THE PUBLIC/PRIVATE DISTINCTION: APPROACHES TO THE CRITIQUE OF LEGAL IDEOLOGY

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This article reconstructs Marx's approaches to the critique of the public/private distinction in law and analyzes contemporary approaches to public/private distinctions in legal studies. Specifically, I focus on three approaches to critiquing the public/private distinction as legal ideology. These approaches are identified in works by Balbus, Klare, and Kennedy. They have affinities with Marx's analyses and demonstrate the incoherence, mystification, and consequences of public/private distinctions in legal discourse and practice. The article demonstrates that the ideological critique of the public/private distinction is characterized by alternative methods and substantive issues. These approaches, I argue, differ because they are concerned with distinctive objectives of inquiry, different arenas of social action, and have distinct purposes.

The public/private distinction is fundamental for defining a wide range of sociolegal issues. In the intimate sphere of reproduction, for example, legal conflicts have emerged between the state, supporting fetal rights, and pregnant women, asserting rights to privacy. These conflicts have emerged, in part, as a result of *Roe v. Wade* (410 U.S. 113 (1976)) which, on the one hand, affirmed abortion as a right to privacy and, on the other hand, affirmed a compelling state interest to protect the potential for human life. State supreme courts, over the objections of pregnant women and their husbands, have required that pregnant women undergo blood transfusions, cesarean sections, take medication, and have their cervixes sutured to prevent miscarriages (Dougherty, 1985; Rhoden, 1986).

The public/private distinction is prominent in scholarship on social and legal issues. The dichotomy appears necessary for individual autonomy, the maintenance of social institutions, and the conduct of legal action; At the same time, it tends to legitimate and mystify patterns of inequality and structures of power through

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which individual autonomy, social institutions, and legal action are accomplished. The appearance of capitalist market relations as a self-regulating economic system has enhanced the centrality of private individualism and has shaped political and legal interventions in the economic sphere (Schroyer, 1973; Habermas, 1975; Fraser, 1978; Wood, 1981). Institutional and legal practices supported by the public/private dichotomy both legitimate and block the recognition of patterns of inequality and power in the relationships among personal experience and public policy. Social dislocations are experienced as "personal troubles" rather than formulated as public issues and psychological individualism dominates popular consciousness (Mills, 1967: 395–402; Sennett, 1977; Lasch, 1984; Hearn, 1985). Commitments to family and career are sources of privatized orientations toward the public arena of law and politics (Habermas, 1975: 78–92). Legal constructions of the public/private distinction support patterns of participation in personal spheres of consumption and publicly organized production (Bell, 1976), and in the allocation of persons to public arenas of production and decision-making and to the private arena of household responsibilities on the basis of gender (Taub and Schneider, 1982: 117–40). The public/private distinction combines contradictory tendencies that define it as an ideology.

The most encompassing approach to the public/private distinction as an ideology is developed in Karl Marx's writings.[1] Marx analyzed the public/private dichotomy directly as an ideology. For Marx, the public/private distinction is pivotal for analyzing intersecting levels of social structure and law such as class relations and the powers to create and implement legislation. In addition, Marx developed a dialectical critique of the public/private distinction. He examined both structural features of social reality and patterns of meaning through which actors reproduce the social structures that constrain their actions.[2]

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[1] Other classical approaches to the sociology of law provide alternative directions for the analysis of the public/private distinction. For Durkheim, the distinction is a manifestation of changing patterns of morality associated with the growing complexity of the division of labor realized through patterns of ritualized public communication (1958: 129–85; 1964: 127). For Weber, the most rational forms of legality in the public sphere are a condition for the realization of privatized values and, indeed, the realization of individual will (Kronman, 1983).

[2] Chambliss (1979) has developed a dialectical approach to law creation that focuses on structural conditions and ideology in analyzing legal resolutions to societal crises. His approach is formulated as a model that is elaborated through a variety of examples from diverse arenas of lawmaking. More generally, Ritzer has argued that Marx's social theory should be considered an "exemplar for an integrated paradigm" because of "his dialectic, his work on the relationship between species-being (micro-subjectivity and micro-objectivity) and macrostructures as well as the relationship among macrostructures, his sense of history and change, as well as his critical orientation" (1981: 232–33). These aspects of Marx's theory are exemplified in his analysis of the public/private distinction.

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There are three distinct approaches to the public/private distinction in Marx's critique of bourgeois legality. In his early writings, Marx argued that bourgeois law divided man into "public person and private person" (1978b: 35). Marx considered this division ideological since it conceptualizes rights as abstract universals that give legal support to private social relations (e.g., personal wealth and religious affiliation) that are the actual conditions of social life. Following this philosophical critique of abstract universalism, Marx sought to critically analyze the public/private dichotomy by establishing its sources in political economy. Most pointedly, Marx linked the ideological nature of the public/private dichotomy in law to social relations of production, exchange, and appropriation. The separation of workers from the means of production, the organization and control of labor through wage contracts, and the spread of market relations are conditions for articulating a radical separation between private and public spheres of activity in law (1964; 1970). In his later writings, especially those that analyzed laws regulating the working day, Marx utilized the public/private distinction more empirically for analyzing the ideological boundaries of class struggles and the horizons of change within particular historical circumstances. In this third approach, the public/private dichotomy frames the analysis of social relations that defined particular constellations of power in the contested terrains of the state and law.

The relationships among these approaches have been subject to considerable analysis and debate. Some scholars have argued that philosophical critique, as exemplified in Marx's early writings, is primary for the study of ideology and must be central to the very concept of ideology lest positivist tendencies overwhelm the reflective capacities that enable people to formulate purposeful identities as acting subjects (Wellmer, 1971; Bologh, 1979). Other people have contended that the philosophical critique of ideology is, actually, prescientific and does not constitute the grounds for material analysis (Althusser, 1969). As such, philosophical criticism may lose touch with the world of material production and political action, becoming an end in itself and its own object of inquiry. Still others have maintained that a Marxist analysis of ideology should move from speculative criticism to concrete analysis and that concrete analysis is the fulfillment of more speculative approaches that are, essentially, heuristic (Hunt, 1985). Finally, the disparity between philosophical criticism of ideology and concrete analysis of ideology parallels alternative strategies toward political and legal action. Philosophical criticism is often associated with a belief in spontaneous action, while concrete analysis has an affinity with more disciplined action based on scientific theory and research (Gouldner, 1980).

This paper does not seek to resolve disputes concerning alternative assessments of Marx's analyses of ideology. Rather, by fo-

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cusing on the public/private distinction in law as a topic of inquiry, I maintain that each of the approaches to ideology found in Marx's writings has its own analytic integrity. Alternative approaches to ideology are concerned with different objects of inquiry, different patterns of social relations, and focus on different problems. First, philosophical critique of the public/private distinction focuses on law as a discourse that distorts the recognition of essential human capacities. Second, efforts to root legal distinctions based on the public/private dichotomy in categories of political economy focus on the social sources of legal categories. Finally, concrete analyses of class and social relations that utilize the public/private distinction are concerned with analyzing the conflicting forces that shape particular events.

The paper proceeds by reconstructing concepts in Marx's theory around the public/private distinction in order to analyze the differences among his more philosophical critique, his critique that roots the public/private distinction in categories of political economy, and his use of the public/private distinction for concrete analyses of law creation. By locating the public/private dichotomy at the center of Marx's theory, its distinctive features can be elaborated through particular concepts and analyses in Marx's work. Since other analyses of Marxian theory have not taken the public/private distinction in law as central, this reconstruction provides a novel analytic focus.[3] Based on this reconstruction, writings on the public/private distinction by Kennedy (1982), Balbus (1977), and Klare (1982) are discussed in light of their methodological approaches and analytic principles. These particular works are selected because they focus on particular patterns of social relations as delineated in our discussion of Marx.

This essay seeks to demonstrate that the critique of the public/private distinction generates multiple usages elaborated through particular studies. Kennedy's analysis is largely an internal critique of the public/private dichotomy in legal discourse, Balbus' analysis demonstrates a social science approach to the relationship between political economy and the public/private distinction in law, and, finally, the discussion of Klare's study shows how the public/private distinction is used in historical studies of legal change.

[3] Seidman, arguing that "it is a mistake to differentiate Marxism and sociology as representing an opposition between a revolutionary and a liberal ideology" (1983: 12), thoroughly discusses alternative analyses of the relationship of Marx's theory to variants of liberal theory. The public/private distinction is not a focus of attention in these analyses.

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I. MARX ON THE PUBLIC/PRIVATE DISTINCTION

The public/private distinction underlies basic issues that Marx studied and also infuses his analytic concepts. Marx developed alternative approaches to the critique of legal ideology by articulating issues through the public/private dichotomy.

There are three major approaches to the public/private dichotomy in law in Marx's writings. First, from the vantage point of philosophical criticism, the public/private distinction provides the categorical framework for legal discourse. These categories have an abstract, mystifying universality: the discourse of "citizenship," "formal equality," and "private rights" obscures the social relationships among people and their conditions of life. Mystification is accomplished through a method that inverts the actual relationship between social relations and legal categories. In its ideological formulation, the private/public distinction in legal theory reverses the dependency between social institutions and legal categories (1978a: 16–18). For example, civil society and the private sphere are made to appear to be dependent on legal categories that demarcate them as arenas of action. Owning property, buying and selling on the market, and engaging in household consumption have their social significance established through a universalizing legal discourse rather than through the practical meaning they have for actors.

The domination and inequality characteristic of civil society and the private sphere are obscured through legal categories that are posited idealistically. Specifically, the equality and freedom posited in the public sphere serve to secure social, religious, and material distinctions in the form of private rights that are the material conditions of inequality and conflict through which social relations are constituted (Marx 1978b: 33–42). Both the reduction of "the worker's need to the barest and most miserable level of physical subsistence" and the "refinement of needs" of those with wealth are buttressed by public principles of formal equality and commodity exchange (1964: 149–53). To be sure, bourgeois law provides an ideal vision of freedom and equality that is an historic advance over doctrines that stressed beliefs in natural superiority. Yet, it actually serves as a formal framework for the realization of private power and domination.

Marx not only formulated the public/private distinction as ideological; He argued against it by showing that the law and the state are not subjects of action that predicate civil society and the private sphere. He maintained that the universal, abstract categories of the public sphere are not adequately grounded in social conditions and the forms through which social life is conducted (1978a). Rather, legal categories, rooted in a speculative and contemplative approach to idealist theorizing, distort social relations. In large part, the inadequacy and ideological character of this ide-

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alized approach to the public sphere results from deducing those forms of social life that are closest to the private sphere from the most universal public categories. Family life, property ownership, and market relations are viewed as personal emanations of eternal principles. As a consequence, the private sphere and the realms of everyday action are presented as aspects of an abstractly unified logic of social and political constitution.

In opposition to this formulation, Marx maintains that the family and civil society are, actually, "the driving force" of the state rather than being merely produced by the idea of the state (1978a: 17). Instead of being determined by a speculative logic that locates necessity within the bounds of the relations among ideas, "the fact is that the state issues from the multitude in their existence as members of families and as members of civil society" (Ibid.). Indeed, it is from this facticity rather than from speculative thought that the family and civil society can be correctly understood as the natural basis of the state. Individuals, in their actual relations with one another in the private sphere of the household and in more extended relations in civil society, provide the foundations for public life and the state.

In addition, Marx criticized the ideological distinction between the public and private from the standpoint of democracy. Democracy locates the sources of politics, law, and the state in the activities of people, and therefore represents a major departure for the self-grounding of human activity. Democracy, Marx maintained, does not require an abstract, transcendental origin: through democracy people can recognize that "it is not the constitution which creates the people but the people who create the constitution" (1978a: 20).

Nonetheless, law based on popular democracy may itself generate the public/private distinction as an ideological form. Conditions of private life and civil society: how people live together in families, their means of survival, their everyday understandings of themselves, and their relationships to one another and to history determine whether forms of law and politics are truly democratic. Most pointedly, "the abstraction of the *state as such* belongs only to modern times, because the abstraction of private life belongs only to modern times" (1978a: 22). The distancing of the public sphere of politics and law from the private sphere is based on conditions internal to the private sphere and civil society.

Marx's second approach to the analysis of the public/private distinction attempts to analyze the relations between the private sphere and legal categories by locating sources of abstraction in material relations. Grounded in the concept of alienated labor, Marx criticized bourgeois political economy in much the same manner that he criticized idealist conceptions of law. Political economy is neither grounded in the social conditions that are the basis for its categories nor does it adequately conceptualize the ac-

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tive relationships that its categories formally express. The categories of private property, exchange, free labor, profit, and rent are assumed as fundamental premises by bourgeois political economy without attending to the human activity that gives rise to them and without grounding them in the human processes that actively produce them. For this reason, the categories of political economy take on the character of detached analytic concepts that operate as rarefied ideals. In effect, political economy "starts with the fact of private property, but it does not explain it to us. It expresses in general, abstract formulas the *material* process through which private property actually passes, and these formulas it then takes for *laws*" (1964: 106). Abstractions predominate and distort the recognition of the patterns through which people produce, distribute, accumulate, and consume social wealth.

In this approach, private property is the core category around which political economy and law converge. Private property is the public presentation of the external results of alienated labor, of the separation of the person from the product of labor and productive activity, in the appropriation of the products of labor (1964: 116–17). Private property, moreover, is a point of contradiction for both legal categories and economic activity: Just as labor is the condition for the appropriation of objects in the juridical form of private property, so private ownership is the condition for labor as a commodity that has but very limited rights in the product that it creates. Private property, in the form of capital, is the relation through which labor is removed from the worker in a manner that serves to make the organization, the productive process, and the product of labor come to dominate labor as an independent power.

Both the philosophical critique and the critique of political economy analyze the public/private distinction as ideological categories. These critiques seek to reveal the ideational and practical sources of the public/private distinction in law as a legitimating and mystifying framework that must be overcome if adequate knowledge of social relations is to be realized. By contrast, Marx's third approach to the public/private distinction virtually takes the distinction for granted as a condition of action. The analysis of the development of legislation regulating the working day exemplifies this more concrete, empirical approach to the public/private distinction. The categories of public and private define class relations, social forces, and terrains of conflict. The public/private distinction takes on aspects of a structural condition as it shapes a limited, but nonetheless progressive, historical development. The development of this legislation, in good dialectical fashion, includes a partial transformation of the public/private distinction itself.

A struggle over the working day emerges as the capitalist, as the purchaser of capital, seeks to extend the working day, and the worker, who sells his/her labor power, seeks to limit the working day to a "particular normal length" (1977: 344). These antago-

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nisms, which take the form of private rights at odds with one another, tend to become public issues and political conflicts; A struggle among private individuals exercising their equal rights. The struggle over the limits of the working day becomes a political and legal struggle, "a struggle between collective capital, i.e., the class of capitalists, and collective labor, i.e., the working class" (1977: 344). Yet, the length of the working day has collective significance as a health issue and as a military issue for each nation; thus public issues emerge out of the confines of the conflicting private rights of capitalists and workers.

From the fourteenth century through much of the eighteenth and early nineteenth centuries, legislation tended to increase the working day and to shorten the time allowed for meals and recreation (1977: 382–89). By the early nineteenth century, the working day and hours of work had been so extended that "every boundary set by morality and nature, age and sex, day and night, was broken down" (1977: 390). The factory system had succeeded in homogenizing the productive activity of workers to such an extent that their time was virtually under the complete control of the labor process and had lost any distinctive demarcations between private time and time devoted to working.

Marx analyzed legislative efforts to limit the working day in terms of public activism by workers, divisions within the bourgeoisie and between the bourgeoisie and large landowners, and compelling national interests recognized by bourgeois and working class political leaders. Most significantly, by the 1840s economic liberalism was increasingly combined with political democratization. This yielded fuller participation of the working class in public life and the enactment of legislation such as the Factory Act of 1844, which regulated the working day and limited the number of hours for women over eighteen years of age. Marx deemed this to be "progressive" because "for the first time it was found necessary for the labor of adults to be controlled directly and officially by legislation" (1977: 394). The Factory Act of 1847 limited the working day of young persons and women to eleven hours and further mandated that the working day for these categories of workers be lowered to ten hours by 1848. In addition, these Acts extended legislation to areas of employment that had not been previously covered and limited the times of day during which work could be performed. Ultimately, there was a wave of factory legislation beginning in 1850 that more clearly limited the working day, allowed for meal times, and determined the hours during which work had to take place. Overall, manufacturers accepted and even supported this legislation. "The capital's power of resistance gradually weakened, while at the same time the working class's power

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of attack grew with the number of its allies in those social layers not directly interested in the question" (1977: 408–409).[4]

For Marx, the successful struggle to limit the working day was of historic importance. It went "hand in hand with the physical and moral regeneration of the factory worker" (1977: 408–409). The increased health and vitality brought about by limits to the working day, moreover, were "preliminary and necessary for further emancipation and improvement" (1977: 415). The public definition of the working day through legislation and the collective efforts to bring it about enabled workers to exercise rights over their time, rights that characteristically took the form of private rights. The amount of time and the periods during which workers were contractually obligated to expend their labor were more clearly delineated and regulated by law. Corresponding to this legal regulation, there was an increase in the amount and period of time that could be privately controlled by workers themselves for their own recreation and development. "Time for education, for intellectual development, for the fulfillment of social functions, for social intercourse, for the free play of his body and his mind . . ." (1977: 375).

Thus, it was Marx's expectation that the formation of a progressive public sphere, which led to increased private rights of workers to control their time, would generate conditions both for the enhancement of workers's private lives and, also, for their fuller enlightenment and participation in public life. While the limitation of the working day did not, for Marx, overcome the realm of necessity, it nonetheless served to open up the possibilities of fulfillment and freedom both in terms of the worker's development as a private individual and as an actor in the public spheres of politics and culture.

II. CURRENT APPROACHES

Marx's three approaches to the critique of the public/private distinction in law provide a rich and complex foundation for the analysis of legal ideology. First, whether at the levels of legal discourse, the intersection of economic discourse and legal discourse, or law creation, the public/private distinction is best analyzed in relation to its impact on consciousness and social action. The dichotomy is itself a product of action and thought that becomes a structural and ideational aspect of the constitution of the social world by actors. Second, the public/private dichotomy combines both normative and cognitive grounds for legitimating patterns of power and inequality through which society is produced. The public/private dichotomy contributes to the appearance of a realm of

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[4] Marx considered it especially significant that the victories won for limiting the working day became generalized to other nations and took on an international character (1977: 412–15).

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Table 1: Critiques of the Public/Private Distinction

Approaches	Examples	Analytic Principles
Internal critique of legal categories	Kennedy (1982)	Decomposition
Legal critique based on critique of political economy	Balbus (1977)	Relative autonomy
Concrete critique grounded in historical analysis	Klare (1982)	Oscillation

abstract equality that masks the actual determinants of social life by rendering them into "private rights." Finally, in the course of historical events such as labor struggles, the public/private dichotomy defines boundaries of political and legal action. The public/private distinction, while it originates in patterns of political and economic domination, can have emancipatory or repressive consequences.

The analyses that we now turn to have affinities with Marx's approaches but also go beyond them by specifying further contradictions in the dichotomy, its relation to capitalist economic categories, and its consequences for particular arenas of law. Table 1 presents approaches to the public/private distinction, examples of each approach, and their leading analytic principles.

Duncan Kennedy's critique of the public/private dichotomy is based on the view that the range of distinctions that characterize liberal legality, "state/society, individual/group, right/power, contract/tort, law/policy, legislative/judiciary, objective/subjective, reason/fiat, freedom/coercion" are all going through "similar processes of decline" (1982: 1349). He argues that the public/private distinction has increasingly lost its capacity to plausibly capture features of reality and specify differences that are consistent and relevant for legal decision-making.

Kennedy provides a critique of the public/private distinction that is "localized" to legal categories, legal consciousness, and the sphere of legal social relations (Boyle, 1985: 760–61). To be sure, the distinction collapses in encounters with facts. Yet, since facts are themselves partially constituted through the public/private distinction, facts alone cannot provide sufficient grounds for alternative categories. The public/private distinction continually collapses into itself in such a way that it becomes as self-sustaining as it is incoherent.[5]

[5] The persistence of the public/private distinction can be analyzed from the vantage of ideologies that, by making language itself appear to be based on decontextualized and abstract rules, support abstracted universalism is the public sphere of legal discourse. Weissbourd and Mertz point to useful directions for such an analysis in their critique of Hart's theory of law (1985). In

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Kennedy's critique is internal to the public/private distinction in law. The critique is accomplished by analyzing the decomposition of the distinction's coherence and its capacity to adequately articulate issues. As such, this approach has much in common with deconstructionist efforts to demonstrate that oppositional concepts and categories are interdependent and contain shared meanings (Johnson, 1980; Culler, 1982). Public/private distinctions, as constructs of particular legal activities, are neither natural nor logically sustainable. From the vantage point of the consciousness of subjects engaged in legal discourse and practices, this critique demystifies the categories through which phenomena are constructed. It calls for a break in routine and an opening to new ways of conceptualizing legal issues.

The internal critique of the public/private distinction follows a six-stage trajectory of decline. The first stage involves cases that have large stakes and require that the public/private distinction be applied but, significantly, have core elements that fall between the poles of the public/private dichotomy. For example, in *Osborn v. Bank of the United States* (9 Wheat. 738 (1824)), the question of whether the bank was private or public was central and very difficult to resolve. In this case, an official of the state of Ohio seized the assets of the Bank of the United States, and the bank sued to have them returned. This case combined constitutional issues involving the right of the federal government to sue states with the legal status of the bank as a public or private entity. As a result, the public/private distinction became a focus of controversy.

As ambiguities emerge in attempts to apply the public/private distinction to hard cases, a second stage of decline is reached. In this stage, intermediate terms emerge to account for ambiguities. For example, it becomes possible to analyze private institutions as performing "public functions" (Gunther, 1975: 516–25). In *Marsh* v. *Alabama* (326 U.S. 501 (1946)), the Supreme Court held that the more the private owner of a town opened up his property for use by the general public, the more the town became subject to state regulation since it was engaged in a public function. While intermediate terms such as public function may serve to resolve particular cases, these terms are difficult to maintain since they are grounded in disagreements over which differences are important in constructing them: which aspects of a situation are public and which are private are subject to interpretation and controversy. The very distinction between public and private becomes blurred as core aspects of the distinction to either side of the dichotomy.

This last point suggests the third state of decline, the collapse of the distinction. The distinction collapses when it becomes inco-

addition to explicating the similarities between rule-based theories of language and law, they point to directions for analyzing the social sources of these similarities.

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herent because the public side of the distinction and the private side have a core property in common. For example, if both property rights and contract rights are viewed as delegated public powers that should be governed by public law rather than norms of private accountability, the public/private distinction has virtually collapsed (Kennedy, 1982: 1352). While this incoherence seems to require that the distinction be abandoned, it is maintained through a fourth stage of elaboration.

In the fourth stage, which Kennedy labels "continuumization," the public/private distinction is preserved by making it a relative concept rather than an absolute one. While legislative functions fit the extreme public pole, consumer preference fits the extreme private pole. Everything else fits in between along a continuum that formulates a range of institutions and situations that combine public and private elements abstractly so that "the ideal is a range of legal responses exactly calibrated to the range of fact situations: an overlay of one continuum on the other" (1982: 1353). The idea is to create a meaningful balance by combining elements that were once thought to be distinct and, thereby, generate relative distinctions. This, however, leads to a high degree of complexity and disagreements about how such relative distinctions should actually be constructed and applied to particular cases. Continuumization saves the public/private distinction by blurring the distinction through an extensive array of subtle differences that are, ultimately, rooted in imagery from the past: "The distinction is dead, but it rules us from the grave" (1982: 1353).[6]

With the spread of continuumization, the ideological character of the public/private distinction becomes imbedded in legal discourse. At stage six, "stereotypification," the formality of the continuum becomes a pervasive and accepted part of discourse that serves to mechanically recreate pro and con arguments around particular issues and cases. Does a proposed shopping center fulfill a public purpose or does it merely serve the interests of developers? Will the proposed extension of a roadway serve a public interest or will it needlessly reduce private property values? Arguments around such issues become obvious and are reduced to formulas as they are continually repeated (1982: 1354). As a result of the extreme relativism that infuses public/private discourse coupled with the absence of any outside standard for its application,

[6] For an example of an attempt to relativize the public/private distinction and to generate a continuum, see Seidman (1987). Seidman has reviewed alternative approaches to the public/private distinction in legal theory, finds them wanting, and constructs a rationale for the distinction based on core values and requisites of action. Thus, on the one hand, public is constructed on the basis of universalism, government intervention, and openness. On the other hand, private is based on particularism, libertarianism, and secrecy. For Seidman, the public/private distinction is virtually a necessity, however ambiguous, of human nature and social action.

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the public/private distinction is maintained because of its formality and repetitiveness rather than its ability to articulate real issues.

As a final and hypothetical stage, Kennedy suggests that the public/private dichotomy has become "loopified": the ends of the continuum become less distinct so that everything is both thoroughly private *and* thoroughly public. For example, the family fulfills a public purpose at the same time that it is the most private of human relationships; The exercise of individual consumer preferences is intensely subjective and private just as it is open to governmental regulation (1982: 1354). As a result, it is difficult to take the public/private distinction seriously as a description, as an explanation, or as a justification for anything (1982: 1357).

In contrast to an internal critique of legal categories, Balbus develops an analytic approach that contributes to the critique of the public/private distinction by relating the logic of legal categories to the logic of capitalist forms, such as the commodity form (1977). Balbus relates these logics through a semiotic analysis that demonstrates they are identical processes of signification.[7] Law and money are analyzed as languages that "systematically" distort and prevent the recognition of what they are referring to and expressing (1977: 584–85). Moreover, when the public/private distinction is made central to both the legal form and the commodity form, Balbus's initial conceptualization of the identity between them takes on an enhanced analytic significance. It enables us to articulate how the public/private distinction is elaborated in parallel ways in law and in commodity relations.

Balbus's approach is located in ongoing social science controversies over alternative theories of the state, capitalism, and law.[8] He argues against both instrumental approaches to legal studies and formal approaches. Instrumentalism, whether Marxist or liberal, reduces law to the wills of actors and affords little analytic

[7] Balbus has based his semiotic analysis on Lefebvre (1966) and Baudrillard (1972). Gottdiener's (1985) semiotic approach to mass culture provides a brief comparison of alternative approaches to semiotics in light of analyses of ideology and consciousness.

[8] Renner (1949) has argued that major changes can occur in economic development with little change in law. Pashukanis (1980), the theorist of the 1920s and 1930s whose ideas are closest to Balbus's approaches, however, has argued that there is a very high degree of correspondence between capitalist economic structure and law. Beirne and Sharlet (1980) have provided an overview of Pashukanis's work in their introduction to his selected writings. Skocpol (1980) and Skocpol and Finegold (1982) have provided insightful critiques of alternatives in Neo-Marxian state theory and processes of law creation and implementation directly tied to case studies of the New Deal. In these studies, instrumentalism (Weinstein, 1968; Miliband, 1969), political functionalism (Poulantzas, 1973) and state managerialism (Block, 1977) are assessed as alternative approaches to the analysis of the state and law creation within Neo-Marxism. A theory of state capacity is developed as a more adequate alternative. Yet, since the role of form or structure for an adequate theory is not explicitly addressed, even in the discussion of Poulantzas, their specification of the uniqueness of capitalist reproduction—at the levels of law, state and economy—remains elusive.

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integrity to law; Formalism views law as a self-contained order, autonomous from the wills and interests of social actors, "that functions and develops according to its own internal dynamics" (1977: 572). In opposition to both of these approaches, Balbus maintains that law has a "relative autonomy" (1977: 572–573). Law has distinctive principles of organization, its own analytic integrity and structural features which are socially reproduced; Also, "it does *not* respond directly" to the demands of social actors (1977: 572). Yet, law is not an independent sphere of social relations. Rather, it is conditioned by and explainable on the basis of its relations to the requirements of capitalism as an economic system. Law cannot be explained adequately through its internal development. It must be analyzed in relation to the systemic requirements that must be met for competitive capitalism to be reproduced: The public/private distinction in the legal form is identical to the public/private distinction in the commodity form (1977: 585).

Balbus, following Marx, analyzes the commodity form as composed of, on the one hand, use-values satisfying the qualitatively distinct needs of social individuals and produced through specific acts of labor, and, on the other hand, exchange values requiring that qualitatively different objects and laboring activities be represented as equivalents (1977: 572–573). Especially as exchange relations expand to encompass the economic activities of more and more people, commodities must be mediated through a universal medium of equivalence for exchange values to be accomplished. Money, for example, is the universal medium that facilitates the representation of commodities as equivalents. In mediating exchange, money provides a public ordering of production and exchange through an ideological processing of products and laboring activities. Through money, the labor that people perform and the products that they produce become dominated by the quantitative logic of equivalence exchange. The qualitative differences among products and laboring activities lose their distinctive characters as they are homogenized into market-dominated values. As critics of monopoly capital have pointed out, the labor process tends to deskill workers and make them ever more dependent on technologized production (Braverman, 1974), and consumerism is fostered through massive psychological assaults (Baran and Sweezy, 1966: 112–41) that trivializes freedom to expressions of consumer preference (Lasch, 1984). The public sphere appears increasingly abstract and quantitative. Economic activities appear as objects that are "independent of the wills of actors" and people appear to be "caused" by the objects they produce (Balbus, 1977: 574–75).

The abstract public ordering of the economy is paralleled by the emergence of a sphere of privatized human needs.[9] Capitalism

[9] Olsen has analyzed the emergence of the market and exchange rela-

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requires that labor be bought and sold on an individual wage basis. Competition for opportunities to earn wages fosters patterns of egoism and privatized possessiveness that are continually reinforced through the sale of labor as a commodity and the purchase of needed goods as commodities. An abstract public ordering of the economy and privatized economic motivations thus presuppose and reinforce one another. The commodification of the emotions (Hochschild, 1983) and the rendering of occupational activity into "an instrument for the attainment of a private lifestyle" (Bellah *et al.*, 1985: 150) point out the ways in which the dominance of commodity relations in public life transform private experience.

According to the logic of capital analysis, the legal form parallels the logic of the commodity form. Just as products are rendered into individual commodities in the commodity form, so people are rendered into individual citizens in the legal form (Balbus, 1977: 576–77). Capitalist legality, as money, presents social relations in terms of distinctive individuals who appear to be equivalent through the categories of will and rights. As the abstract commodity form masks use-values, so the legal form masks substantive human interests. The "abstract legal person," according to Balbus, 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" (1977: 577).

The legal form generates a public sphere of formal equality through individual rights and free will, and, at the same time, privatizes the substantive interests of social individuals. Individuals are rendered indifferent to one another except as means for the realization of their privatized ends as instrumental, self-interested juridical persons. The legal form reinforces egoism and particular interests, and heightens adversarial individualism, blocking the recognition of social needs (1977: 578). Moreover, privatized relationships among people become taken for granted and are viewed increasingly as grounded in and guaranteed by law.[10] The capacity of law to dominate social relations is enhanced by privatized dissociation.

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tions as a public sphere and the concomitant privatization of the family so that women are rendered as privatized in the family and men are rendered as public actors in the economy (1983). While her critique of the public/private distinction parallels Balbus's critique, it focuses on gender as a core dimension of the public/private distinction.

[10] Analyses of tort law display alternative approaches to how central commodification and contractualism should be in providing remedies for injuries at the workplace and harms from using products. Abel (1982) has argued for ways to compensate people that limit the commodification of social relations and individual experience. Priest (1985), in his analysis of recovery for injuries from product use and the development of enterprise liability since the 1960s, has shown the importance of enterprise liability for the maintenance of contractualism and commodity relations.

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In Balbus's critique of the legal form, the public/private distinction is independent of the will of social actors. Rather than being fully autonomous, however, the public/private distinction in law conforms to the public/private distinction and systemic requirements of competitive capitalism. The systemic features of commodity production generate the split between the public ordering of exchange and the privatization of the individual in a manner identical to the public ordering of politics through law and the privatization of the individual as a juridic subject.

The relative autonomy of the law, which is grounded in the partial dependence of law on economic relations, provides a more adequate conceptualization than either instrumentalism or formalism for the analysis of the public/private distinction in law.[11] The analytic advantages of Balbus's approach also contribute to demystifying the social sources of law creation. Ideological criticism is combined with sociological concept formation.

While the substantive content of Balbus's semiotic analysis is the distortion of the meaning of the social relations that underlie the public/private distinction in legal and economic discourse, Klare locates the public/private dichotomy in the concrete historical relations of labor law. To be sure, Klare theorizes the public/private distinction from a critical perspective that incorporates Balbus's concept of "relative autonomy" (1978: 268–70) and Kennedy's focus on legal consciousness (1982: 292). Here the problem is to analyze how the public/private dichotomy contextualizes particular historical conflicts and is itself embedded in historical events. Thus, during the New Deal, the public/private distinction in labor law lost its specificity as the law became more directly enmeshed in political and economic processes (1982: 280). The law no longer monitors economic activity from the outside through the application of rules; Rather, law is an element in the social constitution of economic reproduction.[12] Disjunctures among law, poli-

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[11] This is not to say that an approach to legal analysis based on relative autonomy is not without problems. Alan Stone (1985: 45–46), citing Hugh Collins (1982) and Mark Tushnet (1983), has raised two important questions:

1. How are laws that are not related to commodity production, such as certain criminal laws, to be explained when commodity production is seen as the source of the legal form?
2. How are specific legal actors, such as judges, to be seen as promoting capitalist interests?

To be sure, these are important questions. It would seem that they can best be answered empirically through particular studies that specify how relative the autonomy of law is under definite conditions.

[12] The legislation of loan guarantees to private corporations exemplifies how the public/private distinction provides frameworks for the state financial support of market relationships while, at the same time, blurring distinctions among political, economic, and legal discourse. Both the Lockheed loan guarantee (Turkel, 1981) and the Chrysler loan guarantee (Turkel, 1982; Turkel and Costello, 1985) have raised important questions concerning legal particularism and patterns of legal legitimacy that cut across core dimensions of the public/private distinction.

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tics, and economics as separate spheres of discourse give way to a more inclusive social discourse.

Klare shows that the public/private distinction in labor law is pervasive but it does not have a stable meaning and it is not consistently applied. Conflicts within this terrain include whether employment contracts are private contracts or whether there is a public interest bounded by public policy, such as the National Labor Relations Act of 1935 (29 U.S.C. §§ 151–168 (1970)), in regulating labor relations. Also conflicts over the extent to which employees have rights to personal privacy in the workplace, employer's private property, the extent to which employers have an exclusive right to determine how their capital is used as opposed to interests of the community and their employees, and the ways in which labor unions are public or private entities are examples of the centrality of the public/private dichotomy. Yet, rather than providing clear conceptual distinctions, the public/private dichotomy provides "a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement. . . . The public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results" (1982: 1361). In effect, the public/private dichotomy combines analysis and legitimacy.

Beyond these specific areas of controversy, changes in labor legislation since the 1930s suggest shifting patterns in the structure of authority and social relations of labor and management in terms of the public/private dichotomy (Klare, 1982: 1388–1400). The Norris–LaGuardia Act of 1932 (29 U.S.C. §§ 101–115 (1976)) prevented federal courts from issuing labor injunctions which had been used to block union organizing activities and strikes. The Act sought to deregulate and, in effect, to privatize relations between employers and employees so that their conflicts could be resolved through private contractual agreements.

Building on this foundation, the National Labor Relations Act of 1935 sought to create a framework of public law in which employees and employers would engage in private bargaining and negotiation to arrive at contractual agreements. Given the greater economic power of employers over employees in contract negotiations, the Act sought to enhance the power of employees in reaching private contractual agreements by recognizing a public interest in promoting unions as a form of private power, recognizing the legality of strikes and other self-help measures by employees, defining through public law the obligation of employers to bargain, and instituting the National Labor Relations Board to administer the various provisions of the Act. Public power and private freedom were combined so that "public regulation of the workplace was contemporaneously defended and justified on the ground that it would not interfere with *private* determination of working conditions" (Klare, 1982: 1392).

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From the vantage point of the history of labor law since the 1930s, it is clear that the combination of public law and private contractual agreements has shifted in both its public and private dimensions. The public dimension has increased as courts have been called on to settle disputes over specific aspects of collective bargaining not resolved by the National Labor Relations Board.[13] As a result of further legislation that reflected the experience of World War II, the state has been drawn into the presumed private domain of contract negotiation as mediators and arbitrators to make private negotiation work more effectively and, thereby, to prevent strikes and other disruptions of industrial peace. Other legislation, such as the Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 651–678 (1976 and Supp. IV 1980)), have led to state regulation of the workplace. Relations within the private dimension have shifted as managerial decisions regarding investments and the scope of the enterprise have become enshrined in collective bargaining agreements along with the pledge of employees not to strike during the term of a contract and the legal obligation of unions to enforce the no-strike pledge.

One lesson that can be drawn from this history is "that 'private ordering' presupposes that public power has established a regime of rules and enforcement agencies, that the 'unregulated' market is a fiction and that private ordering is itself a mode of public regulation" (Klare, 1982: 1415). Although the social relations of authority along with the nature of freedom and compulsion have shifted in the arena of labor law, they have continued to be constructed and legitimated through the private/public dichotomy: the public and private dimensions have oscillated but have continued to presuppose one another. While the distinction is applied in different ways under varying historical circumstances and power relations, the continuation of the public/private distinction points to the fact that the fundamental relations between employers and employees have not changed.

III. CONCLUSION

These ideological critiques of the public/private distinction in law are grounded in three analytic frameworks similar to those I reconstructed from Marx's writings. The first approach, philosophical criticism, conceptualizes abstract legal categories that define universal equality in the public sphere as grounded in privatized sources of power, inequality, and egoism. Kennedy's analysis extends this critique by demonstrating how the public/private distinction breaks down within legal discourse, leading to incoherence and inabilities to adequately articulate issues. The second framework articulates the way in which the public/private distinction in

[13] Delaney *et al.* (1985) have reviewed and assessed research on key provisions of the National Labor Relations Act of 1935.

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law is grounded in categories of political economy. Balbus deepens this framework by analyzing how the social relations that underlie both the commodity form and the legal form are distorted through identical processes of signification. The third framework analyzes concrete, historically located social struggles that are defined through the public/private distinction as terrains of class conflict that lead to legal resolution. The third approach solidifies the public/private distinction by showing how it shapes the formation of issues, patterns of action and conflict, and conditions of life that are the object of historically located class struggles. Klare adds to this approach by stressing the way in which the public/private distinction is historically contingent and by showing how law directly constitutes the social organization of labor through the public/private distinction.

These three analytic approaches characterize public/private distinctions as discursive and symbolically-charged social products rooted in wage labor, commodity production, and the commercialization of human relationships. Generally, the public/private distinction provides a categorical framework that partially legitimates and obscures these underlying social relations and thereby contributes to their recreation in everyday activities. The purpose of ideological criticism, moreover, is to demonstrate the inadequacies of the public/private distinction in liberal legal theory for analyzing law and social relations. Instead, ideological criticism uses the public/private distinction to analyze the ways in which it supports patterns of domination and inequality, and also shapes boundaries of struggle and emancipatory alternatives within particular historical contexts.

I have elaborated these approaches to ideological criticism through a reconstruction of Kennedy, Balbus, and Klare's analyses of the public/private distinction. Kennedy's critique demonstrates the internal breakdown, incoherence, and ritualized maintenance of the public/private distinction in law. His critique, which stays within the bounds of legal discourse and consciousness, calls decisions that rest on the ossified public/private distinction into question, thereby undermining their jurisprudential legitimacy. Balbus's critique shows how the public/private distinction is independent of the wills of social actors, not because law is a fully independent order, but because it conforms to and reinforces the systemic requirements of competitive capitalism. In addition to providing a more adequate analytic framework than either instrumentalism or formalism, Balbus shows that the identity of the legal form and the commodity form reinforce the mystification of social relations and legality. Law is a formal public representation that serves to privatize consciousness and fragments collective sources of popular power. Klare's analysis of labor law shows how the public/private distinction has served as a rhetoric for conflict and law-making. The oscillation of the public/private framework

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Table 2: Dimensions of the Public/Private Distinction

Object of Inquiry	Primary Actors	Practical Outcomes
Kennedy: legal discourse	Legal practitioners	Empty ritualism
Balbus: social theory	Social researchers	Inadequate explanations
Klare: labor law	Workers/ employers	Fixation of relations

is related to class-based sources of power that shape the legal organization of collective bargaining in ways that severely constrain the range of working class action.

These three critiques of the public/private dichotomy each have specific methodologies that focus on different substantive issues and have distinctive practical outcomes. Table 2 presents a summary of the different analytic dimensions in these critiques of ideology.

These approaches are located in distinct, yet related, social relations of inquiry and action: legal discourse for Kennedy, social theory for Balbus, and labor law for Klare. Since they are directed at different objects of inquiry, the consequences of the public/private distinction are embedded in different conceptual frameworks: the conceptual relations underlying legal decision-making for Kennedy; the conceptual relations underlying sociological explanation for Balbus; and the conceptual relations underlying labor and management relations for Klare. Also, each approach focuses on actors that are primary for the realization of the activity: legal practitioners and legal scholars for Kennedy; social researchers for Balbus; and employees and employers for Klare. Finally, each approach delineates a practical outcome resulting from the ideological character of the public/private distinction in its domain of social relations of inquiry and action: empty ritualism for legal discourse; inadequate explanations for social theory; and fixation of relations for labor law. A variety of primary actors, engaged in particular practical activities, generate distinctive legal ideologies that are constructed on the basis of the public/private dichotomy.

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