THE IDEOLOGY OF LAW: ADVANCES AND PROBLEMS IN RECENT APPLICATIONS OF THE CONCEPT OF IDEOLOGY TO THE ANALYSIS OF LAW

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In this paper I note the growth of analyses of law that focus upon its ideological character and content, and I identify problems and difficulties manifest in the ideological analysis in recent critical and Marxist texts. The paper argues that work focusing upon the ideological character of law realizes significant advances over that produced by the more orthodox approaches within the sociology of law and jurisprudence employing normative analysis. It is possible to make ideological analysis more rigorous. The paper outlines the elements of a theory of and methodology for the ideological analysis of law.

I. INTRODUCTION

The application of the concept "ideology" to the analysis of law has been one of the distinctive features of the strand of critical legal studies that draws upon the Marxist tradition. My objectives in this paper are:

i) to situate the "ideological analysis of law" within contemporary Marxism,
ii) to locate its relevance to the current concerns of the sociology of law and of critical legal studies,[1]
iii) to explore the substantive contribution of work written under the imprint of "the ideological analysis of law" and to identify its major variants,
iv) to show that theoretical and methodological clarification of both the components and scope of the ideological analysis of law is needed, and
v) to outline some elements of a theory of ideological analysis.

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[1] For my present purpose I distinguish "critical legal studies" as a trend of analysis that, while drawing significantly on the Marxist tradition, is primarily identified by the political project of intervening in the scholarship and practice of legal education.

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There is an extensive literature that refers variously to "the ideology of law," the "ideological dimension of law," or "legal ideology." Behind the apparent homogeneity of this writing lie diverse conceptions of ideology and even greater diversity in the way these conceptions are used. Its effects are regularly taken for granted when they should be treated as problematic, and its heuristic potential for the analysis of law is often thwarted by the vagueness and imprecision that one encounters in probing apparently sophisticated conceptualizations. "Ideology," like "dialectics," is all too often invoked as an evasion rather than a solution. If the concept of ideology is poorly used by many of those who write in the Marxist tradition, it is hardly used at all by those who approach the study of law from other perspectives. In the major texts on the sociology of law, both old and new, the concept "ideology" is noticeable by its absence. While no single concept provides a magic key to the mysteries of law, the idea of ideology is important in understanding legal life. There is no concept within the sociology of law that plays the role that is given to ideology within the Marxist tradition. Thus, the ideological analysis of law is not only significant in its own right, but it provides an instructive point of differentiation between Marxist analyses of law and mainstream sociology of law.

Perhaps the closest alternatives to "ideology" within mainstream sociology of law are the concepts "symbolic,"[2] as used by Gusfield (1963) and later by Carson (1974), and "legitimation," as used within the Weberian tradition (Weber, 1966). Neither of these alternatives has, however, either the breadth or the specificity provided by the concept "ideology." If we aspire, as I do, to break what Trubek has aptly characterized as "the stifling debate between instrumental Marxism and liberal legalism" (Trubek, 1977: 553), we must explore the potential utility of the Marxist concept "ideology," not to show the superiority of one tradition over another but to advance the explanatory power of social theory in its application to the analysis of law.

[2] This paper does not discuss the concept of "symbolism" further. It is, however, important to note the existence of important strands of work which, drawing on the symbolic-instrumental dichotomy, have brought the focus on the symbolic dimensions of law into increasingly close proximity with the concerns of ideology analysis. Such an exploration would require an extended discussion of such diverse authors as Foucault (1977), Ignatieff (1978), and Habermas (1976).

II. MARXISM AND IDEOLOGY

We must, at the outset, recognize that a "correct definition" of ideology cannot be discovered from a search of Marx's texts. Marx used the concept in a variety of ways. Sometimes ideology refers to all ideas, sometimes it refers only to those ideas that are deemed unscientific ("false consciousness"), and sometimes it refers to those ideas that serve the interests of dominant classes, "class beliefs" (cf. Williams, 1977: 66). Not only is the concept open in its texture, but it is also multidimensional. Nevertheless, there are a number of uses of the concept that must be eliminated because they make a definitional assumption about the relationship between "ideology" and "class."

My objective is to use the concept to explore the connection between ideas, attitudes, and beliefs, on the one hand, and economic and political interests, on the other. We can thus ignore ideology as "Ideology," which refers only to a systematic and totalized world view (*Weltanschauung*). Consistent world views may exist, but they must be treated as special or exceptional cases. Second, the idea that ideology necessarily entails some sort of "false consciousness" should also be discarded because it removes the empirically important issue of the association between ideas and interests. For similar reasons we should reject the view that ideology necessarily has a class designation or derivation. For example, the idea that "nationalism" is necessarily traceable to the interests of the "petty bourgeoisie" is empirically problematic and should be replaced by an approach that sees such connections as raising empirical rather than conceptual issues.

While the concept of ideology has often been misused in the ways we describe above, there have been important advances toward a theory of ideology in recent Marxist writing. Our next step is to identify these advances and to relate them to the analysis of law as ideology.[3]

The concept of "ideology" has played a key role for Marxist theorists who make up the "Western Marxist" tradition that

[3] To undertake this task systematically would require a thorough study of the historical development of the Marxist theory of ideology. Much of this work has already been undertaken with a greater or lesser degree of success; of particular interest is the work of the Birmingham group (Centre for Contemporary Cultural Studies, 1977), Ernesto Laclau (1977), and Larrain's wide-ranging history of ideology (1979). The decisive intervention of Althusser is to be found in his major texts (Althusser, 1969; 1971) and has been the subject of critical analysis by Hirst (1979) and McLennan (McLennan *et al.*, 1977). The impact of semiology on the theory of ideology is investigated by Coward and Ellis (1977) and Sumner (1979).

has sought to liberate Marxism from the ossification of orthodox "Marxism-Leninism." Central to this project has been the need to reformulate Marxist theory in a way that avoids the related deficiencies of "economism" and "reductionism." If social institutions and ideas are not a simple reflex of economic or class interests and yet are linked to such interests, a sophisticated concept of ideology is needed to explore such linkages in a thorough, empirically grounded manner.

It is thus no accident that the more recent development of a Marxist theory of law, a subject that had previously received little attention, should follow close on the heels of developments in Marxist theories of ideology. Law is interesting and important because it is both close to yet distinct from the state and is, at the same time, the bearer of important ideological values. Albrow characterizes the development within Marxist theory as a movement "from a Gramscian interest in politics to an Althusserian interest in ideology and finding in law a bridge between the two" (Albrow, 1981: 127).

The main thrust of the renewed concern with ideology has been directed towards elaborating a conception of ideology that plays more than the epiphenomenal or marginal role attributed to it within Marxism-Leninism. This goal reflects a political agenda that sees the need to grapple with the persistence of capitalism, while, at the same time, elaborating non-insurrectionary political strategies for socialist transformation within the advanced capitalist democracies. Theorists have realized that to do this ideology needs to be understood in its role of preserving and reproducing capitalist social and economic relations. While much of the debate has often taken an abstract and theoretical form, these real and pressing political concerns are very much present.

As an example of the recent developments in the theory of ideology, consider the use made of the concept of "relative autonomy." The term "relative autonomy" refers to the partial independence of different social elements, such as the legal, political, and ideological, both from each other and, more importantly, from the general interests of a dominant class. This concept serves the interests of the new Marxism because it acknowledges the fundamental importance of the economic base (albeit "in the last instance") while allowing the ideological realm to be treated as an arena of struggle that is not simply the reflex of economic class conflict. This places a heavy theoretical and political burden on the fragile shoulders

of the concept, and despite the attractiveness of the idea of "relative autonomy" difficult theoretical problems remain. The primary problem is to achieve what Althusser (1969) described as the necessity of holding on to "both ends of the chain" at the same time; that is, to encompass both the relative autonomy of ideology (or law or state) and the determination of ideology (or law or state), in the last instance by economic relations. There are those within the Marxist tradition who argue that the concept "relative autonomy" cannot overcome such theoretical hurdles and that "there is no middle way" (Cutler *et al.*, 1977: I, 172).

Nevertheless, some real and important advances have been made during the course of the debate on ideology. These achievements can best be illustrated if we look separately at three major issues that Marxist scholars have explored with the aid of the concept of ideology.

A. Ideology and Human Subjectivity

A major but insufficiently recognized thrust of the Althusserian tradition was to develop a theory that could at once accommodate the traditional socio-economic concerns of Marxism and a concern for human subjectivity. While this results in some of the most difficult and opaque discussion in Marxist theory, one element is especially important for the analysis of law. The human being according to the Althusserian tradition has three "instances": as a biological being, as a "subject," and as a participant in social relations. For Althusser the "subject" is created by and through a range of different discourses. For example, political discourse produces the individual as "citizen," with its consequent images of atomized but equal citizens existing in a common relationship to the state. Legal discourse transforms both human beings and social entities; for example, corporations become "legal subjects." Legal subjects as the bearers of rights and duties are the primary constituents of the "form of law," which will figure large in my subsequent discussion. The creation of legal subjects involves the recognition of "the law" as the active "subject" that calls them into being. It is by transforming the human subject into a legal subject that law influences the way in which participants experience and perceive their relations with others. Thus, legal ideology provides a constituent of what Althusser called the "lived relation" of human actors (Althusser, 1969: 233). One important implication is that we are encouraged to view law

not merely as an external mechanism of regulation but as a constituent of the way in which social relations are lived and experienced. This approach radically changes the role accorded ideology in social life. Ideology is perceived not as a form of consciousness, which is the conventional view, but as a constituent of the unconscious in which social relations are lived. Once this possibility is appreciated, we have in ideology a new and powerful tool for exploring the relationship between "the Law," legal subjects, and social relations.

B. The Determination of the Content of Ideology

Theorists have been concerned both with the generation of specific elements of ideology and with the patterning or structuring of these elements into more or less coherent and integrated systems that make it possible to employ the concept of "bourgeois legal ideology." Here my earlier rejection of the view that every ideological element has a necessary class designation is important. The class dimension of ideology is not an intrinsic property of words or concepts, but instead arises from the way in which ideological elements are combined and interrelated. Ideologies are not to be treated "as if they were political number plates worn by social classes on their backs" (Poulantzas, 1975: 202). Therborn expresses this particularly well:

> [i]deologies actually operate in a state of *disorder*. . . . ideologies operate, constantly being communicated, competing, clashing, affecting, drowning, and silencing one another in social processes of communication (Therborn, 1980: 77, 103).

Thus, an ideology is not a unitary entity. It draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents. Colin Sumner (1979) expresses something of this approach with his suggestion that ideologies act as grids which select, sort, order, and reorder the elements of thought. This view of ideology is particularly salutary in the field of legal analysis since it counsels us not to assume the coherence and consistency of legal discourse but to search out the resonances of the social, economic, and political struggles that reside behind the smooth surface of legal reasoning and judicial utterance.

The general thrust of the concern with the determination of ideology is the insistence that ideology is a social process that

is realized in and through social relations. At the same time ideologies have their own distinctive characteristics, the most important of which are an internal discourse such that the elements of an ideology are not reducible to a mere reflection of economic or social relations. It is this internal dimension of an ideology that semiotics seeks to grasp through the concept of "sign" and its derivatives.

C. *Functions of Ideology*

The third important issue within the theory of ideology concerns the *functions of ideology*; attention is directed towards the role of ideology as an essential element in the process of legitimation and hence in the reproduction of the prevailing social relations. This concern is particularly pronounced in Poulantzas, who, building on Gramsci's metaphor of ideology as the "cement" of society, proposes the general thesis that: "Ideology, which slides into every level of the social structure, has the particular function of *cohesion*" (1975: 207). Poulantzas is of special significance with regard to the ideology of law because his analysis leads him to the view that juridico-political ideology is the "dominant region" within the dominant ideology within capitalist modes of production. From this he concludes that in capitalist societies law fulfills "the key function of every dominant ideology: namely, that of cementing together the social formation under the aegis of the dominant class" (1978: 88). I do not subscribe to the view that to speak of "function" is to lapse into functionalism; rather we must distinguish between function and functionalism and reject the latter. Functionalism assumes that there are necessary functions that must be fulfilled and then proceeds to search for the agency that realizes or fulfills each function. The deficiency of functionalism is that functions are reified. Their existence is assumed and all social practices and institutions must be classified in terms of them. Poulantzas' cement metaphor and his designation of the state as fulfilling "the particular function of constituting the factor of cohesion between the levels of a social formation" (1975: 44) come perilously close to functionalism. This danger can be avoided if we treat the metaphor as an hypothesis about the *effectivity* of ideology. The concept *effectivity* seeks to draw attention to the effects or results of ideology while at the same time leaving open the issue of whether or the degree to which a possible function of ideology is fulfilled. Thus, with respect to law, we should abandon any *a priori* views about its integrative or

legitimating functions and treat them as open questions relating to the specific effects or consequences of legal regulation and legal ideology.

Distinguishing among these three different issues within the theory of ideology allows us to identify the significant advances that have been achieved in the recent debate. But these advances have extracted their own price. The most important price has been that in order to establish the "specificity" (distinctive characteristics not reducible to the economic base) of ideology, the Althusserian tradition posited the existence of conceptually distinct "instances" of economic, political, and ideological practices. So pervasive has this tendency been that in many texts these conceptual distinctions are assumed to represent real separations. But there is no location inhabited by ideology; there is no realm of the ideological (Jones, 1982). Nor are all social, political, and economic institutions necessarily associated with specific ideological practices. Much more helpful is Althusser's (1971) suggestion of a distinction between "sites" that "produce" ideology and those that "transmit" ideology. Certain institutions such as the media and the university are identified with the ideological realm because they both "produce" and "transmit" ideology, whereas schools, the family, sports, and the like are primarily transmitters of ideology. Applying this distinction to legal systems, we can immediately identify both the creation and dissemination of ideology and proceed to investigate the extent to which these two activities are separated.

A second deficiency within the theory of ideology is the persistence of the *reflection* metaphor, by which I mean the persistent assumption that there exists an objective social world that is "reflected" in thought and in the process is to a greater or lesser extent distorted. This metaphor is ubiquitous as a means of asserting the determination of ideology by material relations and of expressing the divergence between a "real concrete"—that is, some objective ideology-free reality—and its representation in ideology. This imports a dubious epistemology derived from naive materialism. More significantly, the metaphor has its own logic which leads to notions of ideological "distortion" or, more seriously, "inversion" of the real world. Thus, ideologies are discussed in terms of their truth or falsity, which implies that there is a social reality independent of consciousness and that thought

simply corresponds to a greater or lesser extent to this given reality. The dubious nature of the implication is never confronted. While the idea of "reflection" raises the question of how ideology is determined, it does not provide any assistance in pursuing this line of inquiry. As Stuart Hall and his colleagues comment:

> As is often the case in those areas where Marxism is not yet fully developed, the simple formulae are often too simple, too reductive for our purposes. The idea for example, that, broadly speaking, legal norms and rules in a bourgeois society will reflect and support bourgeois economic relations, . . . may provide the first, basic step in such a theory, but it remains, too general, too abstract, too reductive, too sketchy (Hall *et al.*, 1978: 196).

The most important figure in the development of the theory of ideology has been Antonio Gramsci. He has profoundly influenced not only the questions asked but also the general direction of contemporary Marxist discussions. In particular, Gramsci's concern with "hegemony," the processes through which the dominance of capitalist power is secured within civil society, provides both the theoretical and political framework for the ongoing Marxist debate. The issues raised by the idea of "hegemony" go to the very heart of the problems facing the Marxist analysis of law in that this concept poses as a central issue the dialectic of coercion and consent.

The earliest Marxist writings on law, which I have characterized as the "oppositional stage," sought to combat conventional notions of the consensual character of law and strove to demonstrate its repressive or coercive character (Hunt, 1981a). In contrast, most contemporary Marxist writings on law have sought to demonstrate and explore the real significance and deep consequences of the dual character of law as coercion and as consent. Not only is this attempt to grasp and to integrate the elements of coercion and consent a central *leitmotif* of Marxist legal theory but, as I have argued elsewhere, its theorization presents major problems. Moreover, if my argument is correct, the same difficulties are encountered by the non-Marxist sociology of law (Hunt, 1981a).

III. THE IDEOLOGICAL DIMENSIONS OF LAW

A concern with the ideology of law is at the heart of all recent Marxist treatments of law. In this section, I shall examine some of this recent theoretical work in the light of the preceding discussion. I hope to show how some of the ideas

advanced above have been fruitfully employed, and I shall point to a number of unproductive features that remain. There has, however, been such an explosion of Marxist, neo-Marxist, and critical theory of law over the past few years that I am forced to be selective. I will concentrate my attention primarily on four recent texts.

These are *The Politics of Law* (Kairys, 1982a), which is especially significant as the first collective presentation of the Critical Legal Studies movement; *Marxism and Law* (Beirne and Quinney, 1982), a collection that brings together some of the more important of the previously published contributions to Marxist debate on law; *Reading Ideologies* (Sumner, 1979), which is the most closely related to my concerns because it focuses on the applicability of the Marxist theory of ideology to the analysis of law; and *Marxism and Law* (Collins, 1982), which sets out to examine the total theoretical field and gives the relationship between law and ideology a crucial role in the attempt to set forth a general Marxist theory of law. As we shall see, a number of the problems that arise are common to all the texts, which in itself suggests the importance of the issues under consideration.

A. Mystification, Distortion, and All That

The most general feature of ideological analysis is that it starts from the proposition that there is no direct or necessary correspondence between the realm of "knowledge" and that of "the real." As I have already noted, the most pervasive embodiment of the theory of ideology in Marxism is to be found in the metaphor of "reflection." The merit of the metaphor is that it succeeds in combining two central propositions: (a) the known and the real are not identical, and (b) the real is the "object" that produces or determines the "image." The metaphor of reflection captures the most basic feature of Marx's materialist dictum: "It is not the consciousness of men that determines their being, but on the contrary their social being that determines their consciousness" (Marx, "1859 Preface"). It is thus not surprising that the metaphor of "reflection" and its derivatives are frequently invoked.

In all four of the texts under discussion a reflection theory of ideology is a dominant motif. The linguistic variants are many, but the most frequently employed are: "mirrors," "distorts," "illusion," "fantasy," "facade," "mystifies," and "reifies." The problem that I wish to highlight is that these

terms are used in such a way as to imply a theory about the relationship between knowledge and its object, a taken-for-granted "social reality." Propositions such as "law distorts" and "law reflects" are used as if there were some pre-given relationship between the real and its ideological representation. The alternative I propose is that the nature of the relationship between reality and its ideological representation should be seen as "the problem," or object of analysis, without prejudgment as to the way in which the relationship can be captured or portrayed.

For an example of the limitations of reflection theory, consider the essay in Kairys' collection by Nadine Taub and Elizabeth Schneider (1982) on the role of law in the subordination of women. Taub and Schneider argue that the legal distinction between public and private reflects, in a distorted fashion, an actual distinction between the nondomestic and domestic social realms. In so doing the legal distinction functions ideologically and "camouflages the fundamental injustice of existing sexual relations" (1982: 124). This readiness to attribute causality to the legal distinction between public-private leads Taub and Schneider to ignore the question of whether this distortion results from legal ideology or from some other mechanism. For example, no consideration is given to the role of other discourses concerning the family—thus precluding, without discussion, the possibility that the law is largely passive and merely gives effect to an ideological separation between public-private that is produced elsewhere.[4] Now I do not hold any strong view about whether this is the case, but I do wish to suggest that the metaphor of reflection distracts attention from such issues and for that reason should not be invoked as if it were a conclusion.

In contrast, the essay by Peter Gabel on reification in Beirne and Quinney examines the process of legal reasoning in great detail and concludes that "reification" is a result determined by the process rather than a pre-given necessity (Gabel, 1982).[5] In the course of this analysis Gabel makes the important point that we need to distinguish between (a) the processes that create the ideological characteristics embedded

[4] For a stimulating discussion of the public-private dichotomy as it relates to family law, see the article by Frances Olsen (1983), which has the great merit, in contrast to "reflection" approaches, of isolating the complex and shifting boundary between the public and the private and, consequently, its tortuous history in legislation.

[5] In the case of reprinted papers, which occur primarily in the Beirne and Quinney collection, I cite the reprint rather than its original publication.

in the law and (b) those consequences flowing from law that have a particular ideological content. With this in mind, we can see a hitherto unrevealed distinction in the usages "mirrors," "distorts," etc., which are often used interchangeably. Some terms (e.g., mirrors, reflects, reifies) have as their primary referrent the process by which the "real" is transformed into an ideological form (see, e.g., Gabel and Feinman, 1982) while others (e.g., mystifies, illusion) focus on the results or consequences of the ideological form (see, e.g., Kennedy, 1982). Ideological analysis should separate, as distinct methodological and expository stages, the analysis of the production of legal ideology from the analysis of the effectivity of legal ideology.[6]

B. The Form of Law

It is generally agreed that the ideological character of law can be identified at a number of different levels. I shall specify, at least provisionally, three different levels for analysis since this allows me to explore the interrelationship among them. They are:

(a) the ideological content of concrete legal norms;
(b) the ideological content of what are conventionally referred to, most explicitly by Dworkin (1978), as "principles";
(c) the ideological content of the "form of law."

At the core of any attempt to understand ideology is the question of its material determination. Distinguishing these levels allows us to address the important question of whether legal ideology is primarily the resultant of one of them. There is an unexplored and perhaps unconscious polarization in the texts under consideration. It is possible to identify two broadly distinguishable positions.

The first I call *Concrete Determination*. This position argues that the ideological content of law is largely manifest in the content of specific laws, whether judicial rules or specific legislative enactments. This position emphasizes the role of "struggle" in the formation of legal ideology.

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[6] Note that the reflection theory of ideology is not the only one available within the Marxist tradition. Another version is that derived from Marx's application in *Capital* of the essence/appearance distinction. We should be cautious about assuming a simple continuity between reflection theory and essence/appearance theory. Frequently, these two approaches are conflated in the texts under consideration. The further exploration of the ideological dimension of law requires attention to the issue of Marxist epistemology and the need to challenge the simple empiricist model of both reflection and essence/appearance that characterizes much of the recent discussion of the ideology of law (Hindess, 1977; Cutler *et al.*, 1977).

The second I call *Form Determination*. This perspective sees in the form of law the key to law's ideological role. The concrete level gives effect to the necessary and inescapably general ideological content inscribed in the form of law.

Frequently, the position taken by an author arises naturally from the object of analysis: where the object of analysis is concrete, as with a specific statute or series of cases, the discussion tends to focus on concrete determination (Kairys, 1982b; Horwitz, 1982; Tushnet, 1982; Klare, 1982a; Freeman, 1982). Where the interest is at a more general theoretical level, form determination comes to the fore (Gabel and Feinman, 1982; Picciotto, 1982; Poulantzas, 1978; Rifkin, 1982). But this is not a simple empirical versus theoretical divide; some of the most powerful work operates at all three levels (Klare, 1982b; Hay, 1982).

The distinction among the three levels of analysis not only involves important theoretical questions, but it is also related to political differences and debates. Marxists perennially argue over the extent to which law can be harnessed and mobilized to the advantage of subordinate classes or groups, a question that Collins appropriately calls "the radical predicament" (Collins, 1982: Ch. 6). Those who give priority to form analysis typically deny that the bourgeois form of law can contribute much, apart from defense, to struggles against the capitalist order. As Mark Tushnet puts it, the form of law "serves as an additional barrier to the organisation of the under-dog to upset existing social arrangements" (Tushnet, 1977: 102). On the other hand, those who focus their attention on concrete determination tend to see particular legal outcomes as the results of struggles that depend on the balance of forces involved. This issue is at the heart of the important current controversies concerning the "politics of law." There is significant disagreement among "progressives" about the extent to which struggles over the creation and enforcement of legal rights are politically significant and potentially worthwhile. These questions are currently being raised in the internal debates within the Conference on Critical Legal Studies (Hutchinson and Monahan, 1984; Munger and Seron, 1983; Sparer, 1984; Trubek, 1984), and they continue to be debated in Britain under the insistent prodding of E.P. Thompson (1975; 1980; see also Adlam, 1981; Hunt, 1981b).

Leaving aside these broader political questions, I want to focus attention on questions concerning the form of law. An emphasis on the form of law is attractive in that it provides an escape route from the difficulties of instrumentalist versions of

Marxist theory, which focus on the law as an instrument of the will of the dominant class. The form of law is seen not as a manifestation of the will of a dominant class but as a necessary and inevitable consequence of the very nature of capitalist economic relations. Hugh Collins (1982) suggests that there exist economistic and class instrumentalist versions of the theory. In my view both the "economistic" and "instrumentalist" trends are inherent within classical Marxism, and they come to the fore with the ossification of orthodox Marxism. The common problem of both variants is that of "reductionism"; the difference is that class instrumentalism merely adds another step in the reductive logic since class relations are treated as directly derivable from and so reducible to economic relations.

The discussion of the form of law in recent Marxist literature is heavily influenced by the renewed interest in the writing of the early Soviet jurist Evgeny Pashukanis (Beirne and Sharlet, 1980). Pashukanis' influence has focused discussion on the question of whether a *single* form of law is characteristic of capitalist society (cf. Balbus, 1977; Redhead, 1978; Hirst, 1979; Cotterell, 1980; 1981; Warrington, 1981; Picciotto, 1982). This discussion has typically proceeded at a high level of abstraction, concerning itself with the general and abstract capitalist mode of production rather than with the situation in actual capitalist societies. Analysis at this level views capitalism as a simple totality of exchange relations and leads to the identification of a single form of law, the bourgeois legal form.

If, however, the level of analysis is changed and we focus our attention on concrete social formations (that is, historically given societies), we need to identify more than a single form of law. Capitalism has undergone massive changes and development. It exists within widely different political and state structures, and its internationalization has profoundly affected the relations among nation states. While mainstream sociology of law has for some time been concerned with the phenomenon of legal pluralism (Galanter, 1981), Marxist writers have only more recently paid serious attention to this question (Fitzpatrick, 1983). As David Sugarman argues, studies of the contribution of law to the development of capitalism, from Weber (1966) through E.P. Thompson (1975), Atiyah (1979), Horwitz (1977), and others, can only lead to the conclusion that

> there was no single "capitalist" form of law—whether we call it contractual, commodity form or absolute private property. It is more accurate to view each as one of several *forms* of capitalist law which co-existed over long periods, complementing and conflicting with one another (Sugarman, 1983: 256).

What remains to be done is to identify systematically the various forms of law and to study the general conditions affecting their interaction.

However, the general trend in the texts we are treating as representative of recent critical and Marxist scholarship is either to assume a simple, single form of law or to slip between the singular and plural. The apparently sophisticated concept "the form of law" tends to be invoked as a rhetorical device that points to some underlying uniformity of legal phenomena that remains unexplored. When the form of law is identified, it is by reference to general values or what Balbus calls "abstract universals" (Balbus, 1977: 580). But in listing abstract universals, the distinction between form and content becomes blurred. If the concept of "legal form" or "forms of law" is to advance our understanding of the relationship between law and economy, there is an urgent need for conceptual clarification.

My proposals in this regard are modest. I suggest that when we restrict the concept "form of law" at a high level of abstraction to denote the logically necessary characteristics of a legal order within a specified economic or political order, this makes it possible and, indeed, necessary to address the co-existence of forms of law when analyzing specific societies. With regard to law in capitalist societies, the form of law is characterized by (i) "reification" (separation of the juridico-political realms from the economic), (ii) legal subjectivity (separation of legal status from political or economic status), and (iii) the legal subject (a human or organizational entity vested with legal rights) (Hirst, 1979).

I also believe that the form of law has no *necessary* ideological characteristic or content. Instead, certain ideological values have, to borrow Weber's idea, an elective affinity or homologous relationship to the legal form. Hence, values such as individualism, equality, and private property become universal and preponderant values under capitalism and come to function as if they were the form of law itself. The close association between the concept of law and these values means that these values come to legitimate the existing forms of social relationships. Thus, the legitimating potential of law is shared or taken over by values the law only contingently embraces.

I have not included in my definition of "the form of law" the much emphasized element of "formalism." I am uncertain whether formalism inheres in the form of law or is an ideological value preponderantly associated with law in capitalist society. This uncertainty derives from my reflections on Horwitz's work. What Horwitz brings out most powerfully is the essentially contested character of formalism, a contest between impersonal Weberian legal rationality and the class facilitative character of the transformation of American law (Horwitz, 1975; 1977).

Treating legal formalism as a problematic feature of the legal form has the virtues of not universalizing the ideological values most characteristic of law in capitalist society and of directing attention to struggles that surround all ideological elements. This approach reminds us that the most pervasive values that may be subsumed under the label "ideological forms of law" (universality, certainty, etc.) are subject to contradiction and interact in complex ways in the course of legal disputes. My approach alsc reflects reservations I have about following the realist methodology of starting with legal values and subsequently comparing them to "reality." The viability of this position depends on the questionable assumption that legal values have an existence independent of the concrete legal rules in which they are embedded.

The foregoing analysis of the form of law throws into relief an important problem which I wish to mention but do not have the space here to pursue. The "discovery" of the ideological dimension of law by the Marxist and critical traditions tends towards a conceptualization of law itself as an *ideological phenomenon*. The danger is obvious: the materiality of the law—that is to say, law's real impact on real people and real relations—tends to be ignored. In seeking to establish the extent to which all social practices are suffused by ideology, we must not lose sight, to paraphrase Marx, of "the dull compulsion" of legal regulation, particularly in the spheres where law operates relatively unproblematically to give effect to the existing forms of social, economic, and political relations. If we are to grapple with real world problems, we must not retreat into idealistic theories of ideological determination.

C. The Function and Effectivity of Legal Ideology

One of the most distinctive features of the contemporary Marxist and critical trends is the powerful historical scholarship which has been its most notable achievement to

date. In Britain there has been the major impact of the project that produced *Whigs and Hunters* and *Albion's Fatal Tree* (Thompson, 1975; Hay *et al.*, 1975) and *Policing the Crisis*, a "contemporary history" study of the "mugging crisis" of 1972-73 (Hall *et al.*, 1978). The latter work is of particular interest because of its self-conscious attempt to integrate theoretical and historical analysis. And in the United States there has been a similar interest in revisionist legal history, spearheaded by Morton Horwitz. These critical legal histories share a common concern with the effectivity of legal ideology as it operates in conjunction with the material and coercive instrumentality of law. Douglas Hay's powerful analysis of the combined impact of "justice," "terror," and "mercy" is a good example of work that focuses on this conjunction (Hay, 1982).

The two most important strands present in this tradition are best characterized by the distinction between "function" and "effectivity." Attention to "function" yields formulations of a general theoretical character about the role of legal ideology at the level of either the abstract modes of production (e.g., Althusser's "ideology secures the reproduction of the social relations of production," 1971: 141) or, more concretely, with respect to historical epochs (e.g., Poulantzas' "juridical ideology written into law becomes the dominant area of ideology in a mode of production in which ideology no longer plays the dominant role," 1978: 88). A concern for "effectivity," on the other hand, leads to a focus on the causal role of legal ideology in specific historical circumstances; e.g., Klare's (1982a) study of the influence of judicial ideology on the formation of labor relations in the U.S.A. before World War II.

The distinction between "function" and "effectivity" rarely appears in pure form. Instead, we frequently find either an oscillation between these foci of inquiry or a conflation of the two levels. This is unfortunate. In the analysis of legal ideology one must keep firmly in mind the different *levels of abstraction* of these related but distinguishable perspectives. Thus, it is perfectly proper to treat a possible function of legal ideology as an hypothesis to be evaluated through concrete historical investigation and discarded, amended, or qualified in the movement from one level of abstraction to another. It is a mistake, however, to treat a possible function of law as given or proven and to use history to "reveal" the operation of this essential or assumed function. It is equally unacceptable to arrive through concrete historical analysis at a conclusion concerning the effectivity of legal ideology and then to

pronounce this a "function" fulfilled by law during a particular historical epoch.

As an illustration of the second of these questionable procedures, consider E.P. Thompson's thesis that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good" (Thompson, 1975: 266). Thompson arrives at this conclusion from his compelling study of "The Black Act" of 1723. The Act itself and its enforcement are interpreted as a conflict between the "new" landowning Whig gentry and the customary rights of farmers and forest-dwellers. Thompson demonstrates that in the period after the 1688 constitutional "revolution," when the structures and supports for the legal order were still weak, the rule of law had a significant impact on the manner in which this draconian legislation was enforced. But Thompson moves, without further argument, from his historically specific study to a generalization about the function of legal ideology in modern capitalist society.[7] I have considerable sympathy with Thompson's insistence on the contemporary significance of the rule of law, but not with the means by which he arrives at it, for Thompson ignores important differences in levels of analysis.

Having clarified the different levels of analysis involved in the distinction between "function" and "effectivity," we need to consider the risks inherent in functionalist modes of analysis. One such danger is the temptation to lapse into a naive instrumentalism which posits a single dominating function expressed, for example, in theses such as "law reproduces the social relations of capitalist society" or "law legitimates capitalist social relations." Such single function theses are themselves attributable to the ideological reification of law. In such theories law is presented as "the Law" and is discussed as if it were a totally coherent and integrated process. A valuable corrective against tendencies to see law in this way is found in modern Marxist and critical legal theory: the idea of "contradiction." This concept focuses attention on the limits of

[7] The historical studies in the two collections of texts are peppered with less serious and less controversial examples. Genovese in his otherwise very convincing account of the role of law in the slave states asserts, as a given, the hegemonic function of law (Genovese, 1982). In so doing he comes perilously close to the functionalist circle of specifying a necessary function and then showing it revealed in practice. Janet Rifkin (1982), in advancing an abstract, necessary connection between law as hegemonic ideology and the ideology of patriarchy, similarly builds an unnecessarily functionalist account of the rule of law in perpetuating male dominance.

doctrinal coherence and on the variable operation of different legal procedures and institutions.

One of the most important contributions of radical legal historiography has been to breathe life and substance into the abstract category of "contradiction." At the outset this enterprise involves distinguishing between *internal* and *external* contradictions. The shift to a more empirical level of analysis, one of the hallmarks of the Critical Legal Studies movement, has allowed scholars to highlight the contradictory character of legal development; and it has helped them to avoid the pitfalls of instrumentalism. There is, however, a tendency within critical legal studies to focus one-sidedly on either internal or external contradictions. Thus, some work that examines doctrinal development stresses its internal incoherence while another strand emphasizes contradictions arising from the interplay of classes, class fractions, and other social and political forces as they struggle over the creation and practice of law. Both strands of research could be improved if they worked with a more systematic model of internal and external contradictions.

This is not the place to develop such a model, but I want to mention three considerations. First, with respect to both internal and external contradictions different "levels" need to be distinguished. Looking at internal contradictions, for example, we can distinguish among: (a) juridical reasoning and its ideological forms, (b) the ideologies embodied in the policy aspects of legal doctrine, (c) different legal institutions (e.g., types of courts), and (d) the professional ideologies of different kinds of legal actors. Such distinctions involve no profound theoretical insights, but they do provide a checklist of the sources and forces involved in the ideological determination of law. Second, the internal and external dimensions of legal ideology are not watertight compartments, and the interface between the two is a significant location of contradiction. Models of internal and external contradictions must take this into account and allow for some permeability. Finally, I would stress the practical significance for intervention in the politics of law of a careful analysis of contradictions since these pinpoint areas in which the subordinate classes have their greatest potential for effecting change. This speaks to the political importance of the model-building enterprise rather than to how it should be done.

Thinking about contradictions highlights problems with two widespread features of contemporary Marxist writings.

The first is a tendency to overemphasize the independence or autonomy of the internal ideology of law. A clear example is found in Karl Klare's conclusion from his study of the Wagner Act that law-making because of the impersonal, antiparticipatory, suprahistorical forms of thought and procedures involved "is governed by the process of alienation" (1982a: 168). This analysis does not give due weight to the pressures and contradictions that constantly press upon the judicial process and disrupt the calm of formal judicial logic in ways that Klare's substantive analysis demonstrates. I also question the conclusions that Klare draws from this line of argument. His preferred alternative requires "a quest for justice in each concrete historical setting" and the abolition of the rule of law (1982a: 168). In my view the call for individualized justice is not self-evidently a progressive demand. I remain convinced that the most important lesson for legal politics that may be drawn from our experience of "actual socialism" in the Soviet Union and other states is the necessity of retaining formalized and entrenched rights, the core of the rule of law, to protect citizens and social institutions against political usurpation by the state and the bureaucracy.

The second feature of the recent critical literature that my analysis calls into question is what I see as an overemphasis on the autonomy of the general ideological function of law, variously expressed by the legitimating or hegemonic function. Let me take as my example Colin Sumner. His analysis is in many respects parallel to the position I have advanced, but I believe he overstates the general function of legal ideology. "The Law," he argues,

> lies hidden beneath a heavy shroud of discourse, ritual and magic which proclaim the Wisdom and Justice of the Law. . . . Once this shroud is torn into tatters that hegemonic bloc of classes and class fractions which sustain the rule of capital is in trouble because inequality and domination can *only* be justified mystically and that is precisely the ideological function of law (Sumner, 1979: 277; emphasis added).

Now if the ideology of "The Law" is as effective as Sumner suggests, it is difficult to imagine how this shroud could ever be "torn into tatters"; this is a case of pure verbal militancy. More important is the contention that legal ideology provides the *primary* justification for inequality and domination. This is, in my view, quite simply wrong. Capitalist systems employ a wide range of ideological justifications which are used (a) differentially over time and (b) in different combinations.

These include such important legitimating ideas as "economic efficiency," "freedom," "democracy," and "national interest." The significance of legal ideology lies in its articulation along with other nonlegal ideological bases of legitimation. This point is made by Sumner but then seemingly forgotten.

> . . .The effectiveness of law as an ideological force, as a means toward ruling class hegemony, depends upon its ideological encapsulation of a consensus *constructed outside itself* in other economic, political and cultural practices (Sumner 1979: 264; emphasis added).

This point is nicely illustrated in *Policing the Crisis* (Hall *et al.*, 1978). The authors show that it was the combination of legal ideology with other elements, including appeals to moral consensus, the nation, and ethnicity, that made the shift to a more authoritarian mode of governance possible. While it is appropriate to stress the importance of legal ideology in contemporary capitalism, we must avoid any tendency to think that law is the only structure other than naked violence that props up the capitalist social order. It follows that our analysis of legal ideology, and its relationship to the production and reproduction of hegemony, must pay close attention to the way legal ideology is articulated in conjunction with economic, political, and cultural ideologies.

IV. CONCLUSION

Martin Albrow in a perceptive but critical review of recent Marxist texts on law expressed doubt as to whether "a general critique of law as ideology can lead into the scientific study of social relations underpinning and generating law, i.e., the sociology of law" (Albrow, 1981: 127). I hope that the above discussion has gone some way to demonstrate that Albrow is both right and wrong. He is right in castigating a "*general* critique of law as ideology"; but he is wrong in suggesting that the investigation of legal ideology cannot contribute substantially to the sociology of law.

Ideology is and will remain a difficult, slippery, and ambiguous concept, and there is little to be gained by searching for a "better" definition. Problems cannot be avoided, for ideology involves issues that go to the heart of the puzzling interrelationship between human subjectivity and social action. Yet, handled with care, the concept "ideology" provides an indispensable and irreplaceable tool of analysis.

If the potential utility of the concept is to be realized, it is necessary that we attend closely to two separate but related

sets of distinctions. The first is between the concrete particular and the concrete totality. The transition from one to the other is not a movement from micro to macro levels. This can be illustrated by taking, for example, the methodology involved in the study of a piece of legislation. The concrete particular focuses attention on the immediate or proximate influences, for example, doctrinal developments in that area of law, the particular "problem" addressed by the legislators, or the internal dynamics of the commission or inquiry proposing legislative action. The concrete totality retains the focus upon the legislation itself but seeks to situate that process in the context of wider economic, social, or political determinants. Understanding the relationship between the particular and the totality requires attention to the existence of distinct levels within the legal framework. We need to distinguish, for example, between the ideological elements present in the substance of the legislation, the legal form in which legislation is cast, and the way in which the form and substance of the law relate to the dominant ideological features of the legal system. These levels within the legal system are in turn related to the different levels of social relations, which means that the next step is to investigate the connections between "legal relations," on one hand, and "social relations," on the other. This involves turning our attention from the specific sets of social relations affected by the projected legislation to broader social forces rooted in economic, political, and other practices and to institutions that affect the creation and application of the legislation.

The second set of distinctions that must be maintained is between more abstract and more concrete conceptualizations. The need to distinguish between levels of abstraction is a theme found both in Marx's own methodological writings (Carver, 1975) and in the recent methodological debate (Echeverra, 1978; Sayer, 1979). What follows from this distinction is that concepts must be appropriate to different levels of abstraction. This implies that the unitary conceptions of the "form of law" derived from an abstract conception of the commodity relation are poorly suited to the analysis of the "forms of law" within historically specific legal systems. More generally, when the object of investigation is a specific legal system, more concrete concepts are needed than those that can be derived from an examination of the relationship among economic, political, and ideological practices at the abstract level of "the capitalist mode of production."

The implications of these two sets of distinctions underline one general theme of this paper: namely, that the ideological analysis of law must be understood as operating at a number of different levels, and that these different levels are both conceptual and empirical.

Colin Sumner suggests a distinction between "ideology" as basic or simple elements and "ideological formations" as complex systematizations of ideologies (Sumner, 1979: 20). I suggest that we can improve upon this scheme if we define "ideological elements" as the constituents of any text or speech act (for example, a legal norm or judicial pronouncement) but depart from Sumner by insisting that these elements are far from "basic" or "simple." Despite their apparent protean quality they involve already complex determinations. Ideology has no primary units or building blocks, for concepts do not themselves have any necessary ideological content; this is only acquired as they are employed in specific discourses. From this it follows that no word, however sensitive and emotive its connotations, has any necessary class content or implication; "equality," "fairness," "democracy," and the other key verbal labels only acquire ideological characteristics in their use.

I would retain Sumner's term "ideological formation" for those phenomena that link different ideological elements. This use allows for inconsistencies and tensions within legal discourse but does not assume any necessary systematization. In a legal system the degree of systematization is an issue for empirical inquiry. Additionally, I suggest the term "ideological form of law" to designate configurations of ideological elements where there has been conscious systematization.

The distinctions that the three concepts defined above allow have a significance with regard to legal phenomena which we can illustrate by contrasting a simple conversation with the judgment of an appellate court. While the former will consist of "elements of ideology," the appellate judgment may either involve an "ideological formation" linking discrete elements or may achieve a more rigorous systematization as "an ideological form of law." This makes the "reading" of legal ideology more complex. In my view it restricts the applicability of semiotic analysis, with its emphasis on discourses reducible to primary units of "signs," because in judicial discourse there is already present a more complex structure derived from the modes of legal reasoning.

The second implication of my classification of legal ideology is that we must be wary of assuming a single function

derived from an analysis of the form of law at a high level of abstraction. This means that we should not uncritically accept as proven conceptions of the legal order that seek to identify it in essence as a locus of such phenomena as "mystification," "legitimation," or "alienation." Rather, it is likely that research will disclose a considerable degree of variation in the function and effectivity of different types of legal practice.

The advance of Marxist and critical analyses of law which has been characterized by a special interest in ideological analysis has had a dual impetus. On the one hand, there has been a growing dissatisfaction with the methods and results of traditional legal scholarship and education. On the other hand, there has been a growing consciousness of the need to overcome the limitations and weaknesses of instrumentalist versions of Marxist theory. But the invocation of the concept "ideology" has in its turn necessitated a deepening awareness of both the pitfalls and potential of ideological analysis. This essay has been directed to an exploration of some problems posed by the use of this concept and to advancing some suggestions for the further development of ideological analysis. In it I have tried to stress the need for a greater theoretical self-consciousness in employing the concept of ideology and at the same time to underline the general shift in critical and Marxist studies towards a more concrete historical and empirical analysis of law.

Finally, to avoid any possible misunderstanding of the nature of my current project, I should acknowledge the importance of issues that I have not discussed. I have had nothing to say about the important questions associated with the investigation of the material or social determination of law and legal relations. Nor have I concerned myself with the other side of the same problem: the extent to which law and legal regulation are themselves constitutive of social and economic relations. The omission of these questions should not be read as denying their importance in the analysis of law. The issues involved in the harnessing of the concept "ideology" to the analysis of law are themselves of sufficient importance to merit the specific focus of this essay.

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