COMPLEXITY AND CONTRADICTION IN THE LEGAL ORDER: BALBUS AND THE CHALLENGE OF CRITICAL SOCIAL THOUGHT ABOUT LAW

Review essay on Isaac D. Balbus,
The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts

DAVID M. TRUBEK

> *We reach, then, not a simple conclusion (law = class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate class relations to the advantage of the rulers; not only is this so, but . . . the law became a superb instrument by which these rulers were able to impose new definitions of property to their even greater advantage. . . . On the other hand, the law mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers.* [Thompson, 1975:264]
>
> *As always in social life, the heart of the mystery lies in the relationship between the struggle for power and the beliefs people hold about what is good for them and what they are capable of achieving. That relationship is the cave into which we must follow the enigma.* [Unger, 1976b:242]

INTRODUCTION

Social research on law in the United States is in great flux. Conventional "paradigms" are challenged, and alternatives proposed. Several different definitions of the field, research agendas, and methodologies have been mooted.[1]

This essay is offered as a contribution to that debate. It argues that law and society research should be critical without being cynical, empirical but not positivistic, normative but not subjective, detached yet not disinterested.

I wish to thank Marc Galanter for his invitation to attempt this review, and both him and Richard Abel for their patience and encouragement during its long gestation period. Piers Beirne, Charles Grau, Willard Hurst, Duncan Kennedy, Stewart Macaulay, and Louise Trubek provided helpful comments on earlier drafts. I am indebted to Mark Tushnet for drawing my attention to the study by E. P. Thompson (1975) quoted at the beginning of the essay: this statement, and the passage from which it is drawn, were extremely suggestive for the formulation of ideas presented here. I also profited from a recent opportunity to discuss the study and the theory of law with Isaac Balbus.

1. The variety of positions defies my limited powers of classification. They range from Donald Black's call for a radical positivism (1972) to Unger's call for a total revision of social thought (1976a, 1976b). For recent discussion of these issues, see Nonet (1976); Feeley (1976).

A full statement of this position would require a theory of law in society and of the role of scholarly inquiry. This essay points toward and outlines such theories, but does not fully develop them.

The principal method of the essay is critical. I start with a close analysis of a recent Marxist contribution to law and society research: Isaac Balbus's *The Dialectics of Legal Repression*. Originally published in 1973, the book has recently been reissued. The occasion permits us to reassess its significance in light of the current debate on the nature of social research on law. Early reviewers failed to grasp fully the importance of Balbus's efforts to develop a sophisticated Marxist analysis of the role of law in capitalist societies (e.g., Cole, 1975; Sagarin, 1975). I hope to correct this omission.

This is not to say that I offer Balbus's work as a model, or "paradigm" in the narrower Kuhnian sense (Kuhn, 1970). As I shall show, the book's theory and empirical methods are subject to criticism. However, I believe Balbus's work adds dimensions often lacking in social analysis of law, and his effort to fuse empirical methods and Marxist theory contains much that is valuable. Thus, while I disagree with some of his conclusions, I think he has helped us widen the scope of inquiry. To understand why this is the case, I present and criticize his study in detail.

This analysis of Balbus sets the stage for the remainder of the essay. In the subsequent sections, I explain how Balbus's work can help us to define new theories and methods for future study of law in society.

I. BALBUS'S STUDY OF JUDICIAL RESPONSE TO THE GHETTO RIOTS

The Dialectics of Legal Repression describes the behavior of the criminal justice system in Los Angeles, Detroit, and Chicago during the ghetto riots of the 1960s. Most of the book is devoted to a descriptive and statistical analysis of the way police, prosecutors, courts, and defense attorneys in the three cities handled the cases of persons apprehended during the riots.

The events Balbus wishes to explain are not unfamiliar. Confronted with massive collective violence in the early stages of the riots, police often arrested demonstrators without regard to whether or not there was evidence that an indictable crime had been committed. Bail was set at exhorbitant levels to keep demonstrators off the streets; people were booked and charged without adequate evidence; few of those arrested had access to defense counsel; and defendants were charged with felonies in numerous

cases where the evidence could support a misdemeanor conviction at best.

Balbus's book, however, brings a relatively unique perspective to the study of these well-known phenomena: the book uses empirical methods to study judicial behavior, and Marxist theory to explain the results obtained. This combination of quantitative analysis of judicial behavior and Marxian explanation of the data is unique in the literature on law in the United States. Much writing about law by behavioral scientists eschews normative analysis and fails to place the study of judicial behavior in the context of a broad critical theory of society. On the other hand, much of the writing about law by American Marxists is either very general or anecdotal. Thus while the Marxian analyses are normative and critical, and do attempt to place law in a broader context, they rarely document theoretical assertions with detailed case studies or quantitative data. Balbus's effort to combine Marxian analysis with careful empiricism therefore makes the book a noteworthy contribution to the sociology of law.

Moreover, the study is unique in a narrower sense, in that it is based not merely on a description of behavior in the riots, but also on a series of statistical comparisons which attempt to show how the riot situation altered normal patterns of criminal justice system behavior. Thus, the core of the study is a threefold comparison between

- the behavior of the system in riots and nonriot situations;
- the behavior of the system in minor and major riots; and
- the reaction of the system in different cities to all three situations.

The study is very complex, and the findings are not presented with all the clarity one might wish. However, the main conclusions Balbus draws from these comparisions are that riot cases were handled differently from normal cases, that these differences were more substantial in major than in minor riots, and that the three cities responded similarly to major riots but differently to minor ones (pp. 231-63). These deserve more detailed attention.

A. Major Riot Cases versus Normal Cases

Balbus compares these situations by looking at how persons arrested were treated at each stage of the process. These data show that in comparison with arrestees in normal times, those arrested in major riots were

- more likely to be charged without adequate evidence;

- less likely to have bail set initially in accordance with statutory norms;
- more likely to have bail *reduced* and less likely to be in custody at time of trial;
- less likely to be convicted of a felony if the arrest was on a felony charge; and
- more likely to receive a light sentence.

Although the picture varied somewhat between Los Angeles and Detroit, where the first riots broke out, and Chicago, where the authorities had time to plan their response, a basic pattern can be seen in all cities. While the riots were going on, participants were arrested without much attention to evidence, charged with major offenses, and held on high bail. After the violence subsided, bail was reduced. A significant percentage of those arrested were released from custody, and many were ultimately exonerated or given light sentences. In comparison with normal situations, in which up to 90 percent of all those prosecuted on felony charges are convicted, a significant percentage of riot arrestees prosecuted were not convicted at all, and many of those convicted pleaded guilty to misdemeanors (pp. 78, 145, 216).

B. Major Riots versus Minor Riots

The second comparison is between system behavior in major and minor revolts. Here Balbus found more variation among the three cities. In Detroit and Los Angeles, the statistics of case disposition resembled the pattern in normal cases more than they did the profile of major riot dispositions (p. 246). Thus, prosecutors in minor riots screened arrestees more carefully, resulting in a lower ratio of prosecutions to arrests. Moreover, unlike the major revolt pattern, prosecutors in these cities secured convictions in a relatively high percentage of those cases they pursued. Finally, Balbus found that minor riot arrestees in Los Angeles and Detroit were much more likely to be imprisoned after conviction than major riot participants (p. 251).

The pattern in Chicago, however, was somewhat different. In the minor revolts in Chicago, a much higher percentage of arrestees were prosecuted and convicted than in similar events in the other cities, or in normal Chicago case dispositions (p. 246). Moreover, a lower percentage of those convicted in Chicago than in the other cities received prison sentences (p. 251). On the other hand, in Chicago, as in the other cities, a convicted minor riot participant was more likely to be imprisoned than one who was convicted following a major riot.

C. Theoretical Implications of the Findings

It is to Balbus's credit that he not only tried to document these trends, but also recognized that there were no simple answers to explain them. Much of the theoretical section of the book is an attempt to develop a theory sufficiently complex to explain the observed behavior.

Put in simple language, what Balbus was trying to explain was the variation in patterns of adherence to the formal legal norms of the criminal justice system. On the one hand, he observed behavior that violated these norms: bail set above statutory limits, overcharging, denial of access to counsel, decisions to prosecute without concern for the evidentiary basis of the case. On the other hand, the norms were not totally abandoned: excessive bail was reduced, charges were thrown out, persons accused of felony offenses were able to plead guilty to lesser charges and received light or nominal sentences.

His findings led Balbus to reject two alternative and mutually inconsistent "theories" about the behavior of the criminal justice system in the United States. The first, which he calls the "liberal" theory, is that the system operates solely to detect and punish individual violations of specific norms. Were that theory correct, he argues, the existence of a *riot*, and thus of a challenge to the overall political order, would have no influence on court behavior, and case disposition during riots would not differ from disposition in normal times (p. 253). Yet the data clearly show this was not the case. From his reading of the data, Balbus believes that the existence of a violent threat to order did cause the system to deviate from the norm of individualized justice. On the other hand, this deviation was not directly related to the degree of violence. This causes him to reject the alternative theory, which he calls "Hobbesian." This "theory" would predict that "the severity of elite response would be proportional to the magnitude of the threat confronting the elite" (p. 252). If this theory were correct, he reasoned, the response to major revolts would be more severe—and thus less concerned with formal norms of legality—than the response to minor ones. Yet he found precisely the opposite. He concludes that:

> a participant in a full-scale ghetto revolt involving widespread participation and destruction of life and property is likely to incur *less* concrete deprivation from the criminal courts than one arrested for a comparable offense during "normal" conditions . . . or for a comparable offense during a minor revolt which entails only a tiny fraction of the scope and destructiveness of the major revolt. [p. 252]

Thus Balbus was forced to develop a third theory to explain the apparent complexity and contradiction in the behavior ob-

served. This theory asserts that the criminal justice system is subject to three different and crosscutting sets of constraints: it must preserve *order*, it must *maintain organizational integrity* by economizing scarce institutional resources, and it must *legitimate* the political and economic system by adhering to "formal legal rationality."

The existence of these three constraints, he argues, explains the empirical observations. While the interest in order would dictate higher sanctions for major rioters, the need to economize scarce resources made it impossible for the overburdened court system to process the vast number of cases that resulted from the massive arrests during major riots. Moreover the pressures of organizational maintenance in major riot situations were amplified by *increased* pressures for legitimation in these events, and thus for adherence to formal legal rationality. The very scale of the riots and the resulting public attention to the way rioters were handled by the courts increased, rather than decreased, the pressures to adhere to formal legal procedures once the immediate threat had eased:

> Once the interest in order had been implemented, producing . . . a massive influx of cases which were largely unsupportable in terms of the ordinary canons of evidence, there was no way that a policy of severe sanctions could have been implemented unless court authorities had been willing to ignore the combined dictates of formal rationality and organizational maintenance. Only if they had been willing to abandon their legitimating interest in legality could they have ignored the overwhelming evidence problems . . . or statutory deadlines. And . . . their interest in organizational maintenance militated against a policy of severe sanctions which would have entailed . . . the total disruption of the ordinary criminal calendar. [pp. 254-5]

D. A Critique of the Theory

I welcome Balbus's attempt to develop a more sophisticated approach to the dynamics of legal behavior than might be expected from a cynical "Hobbesian" or instrumental Marxist viewpoint, or from a naive "liberal" perspective. And I think he has made a major contribution in identifying legitimation needs as a significant variable in system behavior. However, I believe there are serious flaws both in his theory of legitimation and the empirical methods he uses to "verify" this theory.

In Balbus's theory, the interests of order and organizational maintenance cut against compliance with norms of due process, statutory procedures, and other protections for the accused. Thus, the theory asserts that the liberal state adheres to what he calls "formal rationality" in criminal justice solely because such adherence is necessary for legitimation. The logical implication of this position is that it should be possible to predict the extent of

deviation from formal rationality on the basis of whether such deviations are or are not critically delegitimating. Moreover, he believes that his empirical evidence confirms predictions drawn from this theory of legitimation—combined with the other variables in his model of system behavior. I do not believe his theory is persuasive, nor its predictions warranted. And I do not think Balbus's data confirm the theory.

If the claims Balbus makes for his study are correct, it should be able to meet three tests. First, the theory of legitimation should be capable of explaining why adherence to legal norms is necessary for the legitimation of the liberal state *and why such norms are adhered to for this purpose and no other*. Secondly, it should indicate the variables that determine when adherence is necessary for legitimation and when it is not. That is, the theory should be able to predict when the system will observe legal norms and when it will ignore them. Finally, the theory should be sufficiently operational that it would be possible to measure covariation of norms, on the one hand, and the lack of pressure for legitimation, on the other. It is my belief that *The Dialectics of Legal Repression* fails to meet these standards.

As a Marxist, Balbus assumes that capitalist societies are divided into distinct and antagonistic social classes. The capitalists—those who own the means of production—are the dominant class. The capitalist class maintains its economic domination by controlling the workers' means of earning a livelihood. But it is also important to the maintenance of the capitalist mode of production that the capitalist class exercises political domination. Thus the state in general, and the law, including the criminal law and the courts, must ultimately support the capitalist mode of production and thus the interests of the class that is dominant in this system (Gold *et al.*, 1975).

Balbus does not adhere to a narrowly instrumental theory of the role of the state in capitalist society. That is, unlike some Marxists, he does not expect that all state activity is directly controlled by capitalists or their agents, or that everything the state does directly and exclusively favors capitalists over all others. Nevertheless, the ultimate function of all state action is to protect the capitalist system. From this perspective all actions by the state which do *not* directly benefit capitalists or the capitalist class must be specifically explained. Accordingly, the real question to be answered is not why the criminal justice system sometimes deviates from legal norms and denies equal protection of the law to those outside the dominant class, but why it guarantees any protections to such individuals at all, and why it adheres to legali-

ty even when to do so is not in the direct and immediate interest of the dominant class.

Since Balbus sees the rioters as members of an economically exploited, dependent class rebelling against an unjust economic and social system, the natural question for him to ask is not why the courts adhered to legality, but why brute force was not the exclusive elite response to the threat the riots posed. That this question is uppermost in his mind is suggested by the following passage, in which he observes that during the riot period:

> the response calculus of court authorities tended to approach the calculus of pure force. . . . Yet even during this period the abandonment of formal rationality was not a total one. . . . Martial law was *not* declared, and *some* concern for the legality of the arrests was exhibited. Thus, although normal prosecution gate keeping was largely abandoned, arrestees *were* prosecuted rather than simply detained without charges, and standard charges were employed in an effort to assimilate the riot activity under the general rubric of predefined, formally prescribed acts. Although bail was set at higher levels than normally, bail was set and the Writ of Habeas Corpus was not formally revoked. Finally, in all three cities a concerted effort was undertaken on the part of court authorities to adhere to normal statutory deadlines. In short, the ordinary criminal process *was* set in motion rather than abandoned in favor of an ad hoc procedure. [pp. 234-35]

This "choice," the use of ordinary criminal process in lieu of "ad hoc procedure," became the key question to be explored as the study proceeded. It is to explain this choice, then, that the theory of legitimacy and the concept of "formal legal rationality" were developed.

Balbus turned to Weberian "formal legal rationality" to answer a question that might not have occurred to a non-Marxist scholar. At its crudest—and Balbus never puts it this way—the question is: why didn't the police just shoot everybody down, or indiscriminately arrest and convict whomever they could lay their hands on? And why didn't they "throw the book" at the major riot participants? On Balbus's assumptions, these are the natural questions.

What he concludes is that the political elite in a capitalist society cannot resort to such tactics because to do so would be to destroy legitimacy. Formal legal rationality is a measure of legitimate rule, and deviations from this standard run the risk of destroying the legitimacy of the state. But if adherence to legality is merely a utilitarian act designed to promote the legitimacy of the regime, and if it entails costs—as Balbus recognizes it does—then the liberal state should provide the least amount of legality sufficient to maintain its legitimacy. A theory of the criminal justice system derived from these postulates should be able to explain both compliance and noncompliance with norms, the recognition and denial of rights, in terms of the logic of legitimacy.

Such a theory would have to set forth the logic of the legitimation process. It would have to explain how legality lends legitimacy to a political order, specify the social groups to whom the ideological messages are addressed, and differentiate between illegal acts that threaten legitimacy and those that do not. In this way the theory would permit predictions about the kinds of illegality that will occur and those that will seem too "costly" to a regime.

Balbus fails to give us a theory that meets these tests. Indeed, he does not really present any coherent theory of the process of legitimation in liberal capitalist societies, but rather a *pastiche* of Weber, Marx, Lukács, and labelling theory, which is neither powerful nor precise. Compared to recent writing on law and legitimation by such thinkers as Unger (1975) and Habermas (1975), Balbus's discussion of legitimacy in *The Dialectics of Legal Repression* is sketchy.

The theory of legitimation developed in this study has two strands. The first is the effort to explain why the liberal state secures legitimacy by adhering to what Balbus calls formal legal rationality. Here he is trying to understand why force must be exercised according to rules. The theory is a general one, meant to apply to all "liberal" societies and to all aspects of law, private as well as public, civil as well as criminal.

The second, and more specific, strand of the argument has to do with the use of criminal law in liberal society. This is as much a theory of illegitimacy as of legitimacy. Thus Balbus argues that by labelling certain behavior criminal, the liberal state can deprive of legitimacy what is in "reality" valid political protest. When the opponents of the liberal state resort to collective violence, it is in the state's interest to label them criminals, not rebels, and to portray their acts as individual incidents of antisocial protest and not the expression of group, racial, or class grievances (pp. 12-13).

What ties the two strands of the theory together is the assumption that "criminalization" will undermine legitimacy unless it is done by processes that adhere to the rule of law, or to what he calls "formal legal rationality," at least to some degree. Thus, the theory of criminalization is really a subcategory of the general theory of legitimation. This becomes apparent when one recognizes that nonliberal societies can and do employ criminalization or similar forms of labelling to deny legitimacy to social protest, but feel less constrained by notions of due process and individual rights.[2]

2. Numerous authoritarian regimes have attempted to define deviant acts as criminal, or even mentally deranged, while denying even the minimal formal protections for those accused of such "political" crimes. See, e.g., Carl (1972).

But when one turns to examine Balbus's more general theory, it is extremely vague and possibly incorrect. He first argues, following Weber, that the reason liberal society must adhere to "formal legal rationality," is that an autonomous or "logically formal" and rational legal order is necessary for capitalist economic growth. Elsewhere I have pointed out that, though this analysis may have validity for the development of capitalism in some European societies, it is of dubious relevance for contemporary analysis (Trubek, 1972). But in any event, there is nothing in the theory of the role of law in economic development that requires the criminal justice systems of developing or mature capitalist states to operate in the autonomous and predictable fashion signified by Weber's concept of "logically formal rationality." To support the latter theory, Balbus must somehow relate legality to political, not economic, functions. He recognizes this, for he goes on to assert that the ideal of the rule of law plays a political role in persuading the "propertyless"

> that they have the legal right and hence the real opportunity of rising into the bourgeoisie. Where the rights of economic entrepreneurial activity are open to all, and are tied to the legal right of expressing economic grievances politically, it is indeed difficult to persuade aspiring workers and other poor that the system is fundamentally unjust. [p. 6]

But this observation is beside the point. The theory of legitimacy through legality states that the *form* of governance makes a difference: it contrasts decisions in accord with rules with arbitrary power. The aspects of the legal order Balbus discusses are *substantive*. He thus fails to explain the significance to liberal society of the *form* of the rule of law, which Weber saw as more important than particular substance. But the reader of *The Dialectics of Legal Repression* will seek in vain for a theory of the relationship between legal form and capitalist society.[3]

A second flaw in the study is the lack of a precise definition of what constitutes "formal legal rationality." The term has no ordinary language equivalent, nor is it employed in the way Weber used it. For Weber, the term described a form of legal thought and, as I have suggested elsewhere (1972), was also used as a proxy for the autonomous legal order that fosters and requires such a mode of thought. Balbus, on the other hand, is employing this term as an empirical measure of compliance with specific norms. But nowhere does he tell us what these norms are or how we can measure deviation from them. Thus, at some points he seems to equate "formal legal rationality" with adherence to statutory deadlines and other clear legal rules. But at other points (e.g., p. 52) he seems

3. In later work Balbus has tried to fill this gap (1977). See Section III, *infra*.

to find a deviation from formal rationality when judges exercise what appears to be their lawful discretion to set bail at higher levels than prevailed in "normal times." Moreover, he seems to include "overcharging" as an example of deviation from formal legal rationality, without giving any detailed attention to the complex legal and factual problems involved in determining whether a given charge is "excessive."

I do not mean to suggest that it would be impossible to construct an index of "formal legal rationality," merely that it is a difficult theoretical and empirical task. Nor do I mean to suggest that Balbus's crude and often implicit assumptions about when norms of criminal justice are and are not violated are wildly off the mark. Rather, I simply want to point out that he has paid insufficient attention to the complex problems involved in operationalizing this key variable and that, as a result, he is able to reach conclusions about his data that no one can either prove or disprove.

This fact casts doubt on whether Balbus really has achieved what he claims in the conclusion of *The Dialectics of Legal Repression*. He asserts that the variance between major and minor riot behavior can be explained in part by variations in legitimation needs. But how can we be sure this claim is correct? The theory of legitimation does not begin to explain what factors in these two situations might cause different degrees of need for legitimation. And the concept of formal legal rationality is sufficiently elastic so that we have no way to confirm Balbus's thesis that there was more "rationality" in the major than in the minor situations. Without an understanding of the causes, or a way to verify measures of the alleged effects, we are left in the end with an unverifiable and thus an unproven set of assertions.

E. Balbus's Contribution: An Interim Assessment

I wish to postpone a final assessment of Balbus's work until I have had an opportunity to develop the theory of legitimation, and to indicate his own later contributions to this theory. But at this point, it is important to note several features of the book that I believe represent valuable additions to social research on law. First, Balbus has recognized the central theoretical significance of that perennial problem of the sociology of law: the gap between the law on the books and the law in action. Where some Marxists may see legal ideas as *pure* sham, and thus the tension between ideal and reality of no theoretical interest, Balbus recognizes that this dialectic constitutes a central issue to be charted and explained. Moreover, unlike some liberal thinkers, Balbus recog-

nized that this "gap" is not an accident, to be easily eliminated by social engineering, but a pervasive if not constitutive feature of legal life in liberal societies. Further, he appreciates that the relations between ideals (or the law in the books) and reality (or the behavior of legal institutions) will be complex and contradictory. Finally, he has pointed to the theory of legitimation as a major key to understanding this territory. Thus, whatever the book's theoretical limits or methodological flaws, it is important in the development of the field, for it points toward new perspectives for research.

II. TOWARD A NEW REALISM

A. Autonomy and Legitimacy

Balbus claims to be using Weber to assist him in developing a coherent theory of the legitimating functions of legal order in capitalist societies. Yet though he employs Weber's concept of "formal rationality" he does not really grasp the full implications of Weberian sociology of law and thus, in my view, misses an opportunity to develop the implications of the Weberian scheme.

The key to an understanding of this opportunity lies in Weber's concept of logically formal rationality, and his theory of legal domination. The unique characteristic of the legal systems of capitalist societies, for Weber, was their ability to develop a mode of legal thought that was *autonomous* from other types of thought. This made it possible for the legal system to become autonomous from the immediate needs of the state apparatus and of individual capitalists. At the economic level, this system favored capitalist development because it was more predictable than other forms of governance (Trubek, 1972). But the autonomy of the legal order also plays a role in legitimating the liberal state in capitalist society. A logically formal legal order appears to be a neutral and autonomous source of normative guidance, and this very neutrality and autonomy of law forms one basis for the claims of political systems in capitalist societies to legitimate authority (Weber, 1968: 941-54).

Weber asserted that the autonomous legal order was the basis of the legitimacy of the capitalist state. He did not, however, fully explain why the legal order's claim to autonomy and neutrality functioned effectively to legitimate the power of the dominant groups in the capitalist societies with which he was familiar. More recent work, strongly inspired by Weber, has extended the analysis to show the ways in which the idea of an autonomous legal order provides legitimation for the system of domination in

liberal capitalist societies. The most complete analysis is that of Roberto Mangabeira Unger (1976a).

Liberal society, Unger notes, is marked by two significant features which affect the consciousness of its members. The first is the "unjustifiability of the existing rank order," the second the "corruption of moral agreements." Men in liberal society find themselves enmeshed in structures of hierarchy that seem invalid. The members of a liberal society lack any basis for consensus on values: and yet at the same time they perceive themselves to be subject to hierarchies of power and wealth that lack any stable basis. As a result, "they struggle to avoid or diminish enslavement to each other in the rank order and to establish the most far-reaching power, the power of the government, upon a basis that overcomes the arbitrariness of ordinary social hierarchies" (*ibid.*: 176). From this effort comes the aspiration to the rule of law as a formal and a substantive ideal: "The rule of law tries to deal with the predicament of liberal society by ensuring the impersonality of power" (*ibid.*: 178). As a formal ideal, the rule of law posits that governmental power must be exercised within the constraints of rules that apply uniformly to general classes of persons or acts. The institutional aspect of this idea is the autonomous judiciary and the concept *nulla poena sine lege*. As a substantive ideal, the rule of law imposes constraints on the content of legislation, or at least on the process by which legislation may be carried out:

> It requires that laws be made by a procedure to which everyone might have reason to agree in his own self-interest. More especially, it insists that each person participate somehow in the process of law-making. It is therefore expected that the legal order will possess the attribute described earlier as substantive autonomy: it will represent a balance struck among competing groups rather than the embodiment of the interest and ideals of a particular faction. [*Ibid.*]

B. Law, Legitimacy, and Mediation

The idea of law reflects the consciousness of a society whose ideals and social structure are in conflict. The ideology of liberal society values social equality, individual autonomy, and fraternity, yet the social system creates and strengthens stratification, permits domination, and dissolves the ties of community (Unger, 1975, 1976a; Thompson, 1975). Thus, as members of a liberal society, we embrace the ideals and yet are aware of their negation. The idea of law offers the possibility of escape from this contradiction.

The idea of legal order and the rule of law can only be meaningful as a solution to the tensions in a *liberal* consciousness. The image of law as *blind*, disregarding all differences between persons except those authorized by law, only makes sense to those who see substantial differences in rank and power between per-

sons and yet believe that these differences are not fully legitimate. For those who live in hierarchical societies but value this hierarchy, untroubled by visions of equality, the idea of judging persons without reference to their social status would be absurd. Conversely, a denizen of a truly egalitarian society who believed in equality, and saw no threats to equality in the operation of social institutions, would be equally perplexed by our statues of blindfolded Justice—for there would be nothing from which the eyes of the lawmakers and judges need be shielded.

Of course, even the denizens of both such societies will sense a need for some of the activities that go under the name of "law" in liberal societies. The most egalitarian society will require customary ways of behaving and truly technical norms, and to the extent that these are necessary and are stated in positive fashion they will constitute "law" in the most general sense. Similarly, in a strictly hierarchical society, the principles of the rank order, the relations between ranks, and the codes of legitimate behavior may be stated in some authoritative form which we can recognize as law. But in neither case is there a need for law as *legal order*: as a realm both institutionally and substantively autonomous from other forms of social ordering (Unger, 1976a: 52-54, 178).

But in liberal society such an institution makes sense because it answers questions created by the interplay of social ideals and social structure, such as: how can I be equal to others if they have more wealth, status, or power than I; how can I be autonomous if I am subject to the orders of others; how can I feel communion with others who do not share my values and ends and who believe that they must use me to achieve theirs? The ideal of legal order offers the promise of some check on, escape from, and (perhaps) ultimate transcendence of hierarchy and domination, and it promises a shield against the egoistic depredations of others. Thus, the idea and the institution of law mediate the tension between social ideals and structure, legitimating a society challenged by its own ideals.

Once we see that law represents an effort to mediate fundamental conflicts, much that is puzzling and anomalous about legal thought and behavior becomes clear. We generally think about law as the reflection of a successful resolution of these conflicts, and thus as a haven from the contradictions of liberal society. From this point of view, it is difficult to explain what sociologists of law constantly reiterate: that legal institutions articulate ideals that they fail to fulfill, that legal rules which embody and restate such ideals are often honored only in the breach, and that there are significant and systematic gaps between the law in the books and

the law in action. For those who see law as the resolution of contradictions, these observations are threatening. Therefore, they must be dismissed as minor problems that can be resolved by social engineering, or reflections of the incomplete unfolding of natural processes of evolution (Trubek and Galanter, 1974). But for those who see law not as a haven from warring principles of society, but as a borderland between them, there is no puzzle or threat. From this perspective, gaps between legal ideals and legal behavior, and between legal norms and social structure, are inherent and fundamental features of the life and consciousness of liberal society.[4] If law is seen as an imperfect effort to mediate between deeply held ideals and pervasive and powerful aspects of social structure, the observed "gaps" become constitutive and essential, features of life which can be neither willed out of existence by minor reforms in law nor expected to disappear through the unaided unfolding of evolutionary processes.

C. A New Realism: Mediation and Critical Social Thought about Law

If we accept this latter point of view, we may be able to approach law with greater realism. What I have been calling a "mediative" perspective prepares us to grasp the full complexity and contradiction of legal life, and to avoid a series of errors that can stem from more simple-minded approaches.[5] The mediative

4. The sources of the tension are brilliantly described by Unger:
> Thus, the very assumptions of the rule of law ideal appear to be falsified by the reality of life in liberal society. But, curiously, the reasons for the failure of this attempt to ensure the impersonality of power are the same as those that inspired the effort in the first place: the existence of a relatively open, political social order, and the accompanying disintegration of a self-legitimating consensus. The factors that make the search necessary also make its success impossible. The state, a supposedly neutral overseer of social conflict, is forever caught up in the antagonism of private interests and made the tool of one faction or another. Thus, in seeking to discipline and to justify the exercise of power, men are condemned to pursue an objective they are forbidden to reach. And this repeated disappointment accentuates still further the gap between the vision of the ideal and the experience of actuality. [1976a:181]

5. At this point it is important to note that I use the term "mediation" in this essay in the ordinary English language sense of a communicative intervention aimed at reconciling or compromising conflicting ideas or interests. In this sense, the term may have very different implications from the technical term "mediation" as used by Marxists, for whom the "mediating" function of law is part of the broader theory of alienation (e.g., Thompson, 1975). Though for Marxists the mediating function of law contributes to alienation, my use of the ordinary language meaning suggests a belief that law may contribute to the elimination of alienation. Since this assertion constitutes the basic argument of the essay, it is unnecessary to make a separate defense of the terminological choice. However, it is noteworthy that the study that first suggested to me the perspective outlined in this essay—E. P. Thompson's masterful examination of English criminal law in the eighteenth century (1975)—contains both the Marxian description of law as "mediating class interest," and a very interesting discussion of the history of English law which suggests that it is possible for scholars of a Marxian orientation to accept the

perspective asserts that a significant feature of legal life in liberal, capitalist societies is the simultaneous assertion and negation of basic ideals of equality, individuality, and community. The legal order neither guarantees these ideals, nor does it simply deny them: it does both. The gap between the ideals of law and its performance is a central and pervasive feature of legal existence and of the consciousness of those who deal with, operate, and observe the legal system. Legal order is not a haven or escape from stratification and domination, yet it can and does permit challenges to those aspects of social structure that violate the ideals of equality, individuality, and community.

Such a perspective helps us to avoid some of the errors into which recent social thought about law has fallen.

The first is the error of the blind, who deny the existence of any gap between ideal and reality, between legal norms and social behavior. In doing so, they render superfluous much of the sociology of law, which has, since its inception, devoted substantial energy to the identification and explanation of those gaps.

The second error is the error of the naive, who accept the existence of these gaps but see them as abnormal, atypical, or easily corrected. For the naive, the discovery of gaps is a valid enterprise, but also represents the fulfillment of the program of social research on law since the gap, once discovered, can easily be eliminated.

The third error is the error of the cynic who sees the gap as evidence of the total falsity of the ideals, and treats legal order as merely a mask behind which the rich and powerful hide their continued domination and exploitation of the poor and powerless. For the cynic, there is no tension between ideal and reality, be-

---

position I have tried to develop here. In his concluding discussion on the significance of the rule of law, Thompson begins by stating that "the law . . . may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation" (1975; 262). But he then goes on to say that the law has an independent logic, which requires application of "logical criteria with reference to standards of universality and equity." Further, he notes that the commitment of the English ruling class to legality did effectively curb its power and check its intrusions. Moreover, Thompson observes that the law served as the normative source for radical critiques of the society, the medium in which social conflicts were carried out, and the arena in which some working class victories were achieved. For the reader who wants more concrete evidence of what I mean by mediation, I can suggest no better illustration than Thompson's study.

Another writer who has conceived of law in liberal society as a "mediating" force is my colleague, James Willard Hurst. In *The Growth of American Law*, Hurst outlines a theory of the legal process as a social force capable of mediating conflicting interests in an increasingly fragmented society (1950: 446-549). Hurst also noted what I have stressed in the text, that the very forces that created a need for mediation undermine the capacity of legal institutions to perform this function. For a discussion of Hurst's position, see Trubek (1977).

cause the ideal has no meaning or effect *except* as a device to obscure the reality—pervasive and unrelieved denial of equality, individuality, and community. All legal ideals are myths, and all efforts to realize them are doomed to failure.

At the opposing extreme is the error of utopianism. The legal utopian is not blind; he recognizes the existence of gaps between ideals and reality. Unlike the naive, the utopian sees the need for concerted effort to close these gaps. But in contrast to the cynic, the legal utopian believes that legal action alone will not only close the gap between law on the books and law in action but also, in doing so, can transform or dissolve structures of domination and hierarchy.

The position of those who accept the complex and contradictory nature of the legal order differs from all of these positions. The mediative perspective rejects blindness, and insists on a ruthless contrast of legal ideals with legal and social behavior, thus embracing the basic empirical program of the sociology of law. It eschews naïveté by expecting that dissonance will be frequent rather than episodic. It refuses to see *only* the gap, or to reduce legal ideals to a mere smokescreen for reality. But it does not embrace the delusion that changes in law and legal institutions alone—without changes in other aspects of society—can resolve the tensions or eliminate the gaps that social research identifies. Since this approach attempts to be both social in perspective and critical in method, I shall call it the program of critical social thought about law.

Adoption of such a program would bring a new realism to the study of law in society. By directing attention to the deep structures of legal life and consciousness, critical social thought might help us avoid some of the wild oscillations that have marked recent scholarship, from a naive utopianism, placing unlimited faith in the combined promise of social inquiry about law and of law as an instrument of social transformation, to total cynicism, pessimistic about both the value of social research on law and the potential of law to help secure and expand the values for which it seems to stand.

III. CRITICAL SOCIAL THOUGHT ABOUT LAW

How is this program to be realized? What differentiates it from that of Balbus, or of other scholars who have attempted to chart the "future" or "boundaries" of social research on law? These are difficult questions, to which I have only tentative and partial answers.

If the program is to be critical and social, it must be able to (1) develop standards for critical analysis of legal institutions; (2) examine the way these institutions actually function; and (3) explain behavior, including deviation from critical standards, in terms of general social theory. The first stage in such an enterprise must be to understand the nature of the social ideals which law is thought to foster, and to examine, empirically and theoretically, the purported relationship between legal institutions and these ideals.

This is a complex task. We are in a period in which the nature of legal institutions and the justifications for them are changing rapidly. In order to understand these changes and evaluate the reasons given for them, we need an analytic system general enough to survive short-run shifts and specific enough to be able to deal with new manifestations of law.

Such a system must begin with ideals basic to our society. It seems to me that the fundamental justifications for the legal order have been its contributions to *equality, individuality*, and *community*. So I propose that we examine law in terms of its contributions to these values.

At the same time, I want to look at the relationship between these ideas and certain features of the legal order. For this purpose, I have selected two features of legal order for examination: generality and autonomy.[6] These very general features of law are selected because much of the discussion about law in capitalist societies has been in terms of the relationship between these institutional aspects of law and the social values with which I am concerned, but the analysis can equally be employed to examine other characteristics of law.

I shall examine these ideals and institutional features and their relationships by stating them as "questions" that combine evaluation and description. These questions can be divided into two categories. The first deals with the extent to which the legal order realizes its own institutional ideals; the second with the relation between such realization and basic social values.

6. In selecting autonomy and generality for detailed analysis, I recognize that I may be focusing on features of legal life whose importance is more historical than contemporary. Scholars like Unger (1976a, 1976b) have suggested that a major characteristic of contemporary law is a shift from autonomy and generality in law, as well as from public and positive norms, to new forms of normative ordering that may be more effective in achieving equality, individuality, and community. The type of analysis I am suggesting is wholly consistent with such possibilities, and should permit evaluation of claims that these new forms of law will promote such values.

A. Generality and Autonomy

Generality and autonomy are key features of the liberal legal order. Societies may have systems of governance that employ edicts or commands that take the form of legal rules. But these may be addressed to specific individuals or groups, and may reflect the direct interest of a prince or ruling elite. Such systems involve law, but lack generality or autonomy (Unger, 1976a: 52-5). The question of generality, therefore, concerns the relationship between legal decisions and rules. To what extent are the decisions of government officials, including judges, made in accordance with preexisting rules, without regard to other features of the situation, such as unique characteristics of the parties or the broader political implications of the outcome?

The question of autonomy focuses on the relationship between official decisions and the interests of specific groups and classes in the society. The concept of legal order rests on the assumption that decisions are not only in accordance with rules, but that the rules foster the public interest. To suggest that a legal order is autonomous is not to say that it lacks contact with society, though this may sometimes be an unfortunate side effect. Rather, autonomy means independence from the interests of *any one class, group, section or party*. A legal order, therefore, is genuinely autonomous to the extent that it reaches decisions and adheres to processes that foster the interests of all citizens. The problematics of autonomy involve measurement of the extent to which decisions reflect general rather than specific interests and the explanation of instances in which the ideal of autonomy seems to be violated.

B. Equality, Individuality, and Community

While the questions of generality and autonomy deal with the extent to which our institutions approximate the ideal of the rule of law, the questions of equality, individuality, and community concern the effect of the rule of law on social life. Thus they chart the relationship between law as an instrumental ideal and the more basic values it is thought to promote.

A legal order is not an end in itself. The system must be justified by its contribution to more fundamental social ideals. Sometimes we lose track of this and tend to treat law as itself a fundamental goal, rather than a means to secure other values. When we do this, either we have forgotten the instrumental nature of legal order, or we have assumed that law is so inextricably linked to other more fundamental values that the achievement of legal order is tantamount to the achievement of these values

themselves. The questions of equality, individuality, and community are a way of making such assumptions problematic so that they can be the subject of critical analysis.

1. Equality

The concept of a legal order is intimately related to the idea of equality of persons. It is said that all are "equal in the sight of the law." The idea of legal order was one of the products of the rise of the idea of individuality. Liberal social thought rests on the idea that each individual is inherently worthy, and that official processes of social choice should give equal weight to the values of affected individuals (Michelman, 1968). But we know that individuals in liberal societies exist within hierarchies of wealth and power that can operate to deny the equality of treatment that the liberal ideal demands. The idea of a system of governance that is general and autonomous—i.e., a legal order—is liberalism's solution to the perceived discrepancy between the ideal of equality and the reality of hierarchy and domination.

In the liberal legalist ideal, equality means equality of treatment by the state. The autonomous legal order deciding in accordance with rules is therefore both the necessary and the sufficient means of ensuring such equality. For the critical thinker, on the other hand, this claim is problematic at best.

For the critical program, the question of equality requires several levels of analysis. The first is the critique of concepts. What is meant by the equality that is guaranteed by law? How does this ideal relate to such concepts as equality of opportunity or equality of substantive conditions?

The second level of inquiry makes problematic the cardinal claim of the legal order—to provide equal treatment. When Anatole France quipped that the law prohibits both rich and poor from sleeping under the bridges of Paris, he implied that the laws against vagrancy would at least be administered without regard to the wealth of the offender, whatever substantive significance such equal application might entail. But is it not also true that a rich man found by the Seine, sleeping off a heavy night of drinking, is less likely to be prosecuted or convicted of a crime than a poor man caught in the same situation? The critical program is interested in ascertaining the extent to which the legal system of liberal societies can in fact operate independently of the systems that allocate wealth, status, and power.

A third level is the potential conflict between ideals of substantive equality on the one hand, and the formalism that is entailed by autonomy and generality on the other. In order to attain

substantive equality, whether of opportunity or of wealth, status, or power, the state must intervene actively in social life. Is such intervention inconsistent with autonomy and generality, and thus with legalism itself? It may conflict with these ideals in two ways. First, such a program must have substantive criteria for favoring one part of society, whose condition will be improved, to the detriment of others, whose situation will be made worse. But how can such criteria be consistent with the ideal of a neutral autonomous state, which stands apart from particular social groups or interests? Second, a program of equalizing intervention requires substantial government intervention in all areas of life. But it may be impossible to operate such comprehensive programs effectively and still adhere to the ideal of generality, i.e., to a system in which the state acts only in accordance with rules set forth in advance of the decision.

2. Individuality

The classics of liberalism identify individuality as a primary value, and see law as necessary to its realization because without the protection of law, individuals will be subject to the stultifying restraints of traditional communities, the arbitrary whims of autocratic rulers, and the depredations of other self-seeking individuals. Once again, the critical program entails a multilayered examination of the nature of individuality and its relation to the legal order. First, it is essential to examine the idea of individuality itself. For liberalism, individuality is a process of self-realization, and law is a means of promoting such realization principally by erecting obstacles to those who would retard it. Yet do we still maintain a notion of the self that requires, and is satisfied by, such a negative definition of freedom? And even if such a concept of individuality were to secure our assent, one would still wish to make problematic the relation between legal order and individuality. For the idea of legal order suggests that law can be simultaneously autonomous from other structures of society, so that it is not merely an extension of the forces that threaten individuality, and yet sufficiently powerful in its impact on social life to curb these forces. The ideology of liberal legalism sees no necessary trade-off between the power and the autonomy of law; a more critical perspective requires us to determine whether the price of power is not a loss of autonomy. Thus, the question of individuality in the program of critical social thought about law encompasses normative and empirical examination of the relationship between law and individuality.

3. Community

The third value of liberal ideology is community. It may seem strange to assert that community stands on an equal plane with equality and individuality in the canon of social values purportedly guaranteed by an autonomous legal order. Legalist thought senses potential conflict between individuality and community (as well as between equality and individuality). Nevertheless, I believe that legal order does present itself as a guarantor of community. For the idea of governance in accordance with rules is an answer to the question of the form community takes in an individualistic yet nonegalitarian society. If community means sharing and participating in a larger whole, legalism promises a political community of citizens equal before the law as the greater entity in which the liberal individual can dwell (Nisbet, 1973:99; Hurst, 1950:439-48). Again, critical thought must examine both this concept of community, and the extent to which legal order can and does realize it.

C. Critical and Conventional Answers to the Questions

We are now in a position to see the relation between Balbus's concept of legal order and that reflected in some other trends in social thought about the law. By showing how Balbus has differentiated himself from liberals and from some other Marxists, we can see why I consider his work a contribution to a new "paradigm" of social thought about law. To do this, I propose to collapse several dimensions of the scheme I have developed. That is, I shall treat autonomy and generality as a single dimension, and the social values as a second dimension. In doing this, I can create a space within which it is possible to place—and contrast—Balbus and other trends in social thought about law.

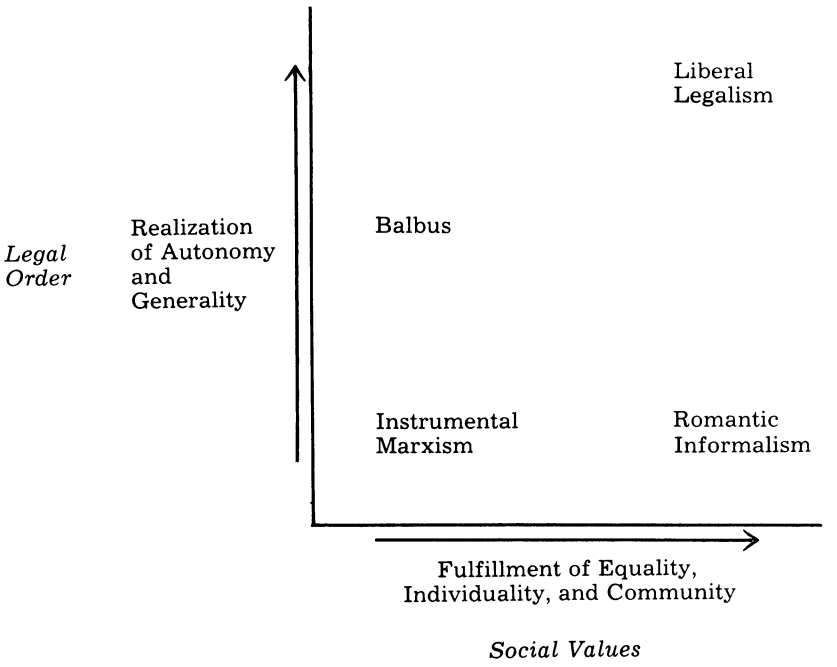
This analysis is the basis of Chart I, in which the vertical axis measures the extent to which the concrete legal institutions of a society are autonomous and general, and the horizontal dimension the extent to which the action or existence of these institutions contribute to equality, individuality, and community.

In analyzing this chart, it is important to recognize what it does *not* demonstrate. It is not based on my view of the actual relations between the several elements that comprise it: I think that it is entirely possible that there are conflicts among and trade-offs between elements included here in a single dimension, e.g., it may be that law can secure equality but only at some costs in individuality. Moreover, the chart only looks at the relations between social values and what could be called the "formal"

characteristics of law (or the characteristics of formalism), thus omitting the normative relevance of the informal dimension of legal life. It is, therefore, not the reflection of a theory of law but merely a heuristic device to analyze some issues raised by Balbus.

CHART I

THE RELATION BETWEEN LEGAL ORDER AND THE SOCIAL VALUES OF WESTERN CAPITALIST SOCIETIES AS REFLECTED IN SEVERAL THEORIES



Crude as it is, this chart helps us to see the relationship between several contemporary theories or "paradigms" that portray the relationship between the legal order of advanced capitalist societies and fundamental values championed in the ideological systems of these societies. At one extreme lies what Marc Galanter and I have called "liberal legalism" (Trubek and Galanter, 1974). This position lies at the upper right-hand corner of the chart, indicating that adherents of this view of law in society believe that the legal orders of capitalist societies can achieve autonomy and generality, and that, in so doing, they will necessarily secure equality, protect individuality, and achieve community. At the other extreme, one finds what Gold, Lo, and Wright call "instrumental Marxism" (1975). While liberal legalists see law as autono-

mous and general, instrumental Marxists see the legal system as a direct tool or instrument of the capitalists employed to further their class interest in maintaining an alienating and unjust social order. The instrumental Marxist expects all legal rules to favor capitalists, and predicts that the legal process will directly discriminate against the working class.

The real value of the chart, however, lies in the intermediate points that it generates. The first intermediate position is Balbus's own stance: the chart lets us see how Balbus differs from instrumental Marxism on the one hand, and liberal legalism on the other. In more recent discussions (1977), Balbus has made explicit the critique of crude Marxist instrumentalism that he began in *The Dialectics of Legal Repression*. This version of a Marxist theory of law, he says, overlooks the autonomous form and structure of the legal order in capitalist society. It fails to see that the legal order can be independent of the *preferences* of individual capitalists or even of the capitalist class as a whole, and nevertheless further the interests of that class. This apparent paradox is what Balbus was attempting to document in *The Dialectics of Legal Repression* when he tried to show that the criminal justice system continued to adhere to notions of due process and equal protection even in the face of a major threat to public order. His empirical work is meant to confront instrumental Marxism with the finding that law can be autonomous and general.

Thus, at the level of positive or behavioral prediction, Balbus is closer to the liberal legalists than to Marxist instrumentalism. His theory tells us that if we are trying to predict how legal institutions will behave in capitalist societies, we must assume that, at least to a point, they will adhere to their ideals of autonomy and generality. Legal norms will not represent direct statements of the interests of capitalists; legal equality will not be a mere sham; the poor and the rich will, to an extent, be treated equally if they commit similar offenses; civil liberties will not be abandoned on a wholesale basis even when the regime is threatened by rebellion.

This is the paradox that stimulated Balbus's theoretical work. As a Marxist critic of capitalism he must show that the rule of law denies genuine individuality, equality, and community. Yet as an empirical observer he shares the liberal legalist's belief that some of the pledges of the rule of law will be honored. Thus he must disagree radically with the liberal's view on the reasons why this will be done, and on the effect of such adherence to legality for members of the society. Where liberal legalists argue that we adhere to legality because the rule of law is an instrument through

which liberal society secures its most fundamental values, Balbus argues that this behavior is really the means by which these values are negated. This was asserted without a full theoretical justification in the *Dialectics*; in his later writing he has developed a more explicit theory to explain the apparent paradox. This theory constitutes a major refinement of the theory of legitimation first presented in the *Dialectics*.

In this theory, the capitalist mode of production itself negates the very ideals it generates. While capitalist (or liberal) ideology values individuality, equality, and community, the capitalist mode of production leads to increasing inequality of income and power, to domination and destruction of genuine individuality, and to the rupture of communal ties and thus alienation. At the same time, the legal order of capitalist society, by the very fact that it is autonomous and general, obscures and mystifies these relations of inequality, domination, and alienation. By treating all persons as equal, the legal order helps mask their inequality. And by asserting that all are joined by their common citizenship, it hides the conflicting interests of workers and capitalists. In his more recent discussions of legitimation (1977), Balbus has analogized law in capitalism to money, seeing both as media through which real relations are masked, and the antagonistic nature of social relations obscured.

It is the notion of mystification that allows Balbus to explain what remained unexplained in the *Dialectics*: how capitalism pursues its ends even when it seems to deny them by honoring the pledges made through the rule of law. If law were the crude instrument of class interest suggested by instrumental Marxism, it would fail to mystify. To succeed in being nonautonomous, that is, effectively to maintain capitalist relations, the law must in some sense, be genuinely "autonomous" from the direct needs and ends of capitalists.

What Balbus has done, tentatively in the *Dialectics* and more fully in subsequent writings, is to break the stifling debate between instrumental Marxism and liberal legalism. I think that this debate has held back the development of social theory about law by falsely polarizing the issues. He has opened a conceptual door by showing that it is possible to achieve autonomy and generality without achieving equality, individuality, or community: as critical social theorists we should welcome this move.

Where Balbus and I disagree, if at all, is on the question whether the legal institutions of liberal capitalism necessarily and completely deny the ideals they purport to express. Where I am prepared to leave open the possibility that these structures may

further liberal ideals, or at worst "corrupt" them only partially, he is convinced that the very acceptance of the structure is a negation of the ideals in their "genuine" form.

Either because of an inherent pragmatism, an incurable professionalism, or a residual liberal legalism, I prefer to leave these questions open, to be resolved by concrete studies and not by sweeping theoretical generalizations. Thus I see room for more specific investigations of the relationships between both the ideological and the practical impact of legal doctrine and legal behavior, on the one hand, and the social ideals of legality, on the other.

In calling for a "new realism," therefore, I advocate a program of empirical studies that would illuminate the way in which formal law may realize, as well as deny, individuality, equality, and community. At the same time, I would like to see us investigate the potential for less differentiated, more particularistic forms of normative ordering within our society, and the contribution of such less "formal" structures to the furtherance of the social ideals.

The latter point is worth stressing. While keeping open the possibility that the development of the formal legal order may promote the basic liberal values, critical social thought about law should be prepared to examine another possibility, ignored by Balbus and rejected by liberal legalists, namely, that informalism in law may promote the social values more effectively than formalism. In recent years we have seen a renewed interest in informalism. There have been calls for various reforms that would lead to less formal processes of dispute settlement. These have ranged from proposals that judges make more particularistic or individualized decisions in specific cases to more radical recommendations for restructuring dispute settling processes through the introduction of mediation, popular tribunals, and neighborhood "moots" (e.g., Nader and Singer, 1976; Danzig and Lowy, 1975). At the core of these several calls for informalism is a belief that the formal structures of law themselves threaten the basic values, and that departures from legal formalism will further the realization of those values.

There are, of course, many variants of informalism. At one extreme is a position I have labelled "romantic informalism." This viewpoint sees law alone—and not the social and economic structure of capitalist societies—as the barrier to realization of the liberal social values (e.g., Pepinsky, 1976). Thus, the romantic informalist argues that changes in legal structures will, of themselves, promote individualism, equality, and community.

In confronting romantic or other versions of legal informalism, critical social thought will find itself dealing with problems similar to those presented by instrumental Marxism and liberal legalism. All these positions deny the importance of that tension between normative ideals and social structure that I believe to be a major key to understanding the dynamics of law in liberal societies. Instrumental Marxists see the relation between ideals and reality as hypocrisy, but not as tension, for the hypocrisy maintains rather than challenges the reality. Liberal legalists and the romantic informalists deny the existence of either hypocrisy or tension. Both really see normative structure and social structure as harmonious. For legalists, this harmony lies in the congruence between the formal legal system and the structure of society. For the informalist, the harmony is latent in an informal normative order that will be revealed once the errors of legalism are abandoned, and we are freed from the straitjacket of legal formalism.

IV. THE CONSTRUCTION OF CRITICAL SOCIAL THOUGHT ABOUT LAW: PERSPECTIVES AND EXAMPLES

At this point the reader may begin to ask: is the "new realism" of critical social thought about law to be defined merely in negative terms? Is it something more than the rejection of liberal legalism's evolutionary optimism about law and justice, informalism's hope for redemption by abandoning legal order, or Balbus's pessimism about the ultimate impact of the "relative autonomy" of law on an alienating and unjust social order? While admitting that my ideas have been formed more as critique than as program, I also recognize the importance of moving beyond critical analysis to the development of a positive conception of the enterprise and concrete delineation of its plan of inquiry. Let me conclude this essay, already overlong, by addressing these questions in a tentative way.

A. Law as Social Criticism

The starting point of this task lies in the recognition that law itself is a form of social criticism. The very idea of a legal order is based on the existence of conflicts between the ideals and the social structure of liberal or capitalist societies. It is, as I have noted, only because as "liberals" we perceive that the power of the state and private institutions may threaten individual freedom that we seek to erect and preserve a legal sphere and power that is autonomous from such sources of potential domination. Similarly, it is only because we sense that modern industrial society does rupture communal bonds that we look to the law as an alternative

way of binding men together in a social whole. And it is because we recognize the illegitimacy of aspects of existing hierarchy that we seek to construct a sphere of social life in which such hierarchical relations are not dominant.

This view of law in modern society is widely shared. Even the most instrumental of Marxists will agree that some of the *ideals* articulated in our legal tradition are worthy social aspirations. And even the most confirmed liberal legalist admits that there is some gap between these ideals and social reality. The question that divides the several points of view is the meaning of this "gap." For some, the legal order is a valid source of critical ideas and action: it is the source of liberating hopes and focus of hope for liberation. For others, like Balbus, the liberal face of law is a threat to the liberal values it proclaims: from his perspective, every victory in the effort to create a liberal counterforce to illiberal power is in fact a defeat. Where others might take some comfort in the legal victories of the civil liberties movement in America and see the possibility for social movements to use law to protect the rights of individuals, reduce inequality, or lessen alienation, Balbus must see "victories" as symbolic at best, and thus conclude implicitly that such efforts by "have-not" groups can only strengthen their enemies.

B. Legitimation and Social Change

The position I would espouse has distinct similarities to that which I have found in Balbus. I recognize, as he does, the negative possibilities of legalism. In seeing law as a way of mediating between ideals and social structure, critical social thought about law recognizes an inherent potential in legal systems to mask hierarchy, offer false hopes of community, and protect inequality. Yet it should also remain aware that the contradictions and tensions that arise in the process of mediation provide opportunities for realizing these values.

Does this position differ from that espoused by Balbus? It is hard to tell from his writings to date: the theory of legitimation which he began in the *Dialectics* and has developed in later work is incomplete. But Balbus's work is part of a growing Marxist literature on the theory of the state in modern capitalist societies (Gold *et al.*, 1975). Balbus has focused more specifically on judicial behavior than most writers in this tradition, but he obviously shares many of the ideas that have been articulated by writers such as Poulantzas (1973), Offe (1975), and O'Connor (1973).

This is not the place to survey, summarize, or analyze this complex literature. We should be thankful to Balbus for introduc-

ing the general themes of the Marxist theory of the state into the more narrow subjects dealt with in the sociology of law. It is clear that this literature has much to offer our field. In particular, there is much to be learned from the discussion of legitimacy, which has become a topic of increasing importance in Marxist theory of the state (Gold *et al.*, 1975).

Many writers in this tradition, like Balbus, reject instrumental Marxism and recognize the "relative autonomy" of the capitalist state and thus of the legal order. They recognize that the legal systems of capitalist societies will adhere to "formal rationality" in Balbus's sense even if to do so might be against the immediate interests of specific capitalists or the capitalist class. They argue that the economic policy of the capitalist state may provide specific benefits to workers even where this may not directly coincide with the interests of capitalists (Poulantzas, 1973: 193-94). Moreover, writers like Offe (1975) and O'Connor (1973) argue that the capitalist state must perform direct economic functions and at the same time legitimate the capitalist mode of production. These roles are seen as potentially contradictory, so that state activities aimed primarily at maintaining the economic system may be in conflict with the state's need to appear as a neutral arbiter of social conflict.

Thus many Marxist theorists of the state, like Balbus, recognize that legitimation needs will cause the capitalist state to make pledges to the dominated classes. Balbus shows how the pledge of equal treatment under the law must be honored *even* when it conflicts with the interests of the capitalist class, if the legitimacy of the system is to be preserved. Since this is the case, one might expect that writers in this tradition would accept the thesis I have suggested: it is possible that the pledge of the legal order to advance the values of equality, individuality, and community may be redeemed. However, there are important features in this body of thought that make such acceptance difficult. The first is the normative assumption of Marxism that the capitalist mode of production by its nature denies these values. The second is the "empirical" assumption that the autonomy of the state and of the legal order is only "relative"—that, as Poulantzas puts it, the behavior of the legal order is determined "in the last instance" by the structure of the capitalist mode of production (1973:11-16). Since capitalism denies the social values, and since the behavior of the political and legal apparatus of the capitalist state is determined ultimately by the need to preserve that mode of production, the pledges of the legal order will be honored only to the extent that they legitimate the capitalist state without altering the structure

of a system that denies the values in whose name those pledges have been given.

Thus the logic of this position suggests that legitimation needs can lead to social change, but never to any change that will further the social values of equality, individuality, and community. It is obvious that I do not accept this ultimate conclusion, and that to the degree that it does follow from the premises on which Balbus and others are operating I reject those premises as well.

This conclusion forces me to articulate an alternative position on the dynamics of legitimation in liberal capitalist societies, one allowing the existence of a potential for change that will further these values. In this essay, I can only begin to outline such a theory, first by contrasting it to what seems to be that represented by Balbus, and then by suggesting the basic elements of my own views.

My view is that political power in modern society derives in a significant degree from legitimacy. Following Weber I would argue that the state cannot exercise effective power unless it is accepted as legitimate. Further, I would contend that a state cannot maintain legitimacy for long periods of time if the reality of its behavior is in marked contradiction with the claims it makes for legitimacy.

To this I would contrast what seems to be Balbus's position, as I understand it. Balbus and others seem to assume that there is no necessary relationship between the power of the state and the extent to which the ideology legitimating the state accurately describes the way the state behaves. Thus, they may believe that the extent of state power in capitalist societies is really independent of whether anyone believes that the state acts on behalf of all citizens or, alternatively, that the public will accept the theory that the state does act in the public interest even when it is repeatedly demonstrated that the state is serving the interests of much narrower groups or classes. In contradistinction to these views, I would suggest that the modern state cannot refuse to redeem at least some of the pledges it makes without losing its effective power, so that the need to maintain legitimacy will impel the state to make changes when the gap between ideal and reality becomes apparent.

I find support for this view of the legitimation process as a motor for change, rather than a brake upon it, in recent writings by Roberto Unger. Unger sees the "dialectic interplay between the organization of power and the forms of its legitimation" as a principal source of social change. This observation is based on the view that at every stage in human history the dominant culture of

a society will, in order to maintain social integration, present the prevailing mode of social organization as the best solution for the satisfaction of genuine human needs at the moment. Further, it asserts that the resulting body of ideas has legitimating effects because of its perceived truthfulness. In this view, ideals like that of legal order do contain essential insights into what it means to be human, and into the nature of a humane society, and thus offer critical standards for social self-evaluation (Horkheimer, 1974: 178). At the same time, this point of view recognizes that the claim by any set of institutions to have achieved these universal values is empirical and therefore open to challenge; and that effective demonstration of the falsity of the claim will generate pressure for change. Critical analysis of the relationship between claim and reality is itself a source of possible change towards a more humane society (see Habermas, 1975).

To this view of the legitimation process, I would urge the addition of sociological insights drawn from Weber. If we are to assume that law has potential for liberation as well as repression, we must be able to demonstrate that the critical potential in the legal tradition is, or at least can be, institutionalized in a society some of whose other social structures are grounded on contradictory principles. For example, if the legal idea of equality remains just an idea, how could we expect it to affect hierarchical systems that are based on inequality?

The answer to this lies in the possibility that the ideals will themselves become the basis for the institutionalization of concrete interests. This possibility lies at the core of Weber's sociology of law. It was crucial for Weber's general theory of the rise of capitalism to demonstrate that certain features of European society, including the autonomous legal order, preceded and were not created by capitalism (Trubek, 1972). But to do that he had to explain how the idea of law became institutionalized without the intermediation of a capitalist class whose material interests required such a system, and also why this structure operated, even in mature capitalist economies, in ways that were not consistent with the direct needs of capitalists. Weber's answer to this puzzle was that lawyers as a status group organized around the ideals of an autonomous legal order. These ideals formed the basis for group cohesion, and for the lawyers' social and material position in society. Since lawyers had concrete interests in the ideals of law, they became, in social and political struggles, an interest group that worked for the promotion of these ideals (Weber, 1968:853-55; Bendix, 1962:115, 415-16).

In accepting this Weberian insight, however, we should not make the error of assuming that lawyers as a class are somehow necessarily committed to the liberating ideals of liberal legalism. Weber himself suffered from no such illusions: he doubted whether lawyers *as a class* manifested any particular "ideological affinities" to particular power groups or ideals (Weber, 1968:876). I am sure Weber would have agreed with critical analysts like Hurst (1950), Auerbach (1976), and Galanter (1976:945), who have pictured the legal professions of modern societies not as closed guilds or secular priesthoods, but rather as loose congeries of subgroups each allied with different strata of society. Thus, for example, the senior partner in a Wall Street firm has more in common with the Board Chairmen of his clients than with a legal services attorney practicing in Harlem. These two lawyers may share a rhetorical commitment to such ideals as equal justice under law, but they will undoubtedly find radically different ways of interpreting this ideal in concrete cases. Even if we find some legal ideals institutionalized within the profession, we should expect those ideals to be diffuse, and subjected to complex and contradictory pressures that reflect the partial articulation of the profession with the very structures whose threat to liberal values may explain the development of the legal ideals. At the same time, we should not look exclusively to the legal profession for institutional support for the ideals of the legal order. Many social movements, such as the NAACP and the ACLU, reflect a more substantial commitment to the values of legalism than that of the organized Bar (Rabin, 1976).

The process of legitimation, as I see it, involves a complex interaction between consciousness and structure, and thus between ideals and their negations. Legal order as an ideal is a constituent part of the dominant consciousness of liberal, capitalist society. The system must promise equality, individuality, and community if it is to maintain legitmacy. And it must incorporate these ideals in concrete structures; in the case of the United States, these include a distinct legal profession, an autonomous judiciary, and a set of processes for the making of public decisions. These structures, however, are subject to crosscutting pressures. To serve their legitimation function they must seem to fulfill the ideals they claim to be incarnate; yet to fulfill these ideals involves conflict with the structures of domination and hierarchy whose presence makes the legal order necessary. This tension is repeated within the consciousness of individual actors in the legal system, and built into the social roles that it establishes. Legal professionals internalize the universal ideals of the liberal legal order, yet are

simultaneously loyal to, and serve, their specific strata. Social movements may mobilize the symbols of legality and employ legal procedures to wrest real victories at the expense of dominant groups; yet this very commitment to legality may forestall other forms of activity—e.g., political mobilization, or ideological challenge—that might effect more substantial or enduring change.

Because the system is in tension, it is difficult to predict the outcome of individual controversies. The particular constellation of forces at any given point in time will, in this view, be important in determining the resolution of specific struggles. *Contra* Balbus, I see the system as partially open and flexible, and therefore as offering support for moral and political "entrepreneurs" who can take advantage of the pressures of ideals and the legitimation needs of the system to effect changes that can further genuine equality, individuality, and community.

To illustrate this analysis, I wish to look at one recent movement for change within the legal system: the effort to create a subsidized "public interest" bar in the United States. This movement, I shall argue, has been impelled by a legitimation crisis created by the confluence of intellectual changes within the legal profession and popular recognition of the manipulation of legal processes by powerful groups in the society. Although this movement may have only limited impact on the practical affairs of the nation, it does illustrate the interplay of ideas and institutions in legal life. It demonstrates that the legal tradition can be a source of social criticism, and that the legitimation needs of the system can make possible the partial institutionalization of critical ideas. At the same time it identifies the crosscutting pressures of legal ideas, institutions, and extraprofessional allegiances that may undermine such reforms.

C. Critical Analysis Illustrated: The Disintegration of Formalism and the Rise of Public Interest Law

To understand the relationship between public interest law and legitimacy needs, we must first trace the development of a long-term trend in legal consciousness—the decline of formalism. I use formalism here in the broadest sense to refer to a set of beliefs about lawmaking and law finding. These beliefs include a faith in the possibility of creating rules, and in autonomous modes of legal thought that will ensure that rules are followed. Formalism, in this sense, provides the underpinning for the idea of legal order itself, as Unger has suggested:

> In the most general sense, formality means simply the marks that distinguish a legal system: the striving for law that is general, autonomous, public and positive. The idea of formality emphasizes the

> deeper motives that inspire the quest for government under law. Formality views the core of law as a system of general, autonomous, public and private rules that limit, even if they do not fully determine, what one may do as an official or private person. [1976a:204]

Among the hallmarks of formalism are the quest for rules that will control bureaucratic discretion, and for neutral principles and autonomous modes of reasoning that will determine the outcome of decisions (Kennedy, 1973). Formalism can be seen as one attempt to create a legal order that can perform a mediating function. For the formalist, all social values are arbitrary (Unger, 1975: 119-21). Since this is the case, any exercise of state power that is not consented to threatens basic values. Because power must reflect the arbitrary desires of some social group, it must oppress the nonconsenting individual and is, by that token, a denial of community and individuality. Formalism claimed to mediate between subjective values and a potentially hostile environment by ensuring that state power could not be used for partisan ends.

Today we witness a decline of faith in formalism. Skepticism about the possibility of neutral principles and autonomous modes of legal reasoning saps the belief in the viability of the formal model. New social needs have impelled the state to create intrusive, extensive, highly complex mechanisms of regulation and distribution for which the model of rules is inappropriate. And the growth of major centers of private bureaucratic power have undermined the belief that controlling the state will guarantee freedom from domination. We begin to believe that autonomy is a myth, and that generality is inconsistent with the modern role of the state. The model of rules appears to many as at best an anachronism that must be replaced, and at worst a mask behind which cynics manipulate the state to their own advantage.

Thus it is my thesis that the decline of belief in formalism will generate a legitimacy crisis, at least within the legal elite. Here we confront a paradox: the doubts that erode confidence in formalism tend to be experienced only by those who have a substantial stake in maintaining the idea of legal order. The idea of legal order is a prominent part of the consciousness of legal professionals. It also suits the self-interest of lawyers to assume that through the operations of the legal system society will secure the values of equality, individuality, and community. Thus lawyers have both an ideal and a material interest in the doctrines of formalism. But at the same time it is lawyers who are most thoroughly exposed to critiques of such doctrines. Not only do they have daily experience with the way the system is manipulated; they also are among the few groups with the professional background and concern necessary to master the complex jurisprudential and sociological argu-

ments that form the critique of formalism. Thus it is to be expected that the loss of faith in formalism, and thus in legal order itself, will be particularly traumatic for the legal elite. One would predict that the issue of formalism would generate strong and conflicting reactions.

There are at least three possible reactions to this critique. The first is to deny that it exists, to proclaim the dogma of formalism even more loudly, condemning its critics as cynics (or worse). The second is to reject the quest for equality, individuality, and community in public life, seeking to realize those values only in a purely private sphere of existence. The third is to find within the formalist tradition the basis for a critical postformal law.

It is this third possibility that I want to explore. Formalism can be seen as the expression of a general social desire for equality, individuality, and community, and a criticism of existing society for denying or threatening these values. If the formalists did not condemn and fear illiberal forces, they would have had no justification for the system they erected. Legal formalism was an answer to a set of genuine human needs. But as we come to recognize that these needs cannot be satisfied through the mechanisms of formalism, the question arises: can the postformalist legal tradition revive the critical insights on which its predecessor was built? Can the formalist legal tradition be transformed from a shield against hostile powers to a sword, an instrument for direct attack on inequality, domination, and alienation?

This will be a major issue in future social thought about law. I cannot even begin to answer it in this essay. Rather, I wish to conclude by giving a brief example of how the legal tradition can simultaneously generate a critical, postformalist approach to law, and yet threaten the full realization of such an approach.

The phenomenon I wish to examine is public interest law. This is a movement, led almost exclusively by lawyers, to establish organizations that can provide subsidized advocacy services to various groups in the society who cannot secure legal representation through the normal fee-for-service system. Public interest law firms deal with problems of the poor, but they also represent nonpoor groups like consumers, environmentalists, children, women, and the elderly (Council on Public Interest Law, 1976).

Public interest law is both critical and nonformal. Most public interest lawyers recognize that effective advocacy for unrepresented groups requires a much wider range of skills than traditional formal legal advocacy. They see all aspects of government as part of a political process: while rules and formal modes of legal thought may have some marginal relevance in advocacy, the task

of representation involves a dialogue between the advocate and decision-makers of all types. A good public interest law firm is, in the words of a critic of this development, a "citizen advocacy center" (Glazer, 1975).

Not only is the mode of advocacy inspired by postformalist legal thought: the movement can be seen as a transformation of the critical insights of formalism into an affirmative program for transforming state and society. Public interest law is based on a critique of the failures of the traditional model of law and professional organization, a critique formulated in terms of the ideals of the tradition itself.

The basic ideals that public interest law is pledged to uphold are commonplaces of the tradition of legal formalism: that state decisions should not favor one group at the expense of another, and that all citizens should be equal in the sphere of life controlled by law. Public interest law, however, asserts that the traditional institutions of law fail to secure these ideals (Lazarus, 1974:270; see also Council for Public Interest Law, 1976:5). The very name of the movement is a rebuke to the rest of the bar, which believes that all law and lawyers, without adjectives, are guarantors of equality and neutrality. The public interest law movement rests on a criticism of two features of the traditional model: the capacity of judicial review to correct administrative bias, and the adequacy of the fee-for-service system of allocating legal services in modern societies.

Public interest lawyers assert that fee-for-service means that not only the poor, but many other groups or interests in the society lack access to fora in which decisions are made that significantly affect their lives. Moreover, they claim that government agencies are biased in favor of organized interests, and that classical rule of law models are insufficient to curb that bias. The public interest law firm, a subsidized general advocacy center that can employ a range of techniques from research through lobbying to litigation on behalf of "underrepresented groups," is offered as the corrective for these defects.

Public interest law is basically a movement in the legal elite. Of course, it has benefited from popular dissatisfaction with government that characterized the late 1960s and early 1970s. But the movement has remained dominated by lawyers disturbed by the gap between the promise and the reality of law in America (Lazarus, 1974: 280-81; see generally Council on Public Interest Law, 1976; 3-76). It reflects the capacity of the legal tradition to generate critical ideas, and the possibility that these ideas can become institutionalized. At the same time, the institutional

fragility of the enterprise may mean that its potential for change will never be realized.

In addition, the very professionalism of public interest law contains contradictions that could blunt the critical impact of the movement. It is not surprising that legal thought has failed to make a clean break with formalism, since the profession has long been organized around this ideal and, furthermore, postformal thought raises the specter of deprofessionalization, or at least demands a redefinition of professional roles. Public interest lawyers have been criticized for sharing the pervasive professional bias in favor of procedural as opposed to substantive justice, for professional rather than lay advocacy, and for litigation in lieu of more direct modes of political action (Handler, 1976). Moreover, the professionalism of the movement may impede its capacity to focus attention on the role of the bar and the symbols of formalism in maintaining existing systems of bias and inequality. Public interest lawyers have drawn attention to the bias of bureaucracies and the contribution of lawyers for the affluent and organized in the maintenance of that bias, but they have also been tempted to offer the subsidized law firm as an all-embracing corrective, thus deflecting attention from the need for more radical reorganization of state institutions and more direct forms of advocacy and participation (see Trubek, 1977).

Thus, the public interest law movement can be seen as a response to a legitimation crisis, but a response whose ultimate effect on society is uncertain. Conceived as a reaction to the loss of faith in traditional legal models, the movement illustrates how legitimation needs can lead to institutional change, thus creating new institutional actors whose presence may affect the outcome of specific controversies. But if the movement also persuades us that a very limited and token response to this crisis is adequate it could fulfill the most pessimistic predictions of scholars like Balbus about the potential of law for mystification. The negative possibilities of the movement are clear, and may be aggravated by its current financial crisis. Public interest law is a tiny movement: fewer than 600 lawyers in under 100 firms, or about 0.0015 percent of the approximately 400,000 lawyers in the United States (Council on Public Interest Law, 1976). Yet even this small enterprise is threatened with extinction because of the decline in financial support from the foundations that provided the impetus for the expansion of the movement in the late 1960s and early 1970s. Financial pressures affect not only the number of public interest lawyers, but also the way some of the leaders of the movement define public interest law itself. For example, a recent report,

designed to mobilize support, adopts a professional and relatively apolitical model of public interest law, thus rejecting more populist models (see Council on Public Interest Law, 1976). Moreover, the movement has had to seek financial support from the very agencies it has criticized, and from the organized bar it opposes before those agencies, which creates the risk that needs for institutional maintenance could take precedence over the movement's social and political goals (see Trubek, 1977).

CONCLUSION

The foregoing sketch of the tension between ideals and reality in the legal profession was meant merely to illustrate the kind of analysis that should follow from the adoption of the critical stance I have called for. It is superficial and incomplete: a vast number of empirical and theoretical questions need to be addressed before a final verdict can be passed on this social movement in the history of American law.

Indeed, the paradoxes of public interest law are merely the current manifestation of the tension between legal ideals and economic, political, and social forces, which has always shaped the behavior of the legal profession in American society. A generation ago Willard Hurst subjected the profession to a critical scrutiny which led him to conclude that the profession had failed to realize its own ideals. In an analysis strikingly similar to the one I have been urging, Hurst argued that law was a potential source of general values in a fragmented society and thus a possible mediator between conflicting factions, and between individuals and centers of private economic power. Moreover, he felt that lawyers have presented themselves as furthering that goal. Yet, he concluded, a close scrutiny of what lawyers do suggested that they had contributed more to social fragmentation and economic domination than to the realization of the general welfare and their own professional ideals (1950:249-378, 439-46).

Looking back on Hurst's critical history of the growth of American law, we can realize how long the program of critical social thought about law has been with us, and how little we have done to develop it. That is the task that is now before us.

The outlines of the agenda of critical social inquiry on law seem clear. Our program must be concerned with an analysis of the tension between ideals and reality in the legal order, and of the relations between law and society. It will have to admit the normative character of social research, while avoiding the temptation to rely on the subjective preferences of individual researchers as the source of normative guidance. It will have to be empirical and

historical, without becoming detached or technocratic. It must be concerned with the gap between the ideals of the law and its reality, between law in the books and law in action, without falling into the belief either that all such gaps are inevitable or that any is merely accidental. And it must frankly recognize the responsibility of the scholar both to identify those values that have general validity and to test the performance of existing institutions against these values: it is a necessary part of my thesis that the future of individuality, equality, and community are inseparable from the commitment of the scholarly community to the critical analysis of these ideas and their realization in legal and social behavior.

Finally, we must be prepared to accept the obligation such a commitment entails. These social ideals are not clear; and as Balbus warns us, they may be corrupted by the structures in which they are embedded. The program I envision is no mere mechanical comparison of ideal and reality, as one might compare a Supreme Court ruling with police behavior. Rather, it involves an effort to develop the ideals at the same time as we deepen our understanding of the structures in which they are embedded. Such analysis may, and often will, require us to conclude that the ideals can only be realized by transcending the structures, and may even involve transcendence of the ideals themselves.[7]

This program will not appeal to all who think of themselves as students of law in society. It rejects the apparent purity of positivism, which seems to promise an escape from the dilemmas of seeking to conduct an objective study of subjective states of mind or values.[8] While the appeals of positivism are great, it is my belief that a "pure" sociology of law can only be achieved by ignoring the tension between legal ideals and social behavior, and thus by abandoning the study of fundamental aspects of law in modern society. Similarly, the program eschews the equally seductive comforts of normative evolutionism, thrusting individual scholars and the scholarly community into a universe that is complex, contradictory, and indeterminate. Yet I believe that there is no other world in which we can work.

Because I think that many scholars have recognized the necessity of normative inquiry, and accepted the responsibility of critical analysis, I think that this call for a "new realism" will not go unheeded. Indeed, I think the readers of this review will find the perspective outlined here neither novel nor troubling: is it not

7. I am indebted to Tom Heller for pointing out this feature of critical legal studies. It is implicit in the discussion in Section III B, *supra*.
8. For the clearest statement of positivism, see Black (1972, 1976). For a critique that has much in common with the position outlined here, see Nonet (1976).

the basic tradition of the law and society movement in this country, and the inspiration for many of the studies that have appeared in this review? If this supposition is correct, then I think the reader will conclude that there is nothing "new" about the realism I have described, and that "critical social thought about law" is what we have been doing all along. I think that those who share this view will see my essay in the spirit it is offered: as an effort to continue a tradition in which we can take great pride, and as a suggestion of tradition. I hope they share my sense of exhilaration in the possibilities that this tradition offers.

REFERENCES

AUERBACH, Jerold S. (1976) *Unequal Justice: Lawyers and Social Change in Modern America*. New York: Oxford University Press.

BALBUS, Isaac D. (1973) *The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts*. New York: Russell Sage Foundation. (2d ed. Edison, N.J.: Transaction Books, 1976).

——— (1977) "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," 11 *Law & Society Review* 571.

BENDIX, Reinhard (1962) *Max Weber, An Intellectual Portrait*. New York: Anchor.

BLACK, Donald J. (1972) "The Boundaries of Legal Sociology," 81 *Yale Law Journal* 1086.

——— (1976) *The Behavior of Law*. New York: Academic Press.

CARL, Beverley (1972) "Erosion of Constitutional Rights of Political Offenders in Brazil," 12 *Virginia Journal of International Law* 157.

COLE, George F. (1975) Review of Isaac D. Balbus, *The Dialectics of Legal Repression*, 69 *American Political Science Review* 263.

COUNCIL ON PUBLIC INTEREST LAW (1976) *Balancing the Scales of Justice, Financing Public Interest Law in America*. Washington, D.C.: Council on Public Interest Law.

DANZIG, Richard and Michael LOWY (1975) "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner," 9 *Law & Society Review* 675.

FEELEY, Malcolm (1976) "The Concept of Laws in Social Science: A Critique and Notes on an Expanded View," 10 *Law & Society Review* 497.

GALANTER, Marc (1976) "The Duty *Not* to Deliver Legal Services," 30 *University of Miami Law Review* 929.

GLAZER, Nathan (1975) "Towards an Imperial Judiciary?" 41 *The Public Interest* 104.

GOLD, David A, Clarence Y. H. LO, and Erik Olin WRIGHT (1975) "Recent Developments in Marxist Theories of the Capitalist State," 27 (5) *Monthly Review* 29 (October); 27 (6) *Monthly Review* 36 (November).

HABERMAS, Jurgen (1975) *Legitimation Crisis*. Boston: Beacon Press.

HANDLER, Joel (1976) *Social Welfare Groups and Legal Reform*. Mimeograph.

HORKHEIMER, Max (1974) *Eclipse of Reason*. New York: Seabury Press.

HURST, James Willard (1950) *The Growth of American Law*. Boston: Little Brown.

KENNEDY, Duncan (1973) "Legal Formality," 2 *Journal of Legal Studies* 351.

KUHN, Thomas (1970) *The Structure of Scientific Revolutions*. 2d ed. Chicago: University of Chicago Press.

LAZARUS, Simon (1974) *The Genteel Populists*. New York: Holt, Rinehart & Winston.

MICHELMAN, Frank (1968) "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 81 *Harvard Law Review* 1976.

NADER, Laura and Linda SINGER (1976) "Dispute Resolution in the Future: What are the Choices?" 51 *California State Bar Journal* 281.

NISBET, Robert (1973) *The Social Philosophers*. New York: Thomas Y. Crowell Co.

NONET, Philippe (1976) "For Jurisprudential Sociology," 10 *Law & Society Review* 525.
O'CONNER, James (1973) *The Fiscal Crisis of the State*. New York: St. Martin's Press.
OFFE, Carl (1975) "Theory of the Capitalist State and the Problem of Policy Formation," in L. Lindberg, R. Alford, C. Crouch and C. Offe (eds.) *Stress and Contradiction in Modern Capitalism*. Lexington, Mass.: D.C. Heath.
PEPINSKY, Howard (1976) "Preventing Crime by Challenging the Rule of Law." Paper presented in the panel on Crime and the Rule of Law, at the annual meeting of the American Political Science Association in Chicago, September.
POULANTZAS, Nicos (1973) *Political Power and Social Classes*. London: New Left Books.
RABIN, Robert (1976) "Lawyers for Social Change: Perspectives on Public Interest Law," 28 *Stanford Law Review* 207.
SAGARIN, Edward (1975) Review of Isaac D. Balbus, *The Dialectics of Legal Repression*, 420 *Annals of the American Academy of Political Science* 212.
THOMPSON, Edward P. (1975) *Whigs and Hunters*. New York: Pantheon.
TRUBEK, David M. (1972) "Max Weber on Law and the Rise of Capitalism," [1972] *Wisconsin Law Review* 720.
——— (1977) Book Review, [1977] *Wisconsin Law Review* 303.
TRUBEK, David M. and Marc GALANTER (1974) "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," [1974] *Wisconsin Law Review* 1062.
UNGER, Roberto Mangabeira (1975) *Knowledge and Politics*. New York: Free Press.
——— (1976a) *Law in Modern Society*, New York: Free Press.
——— (1976b) "Social Theory." Lectures delivered in Harvard College, Spring Semester.
WEBER, Max (1968) *Economy and Society*, 3 vols. Edited by Guenther Roth and Claus Wittich. New York: Bedminister Press.