Modern legal systems have only recently begun to receive the critical analysis they deserve. Unfortunately, critical treatments of the law have suffered all too often from problems of a priori argumentation and ahistorical analysis. These twin sins, I would suggest, have not been absent from Marxist instrumentalist and structuralist works on the state and law. The instrumentalist approach proceeds from the assumption that law and the state are the handiwork of enterprising capitalists. In contrast, the structuralist approach stresses the relative autonomy of state and law from class manipulation, an autonomy which provides the very basis upon which juridical and political structures can contribute to the reproduction of capitalist relations. These Marxist approaches have, it would appear, selectively appropriated portions of Marx and Engels' scattered references to law and legal developments; the latter had no systematic theory of law. Some of the discrepancy between the instrumentalist and structuralist approaches to law can be

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resolved, as the following will suggest, by stressing their historically contingent significance. In brief, we will see that the dynamic relationship between class forces and legal relations/institutions takes a distinctive character depending on whether we observe the historical genesis or subsequent reproduction of capitalism.

My principal concern here pertains to the ideological consequences of capitalist legal relations. While the repressive features of the law are only too well known and experienced, law's ideological components are less palpable. Examination of the latter is especially warranted since the legal system is one of the most crucial, if not the most important, ideological state apparatus contributing to the legitimation of capitalist social relations (Aronowitz 1971:72; Poulantzas 1973:211ff.).

The ideological dimensions of law can be differentiated into two categories: (1) legal ideology as a political instrument exercised by a dominant or an insurgent class and (2) the prevailing ideological consequences of legal arrangements, irrespective of the specific interests and influence of any particular class. Whereas the former involves "a statement, in terms of a system of rules of law, of the aspirations, goals, and values of a social group" (Tigar and Levy 1977:284), the latter refers to ideological features of institutionalized legal relations which may acquire a measure of independence from class control as well as from concrete socio-legal relations—a relative autonomy of legal ideology. (Incidentally, institutionalized legal ideology enjoys political reinforcement, which distinguishes it from other types of ideology.) We will examine below both the instrumental and relatively autonomous contours of legal ideology in the context of the genesis and reproduction of capitalism.

It is important to emphasize that law is not simply imposed upon people, but is also a product and object of, and provides an arena which circumscribes, class (and other types of) struggle.1 The extent to which the interface between law and class struggle assumes one or the other of these forms is situationally and historically contingent. This essay will explore how a fundamental transformation of legal relations in one context depended upon the outcome of serious struggle between dominant and insurgent classes. Attention will be given to both practical and ideological tactics and consequences of this historical class struggle on legal terrain.

I will begin with a discussion of legal developments during the transition from feudalism to capitalism. During this period, the nascent, insurgent bourgeoisie utilized certain important
revolutionary legal principles in the course of its sustained struggle against the feudal social order. With the success of this class' struggles came the institutionalization of its cherished legal precepts and relations. What were instruments of practical and ideological warfare in a pre-capitalist framework gradually became anchored in a new socio-legal order in such a way that they contributed to the reproduction of capitalism. Yet this role of law in contemporary capitalism is not without its ideological contradictions—an issue to be pursued in my concluding remarks.

Legal Struggles During Absolutism

During the transition from feudalism to capitalism a series of laws were devised which contributed to the coercive transposition of the rural poor into an emergent industrial labor force. Marx and Engels' treatment of legislation during this period tends to concentrate on such repressive measures. Yet, changes in legal rights and principles were concomitantly beginning to contribute to the fulfillment of certain ideological and practical preconditions for the existence of rising bourgeois society. Let us explore the legal developments of this period from this vantage point.

After centuries of dormancy and virtual neglect, fresh scholarly interest in Roman law began to surface in Italy during the 12th century. By the 14th and 15th centuries, Roman law had experienced a revival in terms of its practical application within a fundamentally new societal context. It was not long before the contemporary relevance of selected Roman legal canons began to be appreciated throughout Western Europe. To account for such an unprecedented legal resuscitation we must turn to the struggles of certain key political and economic interests.

The renovation of Roman law was given impetus from monarchical quarters seeking to consolidate political-legal hegemony over their respective territories. In particular, a revived Roman law proved propitious to the interests of the absolutist state in "overriding mediaeval privileges, ignoring traditional rights, and subordinating private franchises;" moreover, it enabled the fortification of aristocratic class power in the face of an increasing threat of peasant unrest during the gradual dissolution of serfdom (Anderson 1974:28,18-20; Weber 1954).

While the selective appropriation of Roman legal principles in Western Europe facilitated the growth of political power
from above, it simultaneously proved convenient to the enhancement of economic power from below—resulting in a temporary alliance between monarchical and bourgeois interests. The early, revolutionary bourgeoisie had come "increasingly into head-on collision with the economic and political interests of the feudal masters of this or that section of territory. The merchant class chafed continually against laws and customs maintained to protect the feudal powerholders" (Tigar and Levy 1977:5). Roman law provided one practical and ideological instrument with which to loosen the feudal straitjacket that fettered its commercial activity. To begin with, as Marx (1973:246) observed, Roman law contained "attributes of the juridical person, precisely of the individual engaged in exchange" and this individual freedom was a crucial legal "right which rising bourgeois society had necessarily to assert against medieval society." Secondly, the growth of free capital and commodity exchange in town and country was facilitated by the introduction of Roman legal precepts concerning unconditional, absolute private property (in contrast to feudal conditional property relations). Roman law also contributed a measure of formalism and rational calculation, so needed by the early bourgeoisie:

To those who had interests in the commodity market, the rationalization and systematization of the law in general and...the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability and especially of capitalistic enterprise, which cannot do without legal security. (Weber 1954:305)

Roman conceptions of a professional judiciary, equity, and rational principles of evidence were quite germane to the mercantile need for uniform legal procedures (Anderson 1974:26).

Of course, the re-activation within a new context of certain legal concepts born in antiquity necessitated that they be shorn of their particularistic referents. In its struggle to establish the hegemony of legal relations commensurate with its economic needs, the ascendent bourgeoisie de-contextualized Roman law in such a way that it became "absolutized as the very embodiment of right reason" (Weber 1954:276).

But bourgeois legal struggles within this pre-capitalist environment were not limited to manipulations of Roman law. This class attempted to transform international law merchant (regulated credit, binding contracts) into a distinct province of national law merchant. Natural law provided another "banner
under which the bourgeoisie carried on its revolutionary battles with feudal society” (Pashukanis 1951:189). The bourgeoisie utilized certain natural law arguments—such as the “natural reason” of commercial freedom and the “right reason” of certain Roman legal precepts—to claim divine sanction for and the transcendent legitimacy of its legal and extra-legal struggles against the canon law of the Church and the customary feudal legal order.

A concern for the legitimacy of their legal innovations shaped the instrumental legal struggles of this bourgeoisie. Given the importance of respect for tradition during this period, they could not simply invent new legal principles and relations. In justifying the legal revolution they were attempting, it was important to obfuscate its revolutionary character—legal developments were presented as concordant with time-honored legal rights and relations, while in fact these legal changes spelled a severe rupture with the feudal past (Tigar and Levy 1977:6, 280; Balibar 1970:229).

The legal machinations of this insurgent bourgeoisie were eventually successful. Implementation of the principles of contract, alienable property, and personal economic freedom as well as rationalized legal procedure provided certain necessary conditions for a growing sphere of commercial activity within pre-capitalist England and France. Other European states gradually followed suit, so that by 1600 the major bourgeois legal precepts had almost everywhere replaced feudal legal relations (Tigar and Levy 1977:183). This, of course, did not necessarily mean that the bourgeoisie exercised instrumental control over European legal systems during this period. Nor is it to suggest that the rural and urban lower classes rested silent in the face of these gradual but profound legal and social changes. What is crucial here is not bourgeois manipulation of the law and legal functionaries as much as the hegemonic implantation of bourgeois principles and priorities into the form and general orientation of the law. As Montesquieu’s The Spirit of Laws proclaimed in 1748:

The spirit of commerce brings with it that of frugality, economy, moderation, work, wisdom, tranquility, law, and order... In order to maintain the spirit of commerce, it is necessary that... its spirit rule alone, unhindered by any other, and that all the laws favor it.

Capitalism and Legal Ideology

The consequences of class struggle on the terrain of law during absolutism provide a legacy of legal innovation inherited by
European competitive capitalism. Let us examine the practical and ideological consequences of those now institutionalized bourgeois legal relations of formal rationality and calculability, individual freedom, contract, property, and legal universalism.

I noted above how critical formal legal calculability and rationality were for the genesis of capitalist relations of production. But the consequences of legal precision and predictability are not limited to their immediate, practical significance for capitalist enterprise. If, as Weber (1954:355) argues, "The propertyless classes in particular are not served, in the way in which bourgeois are, by formal 'legal equality' and 'calculable' adjudication and administration," this does not necessarily imply that the class-skewed advantages of a calculable legal system are altogether visible in the capitalist life-world. Indeed, it can be argued that legal formality, rationality, and predictability lend a legitimating aura of objectivity to juridical proceedings which serves to obscure class-skewed legal outcomes (Tigar and Levy 1977:280).

Concomitant with the rise of commodity production and exchange is the constitution of individuals as isolated juridical subjects who possess rights and can assert claims (Pashukanis 1951: Cf. Marshall 1965). The generation of autonomous individuals who have ownership rights in private property, and recognize identical rights in others, is necessary to the entire process of commodity exchange. Law renders the relations of production effective via the freedom it accords to subjects-in-law. It facilitates exchange by formally equal possessors. Law does not merely recognize subjects already constituted as such by economic developments, but is also actively involved in the constitution of those subjects, endowing them with legal rights and individuality. As Hirst (1979:9) puts it: "It is in the law that men are constituted as subjects in the commodity form. Law interpellates individuals as possessive subjects." In this manner, law and juridical ideology originally contributed to the formal isolation or separation of social actors in order that they could be inserted into private property relations and capitalist labor practices.

Such legal individualization provided a necessary condition for the unfettered, volunteristic entrance of "equal," "consenting" individuals into formal agreements and transactions. The Code Napoleon (1804) instituted in the spirit of the French Revolution, had paved the way for the growth of these contractual relations when it dissolved feudal obligations and privileges (a path future bourgeois revolutions were to follow).
Contractual equality of all before the law became, in Engels words, the "grand rallying cry of the bourgeoisie." Specifically, it was the free labor contract which held the greatest contractual import for the development of capitalist enterprise.

The contractual "freedom" attributed to the employment agreement in capitalist production remained, however, fundamentally limited. While genuine contracts are neutral means whereby goals may be pursued, the capitalist labor contract was in fact devoid of real contractual content (Rideout 1966). Nevertheless, the law construes this relation as freely contractual. A de jure equivalence among contracting persons is superimposed upon fundamentally unequal individuals—unequal given their qualitatively different relationship to ownership of the means of production. The advent of collective bargaining has introduced a semblance of real contractual negotiation, but this development, according to Selznick, represents merely "the beginnings of the rule of law" within the employment arena and only the "emergent rights" of parties engaged in collective bargaining. Within the labor process, neutral and bilateral contractual relations remain overshadowed by the continued reign of "managerial prerogative" and the virtual "unilateral power" of employers (Selznick 1969:121–136). In general, contractual relations in this sphere remain:

pervasively involuntary and compelled...historically and politically the dominant fact has been the dependence of the worker on limited employment opportunities. He is neither an effective participant in a bargaining relation nor does he have realistic freedom to choose between working and not working. (Ibid:144)

The juridical constitution of free individuals has both distinctive economic advantages and serves to generate the appearance of individual liberty and voluntaristic contractual relations, which contributes to the occlusion of class relations and economic constraints (Poulantzas 1973:214). Subjects appear free and equal before the law, yet this formal legal equality and freedom is embedded in a social context of overarching inequality.

But the law simultaneously performs an additional politico-ideological function associated with individualization. Since pre-capitalist obligations and constraints have collapsed, the state and legal system now intervene to regulate and coordinate isolated individual activity, enforcing mutual recognition among actors of the universal rights of freedom, equality, and property. The ideological significance of this legal generality
and universality for the cohesion of capitalist society is captured by Poulantzas (1978:87–88):

The function of legitimacy shifts towards the impersonal and abstract instance of law at the very time that the agents "loosen" and "free" themselves from their territorial-personal bonds. It is exactly as if the abstract, formal, and general character of law had rendered it the mechanism most suitable for fulfilling the key function of every dominant ideology: namely that of cementing together the social formation...

Thus, law not only provides certain necessary conditions for the initial constitution of individual subjects able to engage in exchange and enter into contracts, but serves in turn as universal solvent mediating particular antagonisms, thus securing the political and ideological cohesion of the social formation. And the law plays the latter role with equal or greater vigor under late capitalism (Fraser 1978:172).

The establishment of formal legal equivalency between persons under capitalism is paralleled by an abstract legal equivalence among things:

Just as, in law there is no diversity between persons, who are all or can all be owners and contractors, so there is no diversity between things, which all or can all be property, whether they are the means of labour or the means of consumption, and whatever the use to which this property is put. (Balibar 1970:230)

The bourgeois (especially Continental) conception of property involves no more than the relationship between a person (persona) and a tangible thing (res). The right to property (the Roman dominium) entails the right to use and consume things as one desires. But bourgeois law collapses fundamentally different kinds of property into an undifferentiated res—not distinguishing, as Philbrick (1938:697) does, between "property for use" (personal consumption) and "property for power" (control of the means of production). When property consists of the means of production, simple dominium is transformed into imperium, i.e., human domination: "what is control of property in law, becomes in fact man's control of human beings, of the wage-laborers, as soon as property has developed into capital" (Renner 1949:106). The title to dispose of material objects is, under capitalist production arrangements, inherently converted into a title to profit, power, and domination over the propertyless laborer (Renner 1949:114; Cf. Selznick 1969).

In short, the abstract and formal texture of the legal rights of
property and contract and of the equality and freedom of individuals before the law constitutes a juridical veneer which occludes the pervasive substantive inequality and domination that structure the potential realization of these legal rights. That such is the case should be clear from the above. But the U.S. Supreme Court lends its own authoritative support to my arguments in a revealing statement offered in Coppage v. Kansas (1915):

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Needless to say, the Court was itself legitimating those economic and class inequalities to which it referred.

At this point, some of the ideological implications of bourgeois law can be crystallized. Law appears to have universal applicability, subjects are presented as legally equal, contracts are superficially bilateral and voluntary, and property is homogenized to consist of neutral control over objects. As Marx, Weber, Pashukanis, Renner, Poulantzas, Selznick, and others argue, each of these elements of capitalist legality obscures the concrete substantive reality of economic and juridical relations in the context of capitalism. Such potent legal principles and values as contractual voluntarism, universality of the law, rational legal predictability, private property guarantees, and legal freedom and equality tend to obfuscate the (class) genesis and function of these principles. While specific laws and legal practices may be delegitimated by individuals and groups, these legal values tend to provide strong support for the capitalist legal order as a whole, jettisoning potential attacks directed against it (Balbus 1977).

Theoretical and Political Implications

We have seen how the concerted legal struggles of a revolutionary European bourgeoisie eventuated in the gradual implementation of juridical principles and practices which proved crucial to the consolidation of bourgeois domination. I have stressed the importance of the historical genesis of legal precepts and relations forged in the heat of class struggle within a
pre-capitalist milieu. The instrumental use of legal principles contributed, as Balibar argues, to the liberation and homogenization of both property and individual subjects in addition to, as Weber suggests, the rational and calculative regulation of capitalist enterprise. That law came to perform these functions for the genesis of capitalism (and ultimately for its reproduction as well) was no accident. Elements of classical law were ideally suited to these requisites of emergent capitalism. Yet the suitability of law in this regard does not imply that other functional equivalents would have been inconceivable. However, the question of possible alternatives is unimportant here given the fact that the genesis of European capitalism was indeed fueled historically by certain fundamental legal transformations.

After the strategically generated legal norms had become fully institutionalized under competitive capitalism, they began to acquire a *sui generis* quality which rendered them relatively autonomous from direct class manipulation during normal times. As Balbus (1977:583–584) suggests, “the legal form, like the commodity form, necessarily functions *independently* of, or *autonomously* from, the power or will of the subjects who originally set it in motion.” It is not surprising that law and legal procedure should acquire an increasing autonomy from the intentional activity of its genesis given the “universal” and formal *nature* of the legal principles and rights struggled for in this context.

But it was not only the characteristic logic of the legal developments discussed here which rendered law relatively autonomous during the course of competitive capitalism. The popular masses were also partly responsible for the solidification of the relative autonomy of the law during this period. On the one hand, their struggles increasingly necessitated that law appear above mere class manipulation. On the other hand, their demands for the realization of the formal liberties ostensibly guaranteed by this juridical system (Poulantzas 1978:92), forced concessions which a legal system at the direct behest of the bourgeoisie would have been perhaps hard pressed to grant, and for which a relatively autonomous legal apparatus was well suited. (In short, the classes involved in struggle over and within the law altered with the emergence of capitalism. If absolutism had witnessed legal struggle between feudal dominant classes and a rising bourgeoisie, early capitalism set the stage for legal struggle between the bourgeoisie and the working class. Such struggle was of course variable over time and place in terms of intensity, content, and results. In line with the concerns of this essay it should be noted that when the
ruled are successful in challenging the law or asserting their formal rights, this does not necessarily contribute to the de- mystification of legal appearances. On the contrary, legal victories potentially contribute to the reproduction of the illusion that the legal system is governed by justice and equality, thus ideologically increasing submissiveness before the law.)

The relative autonomy of the law under capitalism enables it to both express or codify and mystify fundamental socio-economic relations. Engels (1959:404) comments on both:

In the modern state law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression. . . . And in order to achieve this the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class—this in itself would offend the "conception of justice."

Thus while liberal capitalist law generally expresses the relations of production, law must not be portrayed economistically. While the legal form is homologous to the commodity form, as Pashukanis and Balbus indicate, political and cultural forces provide intervening determinants for the composition of the law (Sumner 1979). In other words, law has not solely been the product of either class interests and struggles or general capitalist economic requirements. Secondly, the law is shaped by the requirement that it appear just. It must not be viewed as the handmaiden of any class or group, but rather as neutral or independent of particular interests and above the very cultural, political, and economic pressures which were responsible for its genesis and which continue to mediate legal relations. But how, concretely, does this relatively autonomous legal system manage to contribute to the reproduction of capitalism while simultaneously mystifying its role in this process? Since we have already explored the ideological dimensions of law, we must establish on the one hand the mechanisms whereby the legal system operates as a specifically capitalist structure, and on the other hand those features of legal relations within (but not of) capitalism which are not so inscribed with its logic and hence potentially transferable to alternative social systems.

(But before proceeding it is important to underscore that my arguments herein pertain to bourgeois democratic states under normal conditions. My observations regarding the relative autonomy of the legal system under capitalism characterize neither exceptional capitalist states nor bourgeois democracies
beset by crises. For discussions of law within exceptional, repressive capitalist regimes, see Poulantzas (1974), van Onselen (1976), and Weitzer (1980). During crisis periods in contemporary democratic capitalism, the normal relative autonomy of the law may be suspended in the instrumental interest of repressing struggle and restoring order. But the effect of crises on adherence to the rule of law may not be that of suspension, depending on the perceived severity of the emergency, resources available to authorities, and official concerns for the legitimacy of the legal and extra-legal response.\(^\text{10}\)

In order to establish the class character of the legal order under advanced capitalism we must first determine to what extent the distinctive internal structure of the law, following Offe (1974:36) on the state, "displays its own class-specific selectivity corresponding to the interests of the accumulation of capital." In other words, we must delineate the systematic "selection mechanisms" specific to the legal system which serve to include some and exclude other interests from legal attention and positive sanction. I want to suggest that advanced capitalism contains capitalist legal institutions which selectively and relatively autonomously ensure legal outcomes favorable to the reproduction of capitalism. Capitalist legal apparatuses are not simple manipulable institutions within a capitalist context. They operate independently to secure the common interests of capital by (1) juridically organizing and unifying the interests of isolated capitalist units, such as, for instance, disciplining wayward capitalists by commanding conformity to the dictates of a rationalized, predictable formal legal procedure (Weber 1954; Gramsci 1971:196; Genovese 1972:27; Therborn 1978:235) and (2) organizing class struggle in such a way that general capitalist interests are protected from threatening antagonistic interests via mechanisms of legal repression, mystification, displacement, and exclusion, all of which restrict the scope of possible events within legal channels (Pashukanis 1951; Balibar 1970; Cloke 1971; Poulantzas 1973; Balbus 1973, 1977; Klare 1978). Thus, since the repressive, ideological, and arbitratve juridical apparatuses of advanced capitalism perform relatively autonomous selective functions which render the capitalist class relatively homogeneous and tend to filter out challenges from interests counter to capital, these are capitalist legal institutions proper.

We can also observe patterns of exclusion in the content or referent of certain of the dearest principles of capitalist socio-legal relations—principles which have been inscribed in the
very orientation of the law. Two such values are those of unfe
terred contractual relations and individualization. But more
important is the sanctity of private property governing much
of the orientation of the law. Considerations of private property
constitute the supreme, general orientation of the capitalist legal
system. And this overarching concern can be considered a
pivotal exclusion criterion (in Offe’s sense) of the highest order,
constituting an important terrain pre-restricting the range and
nature of possible legal events.

Finally, the outcomes of legal processes are biased against
certain groups and classes in terms of the extrajuridical societal
context of racial and class inequality. In such a context, un-
equal legal outcomes are experienced by the poor and minorities
because of (1) economic barriers to equal legal treatment, (2)
structural and organizational characteristics of the legal pro-
fession, (3) social-psychological barriers (e.g., lack of knowl-
edge of laws and legal rights, distrust of legal institutions), and
(4) unfavorable treatment during legal proceedings (Carlin,
Howard, Messinger 1967; Albrecht 1976).

In sum, I am suggesting that the differential class capacity to
exercise ostensibly “universal” legal rights produces class-
skewed legal outcomes in three respects: (1) selections and
exclusions internal to capitalist legal institutions, (2) a general
orientation of the legal order which favors private property,
and (3) extralegal resources differentially available to groups
and classes.

These observations concerning the internal structure and
orientation of the capitalist legal system do not apply to most
specific laws, rights, and sanctions in capitalist society. The
latter are not intrinsically biased in a class-specific manner. (An
absence of significant class-bias in its concrete rules is, in fact,
one meaning of the concept of the relative autonomy of the
law.) Laws prohibiting violent crime, property crime, victim-
less crime, disorderly conduct, and regulating other forms of
behavior apply to rich and poor, powerful and powerless,
alike. Similarly, differential substantive capacity or oppor-
tunity to exploit, avoid, or realize the provisions of these for-
mally universal rules is not inscribed in these laws per se.

In a nutshell, therefore, while we can speak of legal institu-
tions impregnated by capitalism and of a general orientation of
the law conducive to bourgeois priorities, we must refer, in
contrast, to the existence of specific laws and rights in capitalist
society. One implication of this relative neutrality of particular
laws and rights is that they may possess a greater degree of
extricability from their capitalist context than is true for capitalist legal institutions. The transferability of legal principles across social formations and modes of production is not an historical rarity. We have already witnessed one example in the convenient resuscitation of important Roman legal principles which were gradually inserted into nascent bourgeois relations of production.

The potential transferability of legal principles and rights from capitalism to socialism is a highly provocative issue upon which I will not attempt to impose closure. I think it is fair to say that capitalism features at least some legal principles and rights which could prove valuable in other societal contexts. Some would argue, for instance, that legal equality and universality should be retained in a truly egalitarian society. Wright (1973:339) contends that the ingredients of due process are worthy of socialist legality: “The fault in the legal system lies not in the concept of due process, but in the social context in which due process operates.” Socialism, he claims, must retain the core components of liberal justice—habeas corpus, trial by jury, confrontation of accusers, etc. And for Renner (1949:295) labor contracts are not intrinsically evil: “it is not the legal form of the contract of employment but its connection with the institution of property which makes the former an instrument of exploitation.”

When we move from legal rights and principles to the realm of legal formality and the rule of law we encounter thornier problems. The extent to which the form of law is imbued with capitalist priorities becomes critical. For Thompson (1975:264-7) the rule of law, which imposes inhibitions and constraints on arbitrary power and summary justice, is to be praised for its accomplishments in capitalist society and retained in socialist justice. He submits: “if the actuality of the law’s operation in class-divided societies has, again and again, fallen short of its own rhetoric or equity, yet the notion of the rule of law is itself an unqualified good.” For President Nyerere (1968:304) of Tanzania the rule of law was not only admirable but necessary for socialism: “The Rule of Law is part of socialism; until it prevails socialism cannot prevail.” This provides an interesting contrast to Klare (1978:338) who maintains as “inevitable that the form of lawmaking must be a negation of the human spirit.” He adds:

Until lawmaking becomes a quest for justice in each concrete historical setting, until the “rule of law” ideal (the separation of law and ethics) is abolished and ethics
brought directly into daily life as a continuous, participatory practice of mediation and redefinition of relations among people who see in each other the possibility of their own fulfillment, that is until lawmaking becomes a self-conscious, critical form of social practice, there can be no hope of the emancipation of labor. . . . the struggle to emancipate labor must also be a struggle to emancipate law itself.

Balbus (1977:580) shares some of Klare's appraisal. Since, he claims, the legal form "necessarily precludes the realization of genuine equality, individuality, and community," it is a specifically "bourgeois" form; those who would simultaneously uphold this form and condemn the capitalist mode of production which "perverts" it simply fail to grasp that part they uphold is inextricably tied to the very system they condemn. It follows, therefore, that the legal form cannot be the basis for a fully developed, genuine socialist or communist society.

In response to Thompson, it is clear that the elimination of arbitrary, summary "justice" is of indisputable value. But the question becomes whether legal formalism is the best arrangement for introducing real social justice. Klare and Balbus maintain that legal formalism and the rule of law would continue to be inhuman and abstract in any context precisely because it ignores both ethical issues and substantive considerations concerning the motivations for infractions in particular cases and settings. I would argue that the formality and universality of legal arrangements does not necessarily produce injustice. As Engels, Weber, Poulantzas, and others suggest, the primary problem with legal formality and generality is that they remain abstract under capitalism, furthering and mystifying inequality. It is quite possible, in contrast, that a social order which has made serious attempts to eliminate social inequality might find that equality before the law enables further elimination of inequality. This is not to suggest that considerations for substantive flexibility are to be ignored, but rather that some balance be established between substantive concerns and equal legal treatment. The operations of the Cuban, Chinese, and Tanzanian legal systems provide some evidence for the viability of a dual system of justice responsive to both goals (Berman 1969; Li 1970; Cantor 1974; Ghai 1976). The form of law is not reified in these systems—as tends to be the case in capitalism (Cloke 1971)—but is mediated by popular participation in rule formulation and enforcement. In any case, these issues certainly deserve further attention.
In conclusion, I might offer some additional reflections on the role of legal principles and rights within capitalism. On the one hand, such principles serve ideological and occluding functions which “de-classify” and legitimate the socio-legal order, concealing the class nature of law and the state. Yet the actual extent to which legal mystification and legitimation are in fact successful—in terms of how actors experience and interpret legal “equality” and “universality,” for instance—needs further exploration. To what extent are bourgeois legal ideals considered to be false promises?

Since every hegemonic ideology, according to Kellner (1978: 50–52), unwittingly contains “disintegrating,” “explosive,” and “emancipatory” elements, it is quite worth considering some potential unintended consequences of bourgeois legal ideology. One unintended consequence involves the human recognition of the contradiction between the rational components of bourgeois legal ideology and their fetters under capitalism. What the Frankfurt School (1972) calls immanent critique can be exercised in cases where there is a conflict or disjunction between promise and experience. It involves the deliberate individual or collective confrontation of ideological claims with the social relations which prevent their realization, e.g., legal equality and justice vs. class-biased legal outcomes. Of course, the political use of the tactic of immanent legal critique can lead in the direction of attempts to merely improve capitalist society (by attempting to bring claim and reality into alignment) rather than overcoming it. And the state itself may intervene to improve the socio-legal order, generating changes when it detects faltering legitimacy due to gaps between legal ideals and concrete experiences. Ultimately, the degree to which such immanent critique is already exercised in daily life as well as the feasibility of such a method for the strategy of radical lawyers or goals of some political program are issues which await further empirical and practical exploration. One implication of these remarks, however, is that just as the insurgent European bourgeoisie engaged in legal struggle during the transition to capitalism, the transition to socialism may likewise be facilitated by class struggle on legal terrain.

1. It would be mistaken to interpret all struggles within and about the law as class struggles, in which representatives of a class consciously (or even implicitly) pursue their interests on legal terrain. Of course, neither is all law equally important to the reproduction
of capitalist social relations. Legal class conflict which does occur may be oriented toward (1) struggle for the realization of rights guaranteed by law, (2) struggle over the legitimacy and/or constitutionality of particular laws, or (3) delegitimization of the legal order in its entirety. The latter is clearly quite rare. While particular laws may lose legitimacy and the failure of cherished legal principles to live up to their claims and pledges may be the object of struggles for alignment, neither those claims and pledges per se nor the legal order itself tend to be subjected to scrutiny and rejected.

2. Natural law refers to a system of law or specific principles which are believed to have natural, trans-historical validity. In addition to the nascent bourgeoisie, both the peasantry and the proletariat have used natural law to argue for recognition of their basic human rights (Weber 1954:294). And Neumann (1957) goes so far as to claim that, “Whenever a political group attacks the powerfully intrenched positions of another group, it will use revolutionary natural law as an implement...”

3. The English bourgeois legal revolution tended to exhibit greater respect than elsewhere for the feudal legal order. Feudal legal forms were invested with a bourgeois content, in contrast to the Continental frontal assault on feudal law discussed above. This had the advantage of giving English legal changes an illusive continuity with the feudal past. The idiosyncracies of English legal changes did not, however, attenuate their impact at home and abroad; legal changes in both England and France, although distinctive, served to catalyze subsequent bourgeois legal revolutions.

4. It should be recognized that not all legal subjects are human subjects (e.g., corporations, public bodies)—a qualification which does not negate the importance of the developments outlined here.

5. To speak of a relatively autonomous legal order is to distinguish it from any unqualified or total legal autonomy. Relative autonomy involves the simultaneous independence of the legal apparatus from political and class manipulation and its ongoing contribution to the reproduction of capitalist social relations. On the formal separation of law and politics, and the consequences this has for legitimation, see Nonet and Selznick (1978:57–59).

6. The transition to relatively autonomous legal systems occurred gradually and unevenly throughout Europe. 18th century English criminal law, for instance, can be characterized as a mixture of both instrumental control by dominant classes in the countryside and a partial independence from class manipulation. According to Hay (1975:52), it was generally the case that the “private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy in the most exact meaning of the word. The king, judges,
magistrates and gentry used private, extra-legal dealings among themselves to bend the statute and common law to their own purposes."

However, developments in the direction of partial legal autonomy were already embryonic within this criminal legal order. The rule of law in criminal proceedings embodied constraints upon arbitrary power, and included legal technicalities (which might work in favor of the accused)—which reinforced beliefs in the justice of this legal order (Hay 1975:33). Similarly, the appearance of equal justice before the law was fueled by the applicability, however rare, of criminal sanctions to malefactors from the upper echelons of society—elites who were "prisoners" of the legal rules they had created (Thompson 1975:263).

7. There is evidence that American legal principles and practices traversed a path somewhat similar to Europe's in terms of a transition from a generally instrumentally controlled legal apparatus to an increasingly formal, relatively autonomous juridical system. The American legal system was, needless to say, not the product of class struggle in a feudal context. Until around 1830, however, it too functioned in large measure at the behest of the powerful and propertied. The rise of legal formalism in America was in part a response to the Codification Movement of the 1820s, which challenged the neutrality of the law with allegations of its political bias and class manipulation. In addition, commercial and mercantile interests themselves sought a more stable and predictable legal system with fixed, logically deducible rules concerning relations of contract, commerce, and property (Horwitz 1977:255–259).

8. Some examples of this variation are the following. 18th century London was the site of extreme disrespect for the law, while rural England only sporadically erupted in defiance of particular laws (Hay 1975; Thompson 1975). After the French Revolution, class struggle in France developed over the law itself. As Foucault (1977:274) indicates, people fought "against the law itself and the justice whose task it was to apply it" and, moreover, "those struggling knew that they were confronting both the law and the class that had imposed it."

9. Balbus (1977:575–576) elaborates the parallel between economic and legal forms: "If, in a capitalist mode of production, products take on the form of individual commodities, people take on the form of individual citizens; the exchange of commodities is paralleled by the exchange of citizens. . . . The fully developed legal form thus entails a common form which is an abstraction from, and masking of, the qualitatively different contents of the needs of subjects as well as the qualitatively different activities and structures of social relationships in which they participate. Thus the legal form, in Marx's words, 'makes and abstraction of real men' which is perfectly homологous to the abstraction that the commodity form makes of 'real products.'"

10. Balbus (1973) attempts to illuminate the normal operation of the criminal justice system through an examination of a series of political
crises. The concern for re-establishing order during periods of ghetto revolt in the 1960s catalyzed the abrogation of the legal rights of the accused and gross departures from the formal rationality of the criminal justice system. During the post-crisis period—in the face of public delegitimization of repressive tactics as well as system overload from the sheer volume of cases awaiting adjudication—there was a marked return to a concern for legal neutrality, due process, and the exercise of ordinary legal procedures and sanctions. Through his analysis of the tension between instrumental manipulation of the legal apparatus and conformity to formal legal rationality during and after crises, Balbus documents the paramount importance of relatively autonomous law for advanced capitalism.

11. As Cloke (1971:72) writes, “Most statutes, decisions, administrative proceedings, and legal actions revolve around individual claims to property, or the efficiency of the state machinery which regulates and guarantees property expectations. The major areas of law, such as contracts, property law, wills, trusts, corporations, secured transactions, torts, administrative law, and even enormous proportions of criminal law protect existing property.”

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