COMMODITY FORM AND LEGAL FORM: AN ESSAY ON THE "RELATIVE AUTONOMY" OF THE LAW

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Prefatory Note

After a good deal of thought I have decided not to respond directly to Professor Trubek's exhaustive review of *The Dialectics of Legal Repression*, but will rather leave it to readers of my book to determine for themselves the adequacy of his description, analysis, and evaluation of the material contained therein. However, insofar as Professor Trubek also refers briefly in his essay to my "more recent," and until now unpublished, work, it seems appropriate to present a sample of this work, especially since Trubek himself argues that it entails a "major refinement" which "allows Balbus to explain what remains unexplained in *The Dialectics*." Indeed, *in certain respects* the following essay constitutes an autocritique of the theoretical analysis in my book, and a comparison of the two will thus permit the reader to assess indirectly the extent of my agreement with Trubek's critique. At the same time, what follows also constitutes an implicit and, at times explicit, critique of Trubek's own effort to elaborate and apply an alternative to my position, the effort he calls "critical social thought about law."

I. INTRODUCTION

In this essay I attempt to outline the essentials of a Marxian theory of law. This theory, as we shall see, entails a simultaneous rejection of both an *instrumentalist* or reductionist approach, which denies that the legal order possesses any autonomy from the demands imposed on it by actors of the capitalist society in which it is embedded, and a *formalist* approach, which asserts an absolute, unqualified autonomy of the legal order from this society. The instrumentalist approach—whether pluralist or crude-Marxist—conceives of the law as a mere instrument or tool of the will of dominant social actors and thus fails even to pose the problem of the specific *form* of the law and the way in which this form articulates with the overall requirements of the capitalist system in which these social actors function.[1] The formalist ap-

1. Despite their obvious opposition, there is no *theoretical* difference between a Pluralist and an Instrumentalist-Marxist approach to law. Both bypass entirely the problem of the form or structure of the legal order in order to conceive it as a direct reflection of consciously articulated and organized pressures. Thus the difference between them is merely empirical: Pluralists deny that there is a systematic bias to the interplay of pressures; Instrumentalist Marxists argue that this interplay is dominated by specifically capitalist interests. For a powerful critique of Legal Pluralism, see Tushnet (1977). For an influential critique of Instrumentalist Marxism, which contributed significantly to its rejection, by now almost universal, see Poulantzas (1973). The debate between Nicos Poulantzas and Ralph Miliband, which has been carried out over the

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proach, on the other hand, locates and describes the specificity of the legal form but, insofar as it treats this form as a closed, autonomous system whose development is to be understood exclusively in terms of its own "internal dynamics," is likewise unable even to conceptualize the relationship between the legal form and the specifically capitalist whole of which it is a part.[2] In short, neither approach is capable of explaining why a specifically legal form of the exchange of people is inextricably intertwined with a specifically capitalist form of the exchange of products. It is precisely that problem to which this essay is addressed.

The debate between the instrumentalists and the formalists—which has dominated legal theory for at least two hundred years and continues to flourish today—has always been extraordinarily misleading. It is characterized by a false dichotomy which arises from an inadequate starting point shared by *both* approaches, i.e., the assumption that the law must be judged "autonomous" to the extent that it functions and develops independently of the *will* of extralegal social actors. Given this common conceptual terrain, their dispute is necessarily and merely a dispute over the "facts;" formalists "discover" that the law is independent of the will of social actors, and thus conclude that it is "autonomous," whereas instrumentalists "find," to the contrary, that the law is directly responsive to the will of these actors and thus conclude that the law is "not autonomous." Neither understands that the answer to the question whether the law is independent of the will of social actors *in no way* disposes of the question whether the law is autonomous from the capitalist *system* of which these actors are the agents. Even more: the formulation that *to the degree that the law does not respond directly to the demands of powerful social actors it is autonomous, in the sense that it functions and develops according to its own internal dynamics* omits the possibility that the law is not autonomous from, but rather articulates with and must be explained by, the systemic requirements of capitalism precisely because it does *not* respond directly to the demands of these actors. In other words, it is one thing to argue that the legal order is autonomous from the preferences of actors outside this order, but quite another to argue that it is autonomous from the capitalist system (unless one were to commit the "voluntarist" error of equating the preferences of actors with those activities that must be performed if the system in which they function is to

past decade in the pages of *New Left Review*, is also instructive, as is the critique of Marxist Instrumentalism developed by Claus Offe (1972), as well as the analysis of David Gold, Clarence Lo, and Erik Wright (1975).

2. Tushnet (1977) occasionally lapses into this formalist position in his otherwise excellent critique of Lawrence Friedman's Pluralist Instrumentalism.

survive). Indeed, I will try to demonstrate that it is precisely because the law *is* autonomous in the first sense that it is *not* autonomous in the second or, to put it another way, that the relative autonomy of the legal form from the will of social actors entails at the same time an essential *identity* or homology between the legal form and the very "cell" of capitalist society, the commodity form. Thus the Marxian theory of the "relative autonomy" of the law, which I am proposing, cannot be understood as a *compromise* between the instrumentalist and formalist positions; rather it purports to *transcend* the opposition between these positions by rejecting the common conceptual terrain on which they are based and elaborating a wholly different theoretical terrain. This requires a brief summary of Marx's analysis of the logic of the commodity form.

II. THE LOGIC OF THE COMMODITY FORM

This logic, Marx tells us in the first chapter of Volume I of *Capital*, is that of a "mysterious," twofold and, in fact, contradictory reality. A commodity, to begin with, is a use-value: it is a qualitatively distinct object which exists to fulfill a qualitatively distinct, concrete human need and has been brought into existence by a qualitatively distinct form of labor, which Marx calls "concrete labor." In their role as use-values different commodities are thus *not* equal to one another; their inequality corresponds to the unequal labors that produced them. At the same time, however, a commodity is also an object of exchange, or an exchange-value: it exists and is valued not only, and not immediately, because it is used but also and rather because it can be exchanged for another commodity. The existence of exchange-value, or what Marx simply calls value, thus presupposes that qualitatively distinct and otherwise incommensurable commodities enter into a formal relationship of equivalence with one another, i.e., that qualitatively different objects become what they are not: *equal*. This relationship of equivalence, in turn, is facilitated by the existence of a particular commodity, money, which with the development of capitalism becomes the *universal economic equivalent* by means of which the value of every other commodity can be expressed. Money, in other words, permits all products to assume a formal identity so that they can become, in Marx's suggestive phrase, "citizens of that world [of commodities]" (1967:63), that is, they can all stand for or be *represented* by each other. The fully developed commodity form, or the money form, thus entails a common *form* which is an abstraction from, and masking of, the qualitatively different *contents* of the objects and the concrete human

needs to which they correspond: "The memory of use-value, as distinct from exchange-value, has become entirely extinguished in this incarnation of pure exchange-value" (Marx, 1973:239-40).

This abstraction from, and masking of, the content or quality of the object is only made possible by a prior abstraction from, and masking of, the concrete labor that produced it. The common form that is exchange-value can only exist as the expression of the one form that is common to all the qualitatively different labors that bring objects into existence, i.e., of labor-power understood as an abstract, undifferentiated expenditure of energy over a given period of time, or what Marx calls abstract labor. Thus, in order for commodities to become equal to one another, i.e., in order for exchange-value to exist, concrete, qualitatively different labors must become what they are not: *equal*. The result is that the "memory" of concrete labor is "extinguished" along with that of use-value.

The logic of the commodity form is thus that of a *double movement from the concrete to the abstract, a double abstraction of form from content, a twofold transmutation of quality into quantity.* The transformation of commodities from unequal to equal objects parallels, and is made possible by, a transformation of the labor which produces them from unequal to equal. In order for commodities *to be what they are*, both the unequal objects and the unequal labor which has produced them must *become what they are not,* i.e., equal. Thus the commodity form has its origin in concrete human needs and creative labor, but it "possesses the peculiar capacity of concealing its own essence from the human beings who live with it and by it" (Lefebvre, 1969:47), i.e., by virtue of the double mystification inherent in the commodity form, human beings necessarily "forget" that commodities owe their existence to human needs and to the activity in which people have engaged both to produce and fulfill these needs. The commodity form, in other words, is an economic form that necessarily functions *independently* of, or *autonomously* from, the will of the subjects who set it in motion. Thus the *fetishism of commodities*: the masking of the link between commodities and their human origin gives rise to the appearance, the ideological inversion, that commodities have living, human powers. Products appear to take on a life of their own, dominating the very human subjects who in fact bring them into existence but who no longer "know" this. Commodity fetishism thus entails a profound reversal of the real causal relationship between humans and their products: humans, the subjects who create or cause the objects, become the object, i.e., are "caused" by the very objects which they have created and

to which they now attribute subjectivity or causal power. Human life under a capitalist mode of production becomes dominated by the passion to possess the commodity's living power, especially the power of that one commodity, money, that makes possible the possession and accumulation of all other commodities. Thus money is transformed from a means of exchange into the very end or goal of human life itself.

III. THE LOGIC OF THE LEGAL FORM

Although Marx never developed a full-fledged theory of the legal form, it is nevertheless possible to reconstruct from his early writings on law and the state in *The Critique of Hegel's Philosophy of the State* and the essay *On the Jewish Question*, as well as from his later, more fragmentary treatment of the same subject in *Capital, The Grundrisse*, and the *Critique of the Gotha Program*, an analysis of the logic of the legal form which, in its essentials, completely parallels his more systematic, fully developed analysis of the commodity form.[3] Thus, with the aid of these writings, I shall argue that the logic of the legal form and the logic of the commodity form are one and the same.

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. A citizen, in turn, is every bit as "mysterious," twofold, and in fact contradictory a reality as a commodity. An individual citizen, to begin with, is a qualitatively distinct, concrete subject with qualitatively distinct human needs or interests. In this aspect of their existence, then, individual citizens are manifestly *not* equal to one another, an inequality which corresponds to the uniqueness of the human activities and the networks of social relationships from which their needs or interests derive. At the same time, however, individual citizens are not only, and not immediately, subjects with needs but also and rather objects of exchange who exist in order to represent, and be represented by, other individual citizens. The existence of political exchange or representation thus requires that qualitatively distinct individuals with otherwise incommensurable interests enter into a formal relationship of equivalence with one another, i.e., that the qualitatively different subjects become what they are not: *equal*. This relationship of equivalence, in turn, is made possible by the law

3. This reconstruction has profited from my encounter with the work of Lefebvre (1969), as well as that of Jean-Joseph Goux (1972). At the risk of a certain redundancy at points in this reconstruction I have deliberately employed language that is virtually identical to language in the previous section. The identity of language is designed to underscore the identity in logic between the two forms.

which, with the development of capitalism, becomes the *universal political equivalent* by means of which each individual is rendered equal to every other individual, so that any one individual can represent any other. 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 an abstraction of real men"[4] which is perfectly homologous to the abstraction that the commodity form makes of "real products." Let us look more closely at the legal form in order to clarify the way in which it is able to perform this abstraction, as well as the consequences of this operation.

A. The Law as Universal Political Equivalent

The formality, generality, and "autonomy" of the law—captured in Weber's concept of "formal legal rationality" and summarized by Professor Trubek in this issue and elsewhere (1972)—preclude the qualitatively different interests and social origins of individuals from entering into the calculus of political exchange, just as the formality, generality, and "autonomy" of money preclude the qualitatively different use-values of commodities, and the unique labor that produces them, from being recognized in the calculus of economic exchange. The "blindness" of the legal form to substantive human interests and characteristics thus parallels the blindness of the commodity form to use-value and concrete labor, and if the commodity-form functions to "extinguish" the "memory" of use-value and concrete labor, so too the legal form functions to extinguish the memory of different interests and social origins. As Marx puts it:

> The [legal] state abolishes, after its fashion, the distinctions established by birth, social rank, education, occupation, when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member is an *equal* partner in popular sovereignty. [1972a:31]

The legal form thus defines distinctions of interest and origin *out of political existence*, just as the commodity form defines distinctions of use and labor out of economic existence. And, just as the commodity form "replaces" use-value and concrete labor with the abstractions of exchange-value and undifferentiated labor-power, the legal form "replaces" the multiplicity of concrete needs and interests with the abstractions of *"will"* and *"rights,"* and the socially differentiated individual with the abstraction of the *juridical subject* or the legal person. Pashukanis was perhaps the first

4. Quoted in Lefebvre (1969:127).

Marxist after Marx to specify what might be called the common *mode of substitution* underlying both the commodity form and the legal form:

> In the same way that the natural multiformity of the useful attributes of a product is in commodities merely a simple wrapper of the value, while the concrete species of human labor are dissolved in abstract labor as the creator of value—so the concrete multiplicity of the relationships of a man to a thing comes out as the abstract will of the owner, while all the specific peculiarities distinguishing one representative of the species *homo sapiens* from another are dissolved in the abstraction of man in general as a juridic subject. [1951:163][5]

The subject of "equal rights" substitutes for the concrete subject of needs, and the abstract legal person substitutes for the real, flesh-and-blood, socially differentiated individual. Thus we are in the presence of the same double movement from the concrete to the abstract, the same twofold abstraction of form from content, that characterizes the commodity form.

B. Equality, Individuality, and Community

The "equality" established and protected by the legal form is thus purely formal insofar as it is established in and through an abstraction from the real social inequalities of capitalist, class society, which nevertheless continue to exist, of course, even if denied "political" recognition. Thus "the political suppression of private property not only does not abolish private property, [but] actually presupposes its existence" (Marx, 1972a:31). The formality of legal equality, however, does not prevent it from having substantive consequences which are anything but equal and are in fact *repressive*. On the one hand, the systematic application of an equal scale to systemically unequal individuals necessarily tends to reinforce systemic inequalities; this, of course, was the force of Anatole France's famous, ironic praise of "the majestic equality of the French law, which forbids both rich and poor from sleeping under the bridges of the Seine." Thus Marx argues that the right of "equality" guaranteed by the legal form is "a right of inequality, in its content, like every other right" (1968:324). On the other hand, and probably even more importantly, legal equality functions to mask and occlude class differences and social inequalities, contributing to a "declassification" of politics which militates against the formation of the class consciousness necessary to the creation of a substantively more equal society. Thus the "political

5. Only after "working out" the homology between the commodity form and the legal form did I discover that Pashukanis had developed essentially the same analysis roughly fifty years ago! Almost all subsequent Marxist work on the law is, unfortunately, a regression from the standard established by Pashukanis's pioneering effort. The concept "mode of substitution" derives from Goux (1972).

suppression of private property"—legal equality—makes it that much harder to eliminate private property and its attendant class inequalities, since it works to prevent "property" and "class" from entering into the universe of political discourse.

Similarly, the "individuality" established and protected by the legal form is illusory insofar as it is established in and through an abstraction from the concrete, social bases of individuality and is thus a "pure, blank individuality" (Marx, 1843:481) bereft of any qualitative determinations and differences. Just as the commodity form divorces the concrete use-value existence of the commodity from its formal existence as exchange-value, recognizing only the latter as constitutive of the "individuality" of the commodity, so the legal form splits off the concrete social existence of the individual from his or her existence as a formal object of political exchange and recognizes only the latter as definitive of his or her individuality. And a form that defines individuals as individuals only insofar as they are severed from the social ties and activities that constitute the real ground of their individuality necessarily fails to contribute to the recognition of genuine individuality.

The only form of individuality common to all members of a capitalist society, moreover, is the individual*ism* and egotism of commodity exchangers, which is in fact the real (and thus "false") content of the formal individuality produced and guaranteed by the legal form. The indifference to qualitatively different needs "announced" in and through the abstractions of "will" and "rights" parallels, and is made possible through, a system of commodity exchange whose individual agents are necessarily indifferent to reach other's reciprocal needs and are rather obliged to treat each other as a mere means to their own purely "private" ends (1973:242, 245). The juridical person, in other words, is merely the political persona of the individual whose social existence is instrumental, self-interested, and alienated; the individual, in short, who fails to act as a *social* individual aware of the inseparable relationship between his or her development and the development of every other individual.

> Political emancipation is the reduction of man, on the one side, to the egoistic member of civil society, to the egoistic, independent individual, on the other side to the citizen, to the moral person. [1972a:44][6]

6. The legal state, like monotheistic religion, presupposes an individual who is incapable of acting as a social being in his or her everyday life. "Political democracy is Christian in the sense that man . . . every man, is there considered a sovereign being; but it is uneducated unsocial man . . . man as he has been corrupted, lost to himself, alienated, subjected to the rule of inhuman conditions . . . by the whole organization of our society—in short man who is not *yet* a real species-being" (1972a:37).

Thus the commitment of the legal form to individuality is ultimately illusory, because the individuality it recognizes and presupposes is in fact an alienated form of individuality—individualism. The commitment becomes doubly illusory, moreover, once we recognize the contributions of the legal form to the persistence of the very capitalist mode of production which makes genuine individuality impossible.

Much the same can be said about the kind of "community" produced by the legal form. Insofar as the legal order establishes its universality, and its citizens define their communality, through an abstraction from the real social differences and interests that separate the members of capitalist society and set them against one another, Marx argues that it entails an "illusory community" (1972b:159) which "satisfies the whole of man in an imaginary manner" (1969:127).

> In the [legal] state . . . the individual . . . is the imaginary member of an imaginary sovereignty; he is robbed of his real individual life and filled with an unreal universality. [1972a:32]
>
> In order to be a real citizen and have political significance and efficacity, he must leave his social reality, abstract himself from it and return from its whole organization into his individuality, for the only existence that he finds for his citizenship is his pure, blank individuality. [1843:494]

The community of citizens is thus purely formal, i.e., bereft of real content, because the real content of life in capitalist society is overwhelmingly particularistic, rather than universalistic, in character. As such, the community produced in and through the legal order is as "imaginary" as that produced by religion; it is a "heavenly" sphere which "soars or seems to soar above . . . the limitations of the profane world" (Lefebvre, 1969:129-30). Indeed, Marx argues that the legal form is, in essence, a *religious form*:

> Up to now, the political constitution has been the religious sphere, the religion of the people's life, the heaven of their universality in contrast to the particular mundane existence of the actuality. [1843:436]
>
> The individual leads, not only in thought, in consciousness, but in reality, a heavenly and an earthly life, a life in the political community wherein he counts as a member of the community, and a life in civil society, where he is active as a private person, regarding other men as means, degrading himself as a means and becoming a plaything of alien powers. *The political state is related to civil society as spiritualistically as heaven is to earth.* [1972a:32, emphasis added][7]

Thus the "community" produced by the legal form is no more real than the "heaven" produced by a religious system.

Notwithstanding its purely formal, imaginary character, however, this "community" entails substantive consequences of the

7. Thus, as Goux (1972) has noticed, Marx argues that the monotheistic religious form, as well as the legal form, is homologous with the commodity form. "Money is . . . the god among commodities" (1973:221).

highest order. If citizenship is at bottom a religion, then it is an *opiate* in the twofold sense both of dulling and distorting perception of reality, and providing a substitute gratification which compensates for the misery of reality and makes it bearable. On the one hand, membership in the illusory political community blurs the perception of the real, mundane class-based and thus particularistic communities in which people live, providing the basis for appeals to an abstract "common interest" or "public interest" which militate against the recognition of class interests. On the other hand, the political community provides individuals with a compensation for the absence of communal relationships within their everyday existence in the same manner that the perfection of "heaven" compensates for, and thus allows the believer to bear, the imperfections of earthly existence. For both reasons, the "community" produced by the legal form contributes decisively to the reproduction of the very capitalist mode of production which makes genuine community impossible.

Thus the legal form both produces and reinforces illusory, rather than genuine, forms of equality, individuality, and community. At the same time, as I have suggested, these illusory forms contribute significantly to the persistence of a capitalist system which necessarily precludes the realization of genuine equality, individuality, and community. For both reasons, the legal form 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 (Marx, 1973:245, 248-49). It follows, therefore, that the legal form cannot be the basis for a fully developed, genuine socialist or communist society.

There is another way of stating the incompatibility between legalism and socialism. Legal obligations in no way transcend the *concrete particularisms* of capitalist society, but must rather be understood as *abstract universals* which owe their existence to those concrete particularisms. If a truly socialist society means anything, it means a society in which the split between the concrete particularisms of alienated self-*interest* and the abstract universalism of legal *obligation* is thoroughly transcended, such that individuals act as social individuals who are bound by neither interest nor obligation but rather by the *concrete universal* of *social need*.[8] To put it another way, the emergence of human need

8. For readers unfamiliar with the Hegelian terminology employed in this paragraph, I offer the following translation. In the context of our discussion, a "concrete particularism" is an internal want or desire that is, however, a-social; an "abstract universal" is a demand that is social in

as the basis of social production and intercourse necessarily entails the transcendence of that form—the legal form—which, as we have seen, carries out a systematic, bloodless abstraction from human needs. Indeed, this is precisely what Marx envisions in the "higher phase of communist society . . . [in which] the narrow horizon of bourgeois *right* [is] crossed in its entirety and society inscribe[s] on its banners: From each according to his ability, to each according to his *needs*" (1968:324-25).

C. "Legitimation"

The foregoing analysis has important implications for a theory of the "legitimation" and/or "delegitimation" of the legal form, and thus, of the capitalist state. Those who would argue that delegitimation can result from the failure of law to live up to its "promises" (i.e., from the gap between its promises and its performance) fail to understand that the legitimation of the legal order is not primarily a function of its ability to live up to its claims or "redeem its pledges" but rather of the fact that *its claims or pledges are valued in the first place.* As long as "formality," "generality," and "equality before the law" are seen as genuine human values, even gross and systematic departures from these norms in practice will not serve to delegitimate the legal order as a whole, but will at most tend to delegitimate specific laws and specific incumbents of political office who are responsible for these laws. Consider, for example, legal practices that systematically and obviously violate the principle of "equality before the law," such as those that result in rich individuals receiving more lenient treatment than poor individuals who have been convicted of comparable crimes. Such practices may in fact delegitimate particular judges and particular court systems, but they will not delegitimate the legal order itself, insofar as the delegitimation of the former does not call into question, but rather is based on the affirmation of, a central criterion of the legal order, equal treatment irrespective of class position. In other words, those who would object to the rich individual receiving more lenient treatment than the poor, on the grounds that the law should be indifferent to the distinction between rich and poor—that rich and poor alike should receive the same penalty for the same crime—would, in that very condemnation of the judges and courts responsible for the differential treatment, be affirming the legitimacy of the legal

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nature but externally imposed; and a "concrete universal" is an internal want or desire that is socially directed. Thus "social need" is a concrete universal because it creates a bond among individuals for whom sociality is an inner desire rather than either a means to a self-interested end or an obligation that limits the pursuit of self-interest.

order. Thus a "critical analysis of the relationship between claim and reality," *pace* Trubek, is *not*, in "itself a source of possible change towards a more humane society," unless and until this "critical analysis" also entails a critique of the legitimacy of the value underlying the claim itself.[9]

In other words, the objection that the rich receive more lenient treatment than the poor would only delegitimate the legal order as a whole, and thus the capitalist mode of production on which it rests and which it helps sustain, if this objection were grounded on the principle that the rich, given both their greater ability to pay the penalties resulting from conviction and also to avoid the necessity of committing crimes in the first place, should receive *more severe* penalties than the poor who have committed comparable crimes. In this case a central tenet of the legal order would be called into question and rejected—the legitimacy of the recognition of social class origins would be asserted—so that even if this order were subsequently able to make good its promise to provide equal treatment for all it would be found wanting. Delegitimation thus presupposes a fundamental break with the values and (formal) mode of rationality of the legal form itself, a break which presupposes, in turn, at least an embryonic articulation of a qualitatively different set of values and mode of rationality. An adequate theory of legitimation and/or delegitimation would therefore have to explain why the *logic* of the legal order as such, in contrast to particular laws or legal practices, is ordinarily accepted as unproblematical, and is not called into question in the name of a radically different logic.

D. The Fetishism of the Law

The legal form is normally not called into question, I would argue, because the form itself ordinarily precludes the possibility of performing this critical operation. The calling into question of the legal order presupposes individuals who conceive themselves as subjects evaluating an object which they have created and over which they have control. It is just this presupposition, however, which is nullified by the perverse logic of the legal form; this form creates a fetishized relationship between individuals and the Law in which individuals attribute subjectivity to the Law and con-

9. In arguing that the gap between "ideals" and performance in and of itself can be delegitimating, Trubek appears to misunderstand Habermas's account of the possibilities of a "legitimation crisis." The latter requires "a questioning . . . of the norms that . . . underlie . . . action," and not merely a demonstration that these norms are violated in practice (1975:69). Habermas, on the other hand, fails to develop a theory of fetishism, proposed in the following section of this essay, which would account for why this "questioning" ordinarily does not and cannot take place.

ceive themselves as its objects or creations. Under these conditions, the calling into question and subsequent delegitimation of the legal order is literally "unthinkable."

The fetishism of the Law of which I am speaking appears in many guises. The most sublime is probably the formalist theory of law itself, insofar as this theory conceptualizes the law as an "independent," "autonomous" reality to be explained according to its own "internal dynamics," i.e., conceives it as an independent subject, on whose creativity the survival of the society depends. The most ridiculous is undoubtedly the celebration of "Law Day," during which we are asked to pay homage to the God-Law. The most frequent, if it is possible to judge from the numerous discussions I have had with undergraduate students over the past decade, is the common refrain: "If we didn't have the Law everyone would kill each other." All these instances, and many others, are simply variations on the common theme of legal fetishism, in which individuals affirm that they owe their existence to the Law, rather than the reverse, inverting the real causal relationship between themselves and their product. And all these instances thus preclude the possibility of evaluating the legal form, since it is impossible to evaluate an entity which is conceived of as the independent source of one's existence and values. When Society is held to be a result of the Law, rather than the Law to be a result of one particular kind of society, then the Law by definition is unproblematical. Or, to put it another way, the answer to the legitimation question—why do citizens support the legal order?—is, above all, the fact that *the citizens of this order ordinarily do not and cannot ask this question.*

Thus under conditions of legal fetishism the legal order appears not as an object of rational choice undertaken by autonomous subjects, but rather as an autonomous subject itself, whose very existence requires that individuals "objectify" themselves before it. According to Marx, the legal State is a power

> which has won an existence independent of the individuals . . . a social power . . . [which] appears to the individuals . . . not as their own united power, but as an alien force existing outside of them, of the origin and goal of which they are ignorant, which they thus cannot control, and which on the contrary passes through a peculiar series of phases and stages independent of the will and the action of men, nay even being the prime governor of these.[10]

Here Marx is arguing that legal fetishism parallels commodity fetishism, that the legal form, like the commodity form, necessarily functions *independently* of, or *autonomously* from, the power

10. *The German Ideology*, quoted in Ollman (1971:219). Ollman's conception of the State as a "value relation" was an insightful contribution to my effort to work out the homology between legal form and commodity form.

or will of the subjects who originally set it in motion but do not know, or have forgotten, that they have done so. And, as in the case of the commodity form, the "deification" of the universal equivalent rests on the obfuscation of "origins" produced by the abstraction of the legal form. Just as the masking of the link between commodities and their human origins in use-value and concrete labor necessarily gives rise to the appearance or ideological inversion that commodities, and especially their universal equivalent, money, have living, human powers, so the abstraction from and masking of the different human needs and social origins carried out by the legal form necessarily produces the illusion that the Law—as the universal political equivalent—has a life of its own. The corollary to human relationships becoming abstract and reified (thing-like) is that things—be they material products or legal "products"—become personified, i.e., take on human characteristics. Commodity fetishism and legal fetishism are thus two inseparably related aspects of an inverted, "topsy-turvy" existence under a capitalist mode of production in which *humans are first reduced to abstractions, and then dominated by their own creations.*

E. The Semiotics of Formal Rationality

The "rationality" or logic of both the commodity form and the legal form can be grasped as a specific mode of *encoding* reality, a specific *language* for which a linguistic or semiotic analysis can therefore be developed.[11] On the most general level, the homology between legal form and commodity form can be schematically expressed in the following semiotic formula:[12]

$$\frac{\$}{\text{U-V, CL}} = \frac{\text{Law}}{\text{Social Interests \& Origins}} = \frac{\text{Signifier}}{\text{Signified}}$$

"Commodities" "individual citizens" Signified'

In both cases, the same semiotic process is at work. A Signifier ($, the Law) is ultimately related to, and brought into existence by, a Signified (Use-Value and Concrete Labor, different social interests and origins). In both cases, however, the peculiarly abstract character of the Signifier functions to mask or obfuscate the original Signified, so that *meaning is systematically distorted and*

11. Marx himself occasionally speaks of the "language" of the commodity form, and Henri Lefebvre (1966) and Jean Baudrillard (1972) have each developed from these hints a linguistic or semiological analysis of the commodity.

12. Readers unfamiliar with semiological terminology should note that any social practice that is sign-ificant or "meaningful" can be understood as a language whose constituent elements are *signs.* The sign, in turn, whether it be verbal, economic, legal, etc., can be understood as the association or relationship between a signifier and a signified, the former functioning to express or refer to the content of the latter.

lost, to the point where the original Signified slips from view or is barred from discourse (thus the diagonal bar above) and the Signifier appears able to call into existence an entirely new Signified ("commodities," "individual citizens"). The abstract, formal "language" of both the commodity form and the legal form is thus an *impoverished, duplicitous* language which simultaneously prohibits qualitatively different human needs and activities from being encoded, or recognized, and appears to possess powers of "speech" completely independent of, or autonomous from, the human beings whom it addresses.

Thus the comprehension of both the commodity form and the legal form requires an identical *decoding*. This decoding reunites the abstract and the concrete, Signifier and (original) Signified, thus overcoming the abstraction and reversing the reversal that characterize the perverse "language" of both forms. In the process meaning is restored and individuals can recapture the powers of "speech" of which they have been deprived. The "decoding" in which I have engaged, then, is no mere "academic" exercise. Insofar as the delegitimation of the legal form and the capitalist mode of production to which it is tied presupposes precisely the capacity of individuals who are dominated by this mode of production to perform such a decoding operation, my effort to develop such a decoding purports to contribute to the delegitimation of both the legal form and the capitalist mode of production, a delegitimation which is a necessary condition for the creation of a less abstract, more concrete, i.e., more human, society.

IV. CONCLUSION

It should now be clear why the "relative autonomy" of the law does not preclude, but rather necessarily entails, an essential identity or homology between the legal form and the commodity form. The homology between the legal form and the commodity form guarantees both that the legal form, like the commodity form, functions and develops autonomously from the preferences of social actors *and* that it does *not* function and develop autonomously from the system in which these social actors participate. Stated otherwise, the autonomy of the Law from the preferences of even the most powerful social actors (the members of the capitalist class) is not an obstacle to, but rather a prerequisite for, the capacity of the Law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a *class*.

The demonstration of the homologous relationship between the legal form and the commodity form which I have provided,

however, is a theoretical starting point which in many ways has already been historically surpassed. The transformation from competitive, laissez-faire capitalism to monopoly, State-regulated capitalism has resulted in a partial transformation of the content of the homology between economic and political exchange. On the one hand, the growing role of the State as a "productive force" entails the increasing production of use-values—welfare, medical services, infrastructure, etc.—which do not take on the direct form of exchange-values, i.e., which are not produced as commodities. This includes the production of labor-power itself, insofar as the law of value is increasingly superceded by the political negotiation of wages as the determinant of the cost of this most central of all use-values. To this extent, it is possible to argue that the unchallenged supremacy of the commodity form is in decline, and that we are in the presence of a *certain kind* of restoration of the content and quality from which the commodity form abstracts.[13] On the other hand, the development of State-regulated, monopoly capitalism has also witnessed an erosion of the rule of Law and the emergence of less formalistic, more instrumentalist and technocratic modes of social and political control: the Law as universal political equivalent gradually gives way to a series of relatively *ad hoc techniques* which, by their very nature, recognize specific interests and specific social origins.[14] For example, whereas formal rationality in the criminal justice system precludes the consideration of the individual's motive or social class position from entering into the determination of guilt and punishment, these considerations necessarily come to the forefront in technocratic-rehabilitative modes of criminal justice. In short, technocratic modes of social control imply a certain reemergence of the content and quality from which the legal form abstracts, and thus parallel the restoration of content and quality entailed in the increasing political production of use-values. Thus one could argue that a homologous relationship continues to exist between the exchange of products and the exchange of human beings, but that the terms of the relationship have assumed values different from those they possessed during the period of competitive capitalism.

The demonstration of this "new" homology, however, is only a starting point. It does not and cannot tell us why the values of the

13. Claus Offe (1973) develops this thesis of "decommoditification." It should be emphasized, however, that this "restoration of quality and content" only surfaces within a continuing framework of domination and thus in no way constitutes the emergence of socialism.
14. This trend is by no means complete, and has from the very beginning been accompanied by the apparently contradictory extension of the legal form to a range of activities to which it did not apply in the nineteenth century; see Galanter (1976).

two terms (economic and political) have changed, i.e., why we have witnessed a still incomplete transformation from competitive capitalism-legalism to monopoly capitalism-technocracy, or what the values of the two terms of the relationship will be in the future. It does not, in other words, explain how and why human beings came to create this new homology or, for that matter, how and why they came to create the earlier one I have outlined in this essay; nor does it tell us how and why they might further transform them in the course of history. Thus the demonstration of structural or synchronic homologies is not intended as a substitute for an analysis of *praxis* which would serve to reunite structure and history, synchrony and diachrony.[15] It merely suggests that such an analysis would have to proceed from the understanding that the task is to explain how one social whole with a distinctive logic originates and how it transforms itself into a different social whole with another, distinctive logic; that is, from the understanding, in Hegel's words, that "the truth is the whole."

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15. For an analysis that makes a start in this direction by conceptualizing the state both as a form which conditions struggle *and* as an object of struggle itself, see Esping-Anderson *et al.* (1976).

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