as the rule of a dominant class that has made minor concessions to the dominated classes.

71. The influence of postmodernism on Gramsci’s concept of hegemony is discussed in detail by JAMES MARTIN, *GRAMSCI’S POLITICAL ANALYSIS: A CRITICAL INTRODUCTION* 159-65 (1998).

72. Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 523 (1990).

multiple sites (schools, the military, factories, universities).⁷³ For Foucault and Bourdieu, social formations are not simply reflective of economic relations, and oppression is not a one-way imposition by a dominant class. Instead, oppression is largely invisible because it is encoded within institutions and discourses that appear as instruments of knowledge and not as sites of power. For example, the discourse of psychoanalysis favors the male experience (the Oedipal drama) and thereby marginalizes women, just as the discourse of medicine tends to medicalize the behavior of those who stand outside established social categories (e.g., homosexuals were considered “sick,” aggressive women are considered “hysterical”).⁷⁴ These are not cases of outright oppression by the state, but rather are instances of silencing alternative perspectives in the guise of perpetuating a professional discourse. This is a much broader way of conceptualizing oppression, which makes Gramsci’s work seemed one-dimensional for its perpetual insistence on class relations and his talk about the hegemony of a single dominant group. The postmodern era shifted the operative terminology from “class/exploitation” to “discourse/marginalization.”

Gramsci’s focus on class also began to appear inaccurate in light of economic and social trends during the 1980s that began to blur class divisions. In particular, there was a movement away from factory-based production (with the owners on one side and the workers on the other) to a regime of flex-time workers, consultants, speculators, start-up businesses, and independent contractors.⁷⁵ To see how the Marxist notion of class has been problematized, consider the following case: A female computer consultant for IBM speculates on the stock market at night and owns a studio apartment that she rents to a janitor. To what class does she belong? Is she an oppressed wage-worker or an exploitative landlord and speculator? Or is she both—or neither? Faced with situations like this, the postmodernists jettisoned the Marxist obsession with class in favor of talking about domination and marginalization, concepts that allow flexible application in comparison to the rigid Marxist dichotomy of people into

73. For a treatment of postmodernism and post-structuralism, *see* DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* (1997).

74. *See* MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 154-58 (Richard Howard trans., 1973).

75. *See* DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 150 (1989).

bourgeois and proletarians. The postmodernists were similarly dubious about the rewards of a proletarian revolution. Indeed, if oppression and marginalization take place at multiple sites divorced from the economy, there can be no totalizing solution for the elimination of injustice. In this vein, classic postmodern texts like Lyotard's *The Differend* and *The Postmodern Condition* leave the reader with the message that both capitalism and communism have proven oppressive, such that we are without any large-scale (meta-narrative) solution to the various types of marginalization to which we are subject; the individual should therefore simply try to be aware of the omnipresent possibility of exclusion and marginalization and should work at the limits of the institutions and practices in which she finds herself.⁷⁶ This can be described as a radical decentering of the critical enterprise, where the old focus on class has been replaced with a focus on gender, race, language, art, popular culture, and so forth. To some extent, Gramsci anticipated much of the work being done under the guise of postmodernism and poststructuralism because he was the first Marxist to locate domination at multiple sites apart from the state apparatus and the economic sphere, which doubtless influenced thinkers like Foucault and Derrida to look for domination in private institutions, discourses, and language itself. But on the other hand, Gramsci was decidedly un-postmodern in his focus on class and revolution, which found a cold reception among postmodern theorists who had witnessed the problems of communist rule in the Soviet Union, the Eastern Block, and China.

The central postmodern engagement with Gramsci arrived with Ernst Laclau and Chantal Mouffe's *Hegemony and Socialist Strategy*.⁷⁷ Their central task was to preserve the notion of hegemony

76. The postmodern movement away from a central source of oppression was nicely described by Joel Handler in a presentation on postmodernism to the Law and Society Association:

Rather than a social class or other essentialist category, the "enemy" is a more abstract kind of dominant rationality. There is no notion of a universal class which, by establishing its own institutions, would perform a civilizing and liberating mission for society. There is no comprehensive design of a just order as the necessary and desirable outcome of revolutionary or reformist change.

Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697 (1992).

77. See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY* (1985). Laclau and Mouffe's chastisement of Marxist essentialism was harshly criticized by Norman Geras, *Post-Marxist?*, 163 NEW LEFT REV. 40 (1987), although their analysis has received more sympathetic treatment from others. See, e.g., Michael Rustin, *Absolute Volun-*

while criticizing Gramsci for a lingering “essentialism” that sees all social conflicts as derivative of class conflict. It is true that Gramsci often reverted to Marx’s famous claim that the economic base gives rise to a superstructure of family relations, ideology, law, and morality, although at other times Gramsci’s Marxism was less pronounced.⁷⁸ For Laclau and Mouffe there is no single hegemonic center (such as class) from which all forms of oppression can be derived, and, thus, we must reject the standard Marxist line about a proletarian revolution and seizure of the means of production as the only way to eliminate noneconomic types of oppression. Further, there is no necessary connection between the marginalization experienced by various subaltern groups, so oppression can occur independently on several fronts along lines of gender, race, age, physical ability, and so on. Finally, oppression does not flow downhill from a single dominant group, but is constructed in a struggle of articulation between divergent forces, as each group forms its identity. This view represents what Laclau and Mouffe understand as the pluralism of domination, in contrast to the monism of Marxism. After reworking Gramsci’s notion of hegemony in this postmodern manner, Laclau and Mouffe conclude that socialism requires a multiplicity of battles on various fronts by diverse groups, so we are faced with a situation in which there is no central enemy to be engaged in a giant battle.

In a sense, Laclau and Mouffe’s reworking of Gramsci accomplished too much, for by rejecting the essentialist features of Marxism they left themselves without any normative basis for waging the various battles against existing hegemonies because it is not clear *who* should be fighting hegemony or *why* they should be fighting it. In any event, Laclau and Mouffe fragmented the concept of hegemony into varying instances (hegemonies of race, of class, of gender, and of age), effectively rejecting Gramsci’s notion of a single overarching hegemony.

C. The Effect on Legal Scholarship

The postmodern spin on Gramsci proved influential to legal scholars, as evidenced most clearly by a collection of essays devoted

tarism: Critique of a Post-Marxist Concept of Hegemony, 43 *NEW GERMAN CRITIQUE* 147 (1988).

78. See Marx, *supra* note 50, at 4.

to law and hegemony entitled *Contested States*.⁷⁹ In a characteristic statement of this new scholarship, Sally Engle Merry proposes the replacement of Gramsci's singular notion of hegemony with multiple hegemonies:

Nor is there a single hegemony. Instead of an overarching hegemony, there are hegemonies: parts of law that are more fundamental and unquestioned, parts which are becoming challenged, parts which authorize the dominant culture, parts which offer liberation to the subordinate. Law cannot be viewed as hegemonic or not as a whole, but instead as incorporating contradictory discourses about equality, justice, and persons.⁸⁰

After denying that the law is hegemonic as a whole, Merry then recognizes the presence of a dominant consensus that insulates various institutions and practices from criticism:

Some areas of social life are opening up to question, such as ideas about men's right to hit women, while others, such as the systems of gender and class inequality which create the totality of the situation confronting a poor woman with children whose main means of support is a man who batters her, are not.⁸¹

These passages seem to betray a double gesture. Merry is willing to concede the presence of a "dominant culture" and she concedes that a battered woman is faced with the "totality" of a "situation" that generates her powerlessness, yet Merry stops short of recognizing a dominant hegemony that holds this totality in place. This raises a fundamental question: Is there a dominant hegemony of law (as Gramsci suggested), or are we dealing merely with independent sites of hegemony (as Merry seems to suggest, following the lead of Laclau and Mouffe)?

On reflection, this question raises a false dilemma. It seems to me that we can preserve Gramsci's notion of overarching hegemony at the meta-level of the legal system as a totality while also recognizing that hegemonies are contested at the micro-level. In other words, there is no reason for scholarship on hegemony to shy away from an attempt to chart hegemony at a meta-level (as a series of widely accepted and unchallenged structural limits on legal doctrine and prac-

79. CONTESTED STATES, *supra* note 3.

80. Merry, *supra* note 6, at 54.

81. *Id.*

tice). Another serious drawback to the new scholarship on hegemony is that legal scholars have sought hegemony in exotic locations far removed from the very people upon whom Gramsci was focused, namely the “masses.” In *Contested States*, the editors assembled eleven leading papers on hegemony, yet there is not a single paper on middle-class American culture. Instead, the papers discuss the operation of hegemony in India, Tonga, Uganda, Turkey, Kenya, the Caribbean, and so on. The papers dealing with North America include an essay on an antebellum trial, a paper on Hawaiian domestic violence court, and a clerk’s office in New England. To be sure, this line of research generates some fascinating case studies, but it ultimately skirts the task of identifying hegemony in the present. If hegemony is a central force in ensuring the submission and compliance of the masses, then why are legal scholars focused on out-of-the-way places? If scholars are interested in drawing conclusions about this society—here and now—why are they traveling to Tonga, India, Hawaii, the antebellum South, or county courthouses?⁸²

Perhaps the focus on isolated cases reflects the belief that the dialectic of domination and resistance is exercised at the local level in an era of decentralized power relations such that we must abandon grand theory in favor of isolated case studies.⁸³ However, to locate hegemony in such obscure fora would seem to imply that it is not equally at home in the middle-class world where most of us live from day to day. The turn away from the present legal system can be found in Michael Grossberg’s statement: “I was drawn to a case in the antebellum era because the years from the Revolution to the Civil War seem to be the time when the American legal system established a degree of power and authority worth considering in Gramscian-influenced terms.”⁸⁴ There is no denying the power and subtlety of Grossberg’s work, yet there is something perplexing about the notion that Gramsci’s critique (which was aimed at twentieth century industrial capitalism) is best applied to a pre-industrial society.

A further concern with the new scholarship on hegemony is that it tends to focus on blatant cases of domination (such as slavery and

82. Note the comparative essays in *CONTESTED STATES*, *supra* note 3, at 7.

83. Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 L. & SOC’Y REV. 11, 15 (1995).

84. Grossberg, *supra* note 3, at 466-67.

colonialization) or upon those persons who are most explicitly marginalized (such as welfare recipients and poor people who get hauled into court). This overlooks the most basic aspects of law in its routine, nonconflictual operation—the way that law shapes the lives of ordinary people who purchase homes, work in offices, shop at the mall, and spend their nights watching television. To the extent that we share a common culture, the law plays a role in establishing and legitimating it. If the concept of hegemony is to have the critical bite that Gramsci invested in it—if it really signifies a cohesive force by which people submit to a dominant system—then it is an everyday event that must be confronted in the everyday world.⁸⁵

IV. A NEW TREATMENT OF LAW AND HEGEMONY

My discussion so far brings us current with the present state of research on the concept of hegemony. To summarize, legal scholars have rejected hegemony in the singular in favor of locating multiple hegemonies at various sites, and much of the recent work on hegemony is cross-cultural and historical in scope. Certainly, there is nothing deeply wrong about searching for multiple instances of hegemony along the lines of gender, race, age, disability, etc., and there is much to recommend international and historical studies. However, this research agenda is too far removed from Gramsci's original notion of hegemony as a singular, dominant force in the

85. Perhaps the most noteworthy recent attempt to describe the hegemony of law in its everyday operation can be found in Patricia Ewick and Susan S. Silbey's excellent book, *THE COMMON PLACE OF LAW* (1998). They argue that everyday attitudes toward the law shift between the view that the law is reified/transcendent (an attitude that they call "before the law") and the view that the law is a mere game (an attitude that they label as "with the law"). For Ewick and Silbey, legal hegemony is constituted in the paralysis that is occasioned by the perpetual shifting back and forth between these perspectives. When the law is criticized for being a mere game without justification, its transcendent character can be introduced to legitimate the legal apparatus, and, when the law is criticized as unreachably transcendent, its gamelike character is invoked to demonstrate that the law is open to all players:

The multiple images of legality in the stories of "before" and "with the law" constitute a hegemonic legality insofar as together they mediate the mundane, incomplete world of concrete particularities (a judge who never read the papers, a public defender who never showed up) with the demands for legitimacy and consent required of all social institutions, including the law.

Id. at 230. But this says more about how litigants manage their psychological conflict over competing visions of the law than it does about the specific elements that render legal doctrine and practice hegemonic in the Gramscian sense of securing the consensual submission of the masses.

lives of most people in advanced capitalist societies. In short, the critical bite of Gramsci's concept has been toned down considerably.

Many critical scholars (myself included) are sympathetic to Gramsci's notion of hegemony while at the same time somewhat uneasy with Gramsci's reliance on classical Marxist categories of class, revolution, and socialist utopia. The problem that we face is to find a way to retain Gramsci's central insight about the pervasiveness of hegemony without swallowing wholesale the accompanying Marxist baggage. In what follows, I will suggest that this can be accomplished by shifting our focus from the hegemony of a *class* to the hegemony of a *code*.⁸⁶ The substantive elements of this code include the building blocks that enable the current social ontology: private ownership of property, employment at will, inheritance, freedom of contract, limited liability for business organizations, patriarchy, and a regime of negative rights that ensures that individuals must secure their own health care, day care, and other benefits. The formal elements of this code, which will be discussed later in detail, include state dissemination, self-legitimation, self-reference, and the power to shape social ontology. A system of law based on this code is analogous to a blueprint or a map that creates and regulates a limited terrain in which people are permitted to move. The task of the critical scholar is to point out the hegemony of the existing map and to remind us that the map is different from the territory, and that it can be revised to create a new territory.⁸⁷

A. From Class to Code

When a legal system has developed to the extent that it is not only repressive but productive, the individual's submission no longer

86. If the law were simply the will of a dominant class, then it would not contain so many diverse commitments, so many principles and counter-principles, which Jack Balkin has nicely described as "nested oppositions." See J.M. Balkin, *Nested Oppositions*, 99 YALE L. J. 1669 (1990) (reviewing JOHN ELLIS, *AGAINST DECONSTRUCTION* (1989)); J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 15 (1986) (arguing that "communalist" and "individualist" commitments stand in a dramatic tension in the law). Furthermore, the claim of class bias is difficult to prove in areas of law divorced from the economy, such as constitutional law and domestic relations.

87. DENIS WOOD, *THE POWER OF MAPS* 17 (1992) ("Maps Construct—Not Reproduce—the World"). Laws perform a similar sleight-of-hand, pretending to merely regulate a pre-existing set of relations, when in fact the law is what creates such relations in the first instance. For example, property law contains rules of descent for the passage of an estate, but the very notion of an "estate" is a legal fiction derived from property law.

takes the form of simply cowering before a punitive state apparatus but instead takes the milder form of working within the existing legal framework through everyday operations such as buying groceries, cashing a paycheck, or leasing a car. To do these things is not to submit to the will of a dominant *class* but rather to perpetuate a *code* that enables a dominant set of institutions and principles. The lived experience of hegemony consists largely in a series of unreflective actions that are not perceived by the individual as submissive; at most, the individual has merely a vague sense of injustice and an inarticulate belief that things could be better. Hegemony, then, is an extremely common but extremely subtle phenomenon.

Of course, hegemony is not the type of phenomenon that can be directly observed. Individuals do not blurt out: "I am subject to hegemony." Rather, hegemony is diagnosed through a kind of social criticism where we stand outside of our practices and institutions and see that they are one-sided to an extent that we did not recognize while we were operating within their boundaries. Because hegemony is so subtle, I think that it is best captured in literary depictions of middle-class persons who are situated securely within the dominant culture.

Consider first the subtle operation of hegemony in Sinclair Lewis' novel *Babbitt*, a portrait of the ultimate conformist. At one point Babbitt leaves his hometown for a trip in the woods and contemplates a different life but quickly reflects on why he must return to his previous way of life:

[T]hat moment he started for Zenith. In his journey there was no appearance of flight, but he was fleeing, and four days afterwards he was on the Zenith train. He knew that he was slinking back not because it was what he longed to do but because it was all he could do. He scanned again his discovery that he could never run away from Zenith and family and office, because in his own brain he bore the office and the family and every street and disquiet and illusion of Zenith.⁸⁸

Notice how there is nothing physically compelling Babbitt to return to his previous way of life. The concept of hegemony is useful here as a way of explaining how Babbitt's way of life had become so ingrained that he was effectively disabled from any alternatives.

88. Mark Schorer, *Afterword* to SINCLAIR LEWIS, *BABBITT* 320, 323 (5th ed. 1964) (1922).

The passive submission displayed in *Babbitt* is typical of an advanced industrial society where consent is based largely on hegemony instead of physical force and where a low-level and free-floating alienation holds sway. In totalitarian societies, as depicted in George Orwell's *Nineteen Eighty-Four* and Aldous Huxley's *Brave New World*, the state has taken over education, religion, entertainment, and news to the point where children are given repetitive chants to remind themselves of their place in the social hierarchy. But even in these negative utopias there remains an all-powerful State or Party that can serve as a target for rebels. In our contemporary situation, the enemy is so diffuse that it cannot be found—nobody is in charge, nobody commands, yet we all seem to follow the same patterns.⁸⁹ The problem is nicely summed up by Terry Eagleton: “How do we combat a power which has become the ‘common sense’ of a whole social order, rather than one which is widely perceived as alien and oppressive?”⁹⁰ Presumably, the task of the critical scholar is to expose the hidden biases and distortions that lay dormant in that which is “given,” to make us see it as “alien” for the first time.

People who are subject to hegemony are rarely conscious of it; at best, they merely have a brooding sense of limitation and a vague hope for an alternative arrangement. Consider Joseph Heller's cutting depiction of a middle-manager who reflects on his work situation and comes up with the following:

In the office in which I work there are five people of whom I am afraid. Each of these five people is afraid of four people (excluding overlaps), for a total of twenty, and each of these twenty people is afraid of six people, making a total of one hundred and twenty people who are feared by at least one person. Each of these one hundred and twenty people is afraid of the other one hundred and nineteen, and all of these one hundred and forty-five people are afraid of the twelve men at the top who helped found and build the company and now own and direct it.⁹¹

The interesting thing here is that the entire employment system is based on fear, but it is confronted as a raw fact, not as a moral out-

89. This is why the law and the social order more generally seem to be “authorless,” a point captured by Hanna Pitkin: “No one takes responsibility for the whole; no one can survey the whole; no one is in charge.” Hanna Fenichel Pitkin, *Rethinking Reification*, 16 *THEORY & SOC'Y* 263, 273 (1987).

90. EAGLETON, *supra* note 58, at 114.

91. JOSEPH HELLER, *SOMETHING HAPPENED* 13 (1974).

rage. At one point this man considers the rebellious act of tearing up his paycheck, but even this minor protest seems pointless:

What would happen if, deliberately, calmly, with malice aforethought and obvious premeditation, I disobeyed? I know what would happen: nothing. Nothing would happen. . . . My act of rebellion would be absorbed like rain on an ocean and leave no trace. I would not cause a ripple. I suppose it is just about impossible for someone like me to rebel anymore and produce any kind of lasting effect.⁹²

This is a prime example of how hegemony disables people: a white male of substantial means and education looks out on a world and finds it gloomy but unchangeable. Part of the problem here is that there is no clear enemy for this man to rebel against, and in any event the actor has been stripped of aspirations. There is certainly no dominant class of persons (industrialists, bureaucrats) as envisaged by Gramsci as the enemy. Yet at the same time there is an undeniable desperation, a low-level alienation, a disquiet tinged with hope for something better. The role of law in this state of affairs is subtle and indirect, but very important—the powerlessness, alienation, and oppression that we experience is produced and mediated by the legal apparatus to a considerable degree. The gross inequalities in wealth, education, and health care are sustained by legal relations that produce an unequal and unfair society. The role of the critical theorist is to pierce the veil of hegemony that induces compliance and acquiescence and to expose the failure of the legal system to fully deliver on its promises of equality, opportunity, security, and freedom.

Gramsci's point about the inability and unwillingness of people to resist the current arrangement is captured brilliantly in two works by Kafka, namely, *The Trial* and *The Refusal*.⁹³ In the final scene in *The Trial*, two executioners come for K, presumably to carry out the death sentence delivered by the high court that K has never seen. The two men march K through the village and toward a quarry where they kill him. Interestingly, K does not run for his life, does not yell to strangers for help, does not rail at the injustice of it all. Indeed, at one point K hurries them along. Why? The explanation lies in the notions of acceptance and internalization. This middle

92. *Id.* at 19.

93. See FRANZ KAFKA, *THE TRIAL* (1935); FRANZ KAFKA, *The Refusal*, in *THE COMPLETE STORIES* 263 (Nahum N. Glatzer ed., 1971).

class bank manager had come to the point where he accepted (indeed expected) that this irrational system would lead him to his death, and, when it came, there was nobody to complain to, nobody to rebel against. Throughout the novel, K gets caught up in an endless series of bizarre encounters with various gatekeepers (lawyers, priests, executioners), each performing their place within the system but taking no responsibility for the system as a whole. A similar sense of submission can be found in *The Refusal*, where Kafka sketches a vision of life in a small village where the citizens regularly assemble to petition the local colonel for small concessions, always to be met with a rejection. Yet, each time a rejection is issued, the crowd breathes a sigh of relief. Indeed, “the citizens can always count on a refusal. And now the strange fact is that without this refusal one simply cannot get along.”⁹⁴ Such scenarios were doubtless drawn from Kafka’s experiences at the Workmen’s Accident Insurance Institute in Prague, where he was shocked to find that crippled workers routinely accepted their fate: “How modest these people are. Instead of storming the institute and smashing the place to bits, they come and plead.”⁹⁵ This would not have come as a shock to Gramsci, who saw that normal, law-abiding, middle-class people do not storm the Bastille—they plod along with a vague sense that the system is unjust, but in general they resign themselves to their fate and often embrace the logic of a system that harms them.⁹⁶

These examples are important because they illustrate that hegemony is a silent phenomenon lurking below consciousness. This silence indicates the extent to which hegemony is imbricated within the deep structure of a society. It occurs when people are stuck inside institutions and practices that are fundamental to the point that they have become immune from criticism. Thus, in the example from Joseph Heller, the manager cannot see any alternative to a system of employment based on naked fear—that is simply the way that the world is. This explains why hegemony appears as a vague sensation of loss and resignation instead of a feeling of moral outrage: the structures that give rise to hegemony are not immediately visible and thus

94. KAFKA, *The Refusal*, *supra* note 93, at 267.

95. ERNST PAWEL, *THE NIGHTMARE OF REASON: A LIFE OF FRANZ KAFKA* 188 (1984).

96. Perhaps this is why Bourdieu reminds us that “resistance can be alienating and submission can be liberating.” PIERRE BOURDIEU & LOIC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 24 (1992).

cannot be directly confronted until they are made manifest by a critical theorist.

B. Components of Law that Foster Hegemony

We should pause to consider the formal or structural components of law that induce the submission and resignation typified of hegemony. There are at least three aspects of the law that sustain hegemony: exclusivity, social construction, and closure. I would like to examine these factors briefly, since they are the building blocks for the establishment of a hegemonic regime.

By exclusivity, I mean that the state has a monopoly on the enactment and enforcement of law. There is no such thing as an “alternative legal system” akin to “alternative medicine” or “alternative cinema”; there is only one legal system and one set of laws that have the backing of the police and the court system. Regardless of whether one is critical of the law or accepts it without question, the existing law stands as a monument against which all positions are defined. One may subvert the law or violate the law (as for example, when people sell groceries on the street without a license, or when a bookmaker sets up an illegal gambling operation), but the law always stands as the dominant position that defines the subversive activity as subversive in the first instance.⁹⁷ Even when a law is challenged in court, the law is deemed presumptively valid and the burden is placed on the challenger to persuade the court that the law is invalid.

The state wields immense power in being able to exclusively declare the boundaries of law. In this regard we can compare law to a social practice that does not have the state sanction behind it, namely, fashion. People remain free to wear what they want without fear of punishment, subject of course to the sanction of popular opinion. And while there is certainly a dominant fashion, one can create alternatives that challenge the status quo without fear of government reprisal. But this is not an option when it comes to the law. In the process of changing the law, one must first recognize the law as the law (so to speak) and accept the consequences for breaking it. Further, there is no way to escape the law by inaction or “opting-out” since it applies to everyone regardless of their personal beliefs about its legitimacy. Even when lawyers draft documents to circum-

97. On this point, see the discussion in Eugene D. Genovese, *The Hegemonic Function of the Law*, in *MARXISM AND LAW* 279, 280 (Piers Beirne & Richard Quinney eds., 1982).

vent the law (e.g., to avoid taxation), the diversionary action is still defined in terms of the existing law as the object to be avoided. And even when an individual fails to take action, for example by dying without having prepared a will, the law will write a will on behalf of the deceased and distribute her property accordingly, thereby imposing the law on her private affairs. Law, then, is almost hegemonic by its very nature, since it always involves the imposition of an official code by the state onto the affairs of an individual.

Law is also hegemonic in the sense that it is an instrument of social construction. That is, the law is a “way of worldmaking”⁹⁸—it constitutes and produces social ontology by criminalizing “undesirable” behaviors and legitimating certain “approved” activities. The criminal sanction is brought to bear on activities deemed harmful to existing social interests, thereby effectively deterring such behaviors. At the same time, the law rewards those who follow a select set of institutions and relationships, such as partnerships, corporations, wills, leases, and so on; the law recognizes these actions as meaningful and grants protection to people who follow these roads. Thus, the law betrays a double gesture of creating entities (partnerships, estates, freeholds) and then regulating these entities as if they predated the law and were awaiting regulation in the same way that a tree waits for a trimming.

To see how these matters come together, consider the institution of heterosexual marriage, which is certainly hegemonic at the present time. The law has historically imposed a criminal penalty for homosexual conduct, and it has simultaneously facilitated heterosexual marriage as an enforceable and legitimate undertaking. The privileging of heterosexuality is necessarily a public act (and a symbolic performance), since the law is publicly promulgated and disseminated in state statutes and official case reporters. Heterosexuality is then constituted (perhaps “constructed” is a better term) as the exclusive option for legitimate marriages, which renders homosexual relations “illegitimate” or perhaps “illegal.” And for those who take the accepted route of heterosexual marriage, there is only one option available in most states, namely, lifelong commitment. The operation of hegemony here consists in the very fact that we associate marriage

98. NELSON GOODMAN, *WAYS OF WORLDMAKING* 22 (1978) (“Discovering laws involves drafting them. Recognizing patterns is very much a matter of inventing and imposing them. Comprehension and creation go on together.”).

only with heterosexuality and that we understand marriage as the only option for long-term commitment; it is only when a challenge arises that we see the hegemony that previously limited our thinking on the subject.⁹⁹ Hegemony, then, consists largely in the channeling of behavior into officially recognized institutions and practices and by not offering any alternatives.

Hegemony is also secured by closure, a term that refers to the way that the legal system forms a bounded universe of possibilities, a grid, a paradigm, a conceptual scheme. Lawyers are fond of saying that the law forms a “seamless whole,”¹⁰⁰ which is a polite way of saying that the law forms an internally consistent totality, a map that stretches across all possible territory. This was expressed nicely by Grant Gilmore: “On a purely formal level any system of law is complete. Answers will be provided for any questions that can be asked.”¹⁰¹ This grid will filter and frame all legal disputes within its parameters, recasting them in the dominant language of the legal system at the time, thereby extending the system. This last point needs repeating—whenever the law recasts a series of events in the conceptual grid of the law, the law makes reference to itself and legitimates itself. Consider the recent dispute in Florida between two elderly men who won a jackpot on a cruise ship after one man gave the winning coins to the other.¹⁰² The law will magically recast the dispute in terms that are consonant with the legal grid, such as partnership, contract, constructive trust, and bailment. These concepts will then be applied to the case to generate an answer, which in turn legitimates these very concepts by showing how useful they are in providing solutions to disputes of this kind. This self-reference is probably to be expected of any formal classification system operating within a professional discipline (medicine, law, physics), because all systems impose order on chaotic affairs by constituting events in a manner that confirms the classificatory system. Or to paraphrase

99. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (analyzing a challenge to the heterosexuals-only marriage policy), and the resulting Defense of Marriage Act of 1996, Pub. L. No. 104-199 (codified in part in 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996)) (denying full faith and credit for a homosexual marriage granted by a state).

100. See Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936).

101. Grant Gilmore, *Article 9: What It Does Not Do for the Future*, 26 LA. L. REV. 300, 300 (1966).

102. See Adam Chrzan, *Whose Cash? Judge Sends Casino Case to Cruise Line*, VERO BEACH PRESS J., Aug. 14, 1998, at A1.

Thomas Kuhn, the legal system will only admit such puzzles as it is capable of solving,¹⁰³ which perhaps explains why the Supreme Court has never heard a case about whether inheritance should be permissible or whether people have a right to universal health care—such questions stand outside the gamut of permissible inquiries for the Court. Like biology or chemistry, law has a “normal science”¹⁰⁴ that plods along from day to day, and, just as Ptolemy never asked why the earth had an elliptical orbit around the Sun, so the existing legal system rules out incommensurate inquiries and claims, lending a superior (hegemonic) status to the existing concepts. The hegemony that holds sway in the existing legal system, then, consists in the tenacious hold exerted by a few key concepts that form a deep structure that perpetuates the existing power relations. It is not the exercise of power by a dominant group over all other social groups, and, indeed, there is no identifiable dominant group in the sense once understood by Gramsci and other Marxists. Instead we face a code that is self-referring, self-legitimizing, and very difficult to subvert because it forms a closed system at any given time.

C. Bloodless Enforcement

The shift from understanding hegemony as class to hegemony as code is difficult for scholars who have been raised on the Marxist obsession with class. Some writers, such as E.P. Thompson, have asserted that the law only appears to be a code representing a dominant worldview, but on closer inspection it turns out to be the instrument of a dominant class:

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. 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.¹⁰⁵

For Thompson, law must be expressed as a neutral code even though it always bears an underlying class affiliation. Subsequently, the dominant class gets trapped in its own rhetoric of equality and

103. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 37 (2d. ed. 1970).

104. *Id.* at 23.

105. THOMPSON, *supra* note 8, at 263.

universality, thereby opening up grounds for contestation: the much-vaulted rights to equality, property, and security that protect the wealthy can be invoked by those who are treated shabbily. However, Thompson's analysis remains trapped in the increasingly less tenable essentialist notion of class conflict that so captivated Gramsci.¹⁰⁶ In a postmodern society in which class relations have been blurred and where law forms a diffuse and complicated code, social reform involves subversion of a dominant rationality, a struggle to redefine the boundaries of what counts as "legal." For example, when a critical legal scholar argues in favor of universal health coverage or day care, she is not simply struggling against a class that opposes such reforms but more generally against a worldview or dominant code in which such claims are not afforded the status of rights.¹⁰⁷

The hegemony of the existing worldview is largely hidden since it assumes the status of unchallenged assumptions that are not directly at issue in a given dispute. One might argue that the legal system provides room for counter-hegemonic struggles in the form of litigation that challenges the key components of the legal system. After all, as Bourdieu reminds us, a trial is a "symbolic struggle" between "antagonistic world-views" with each view seeking to become a "legitimized vision of the social world."¹⁰⁸ But even here, the parameters of the dispute are usually fixed in a way that preserves the hegemony of the existing system. Consider the case of a welfare recipient who stands up in court to assert that spending money on "church shoes" should be an acceptable use of her state welfare funds.¹⁰⁹ This woman can make a narrow challenge of the welfare

106. See Greer, *supra* note 2, at 308.

107. One of the few thinkers to understand the shift from class to code is the enigmatic French intellectual Jean Baudrillard, who urges a movement from thinking about economic oppression (e.g., extraction of surplus labor from workers) to thinking about symbolic oppression (the way that our thinking has been limited by background assumptions about permissible social arrangements):

[A] revolution has occurred in the capitalist world without our Marxists having wanted to comprehend it. . . . This mutation concerns the passage from the form-commodity to the form-sign, from the abstraction of the exchange of material products under the law of general equivalence to the operationalization of all exchanges under the law of the code.

JEAN BAUDRILLARD, *THE MIRROR OF PRODUCTION* 121 (Mark Poster trans., 1975).

108. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 805, 837 (1987).

109. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990).

laws, but she cannot challenge the very roots of the system that makes welfare hearings necessary (such as employment at will, private ownership of the means of production, and so on). At any given time, so long as the social order is relatively stable, only a small portion of the legal system can be in dispute and the remainder must be silently assumed. All of this contributes to the bloodless enforcement of existing legal and social relations.

V. CONCLUSION: THE VALUE OF GRAMSCI'S WORK

Like other great thinkers, Gramsci was correct about many things and wrong about others. He was correct that the mass of people willingly consent to a system that renders them alienated and disempowered. He was also correct that the law plays a role in securing this consent. At the same time, he was wrong that hegemony was induced by an identifiable class of dominators. I have argued that Gramsci's work may be kept alive if we replace the hegemony of a class with the hegemony of a dominant code, and, by arguing that the hegemony that exists today is more diffuse, decentralized, and insidious than domination at the hands of a ruling class. This observation is emancipatory because it keeps us vigilant against the hegemonic elements in the current legal system that preclude alternative arrangements that might provide a closer fit with our collective commitments to freedom, equality, security, health, and welfare.

But the practical effects of Gramsci's concept are ambiguous. The recognition of hegemony does not tell us what legal system to create once the hegemony of the existing system has been identified. Still, a scholar who understands Gramsci will be on the lookout for artificial constraints that circumscribe the boundaries of permissible legal discourse and scholarship. The recognition of hegemony, then, serves as a kind of self-critical apparatus of the type described by Theodor Adorno: "The detached observer is as much entangled as the active participant; the only advantage of the former is insight into his entanglement, and the infinitesimal freedom that lies in knowledge as such."¹¹⁰

Since hegemony (almost by definition) involves mass submission or consent to a dominant worldview, legal scholars can find plenty of hegemony in middle-class America. Therefore, they should downplay

110. THEODOR W. ADORNO, *MINIMA MORALIA: REFLECTIONS FROM DAMAGED LIFE* 26 (E.F.N. Jephcott trans., 1974).

the search for hegemony in foreign countries and in historical records. Indeed, by refusing to locate hegemony where it is most blatant, legal scholars have diluted Gramsci's critical bite. If Gramsci has become "[t]he Marxist you can take home to mother,"¹¹¹ this has been accomplished at a price. Since we have wandered too far from Gramsci's original meaning of hegemony, I have tried to refocus attention on the hegemony of law on a meta-scale, not as the instrument of a dominant class, but as the mechanism for the constitution of a dominant rationality that has become so commonsensical that it hardly appears worthy of challenge. Reformulating hegemony in this way affirms Gramsci's core idea while severing some of the outdated Marxist baggage.

111. Carlin Romano, *But Was He a Marxist?*, VILLAGE VOICE, Mar. 29, 1983, at 41.