Law and Societies

Abstract
Professor Fitzpatrick offers an examination of bourgeois legality as the concrete embodiment of modern law. Citing examples from the prison system and the workplace, he finds that modern law exists in certain relations of opposition and support with other social forms. From these relations, certain modes of convergence and separation between law and other social forms are identified and explored. To test the utility of this analysis, Fitzpatrick provides an extended application to traditional scholarship about the nature of law and its relation to society. The central focus in this enquiry is the idea of integral plurality as a vehicle by which the abstracted, unitary and universalistic pretensions of the modern legal system may be exposed.
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... and even the sensitive animals tell that we’re not very surely at home here in this encodified world. Perhaps we have still one special tree on the hillside we pass every day that we notice, we still possess yesterday’s street and the devoted persistence of an old habit which decided it liked us and stayed with us.

I. INTRODUCTION

“Law and Societies” is a gentle play on the title of the lecture series, “Law and Society,” held at Osgoode Hall Law School in 1981-82. In various ways, that series provided the origins for this paper. The title encapsulates the central theme of the paper: that state law is integrally constituted in relation to a plurality of social forms. This is called the theme of ‘integral plurality.’ In its development, the theme exposes the limits of viewing law as “typically public, unified and direct in its operation.” This idea of law creates a distortion; liberation from it opens up radical possibilities for the study and the politics of law.

In outline, the paper takes the familiar academic field of legal plu-
ralism as a point of departure. In sustaining the idea of a persistent plurality of legal orders, legal pluralism has proved an enduring, if marginal affront to unitary, state-centred theories of law. Yet its own relation to the state, and to state law, has been distinctly ambivalent. Some of its adherents attribute no special pre-eminence to the state and even see it as subordinate to other social forms. In this view, there is left an unstructured and promiscuous plurality. Other adherents prematurely reduce or subordinate plurality to some putative totality, usually the state or state law. I want to argue that both these stands are ‘right’; they are not opposed, but rather, reflect mutual elements of a wider process. State law does take identity by deriving support from other social forms. Thus, it would appear to be one social form among many, even as a subordinate form. But in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it. There exists a contradictory process of mutual support and opposition. This process is tested and given more specific elaboration in instances of the relations between state law and other social forms, including the prison and the capitalist labour relation. Further, the academic utility of the analysis is found in the light it throws on certain perennial concerns: the gap between law and social reality; the link between law and consensus; and stages of legal development.

II. LEGAL PLURALISM

Using legal pluralism as a starting point, I will draw a distinction between two approaches to it: the diffusive and the centerist.⁶ Ehrlich, the ancestor of the diffusive, remains an apt example. For him, the very basis of state law was a prior “social law” or “living law” which was the “inner order of associations.”⁷ Although the state is one of a plurality of associations, state law is subordinate to “living law.” In the event of a conflict between the two, it would be ineffective. Attempts in this tradition to integrate state law and other legal orders have similarly been in denial of the originality of state law. An example is Bohannan’s famed attempt at integration in which state law results from a “double institutionalization of norms” in which some “customs”, operative within “social institutions” are “reinstitutionalized at another level” as state law.⁷ There is nothing in such a reconciliation that would accord

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state law any distinctness and identity, much less accord it the original
efficacy that, on occasion, it manifestly has. As well, that element of
the tradition that would treat all legal orders equally fails to account
for conflict between orders, a conflict that may point towards some
overarching status for state law.

As for the centerist stand, a start should be made with Gierke.
Like Ehrlich, Gierke saw associations as having a life of their own. The
state was one such association. However, with Gierke’s organic theory
of society, the state is an association which embraces all other associa-
tions and has ultimate authority over them.8 Whilst advancing theories
of pluralism, legal scholars have been prone to make a pre-emptory
ascription of ultimate domination to state law. This is well established
in Griffith’s acute and relentless analysis of legal pluralists which un-
derlines the obduracy of “legal centralism” in this scholarship.9 Both
the diffusive and centerist strands encapsulate processes constituting
state law in its relation to other social forms. Accordingly, it is neces-
sary to move on to state law and its relation to a plurality of social
forms. To this extent, the paper ceases to be exclusively about legal
pluralism, but, insofar as social forms are integral to non-state law, the
discussion remains one about legal pluralism, at least for those who
wish to read it as such.

III. INTEGRAL PLURALITY AND STATE LAW

Social forms are constituted in contradictory relations of support
and opposition with a plurality of other social forms.10 I tentatively
suggest that the more social forms stand in a relation of integral sup-
port, the sharper is the opposition between them: “the more alike, the
more dissimilar.”11 To establish the first proposition, I will take one
idea of law, that of bourgeois legality or the rule of law, and show that

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8 See Hallis, Corporate Personality: A Study in Jurisprudence (1930) at 140-65.
9 Griffiths, What is Legal Pluralism?,(paper presented at the Annual Meeting of the Law
and Society Association, Amherst, June 12-14, 1981). Griffiths' valuable account extends also to
the diffusive strand in legal pluralism.
10 This, and the method of analysis that follows, could be seen as a crude derivation from
Hegel's ideas of contradiction and the dialectic but one which differs in several basic ways from
Hegel: see Taylor, Hegel (1975) at 104-106, 227-31 and 238. Of course, the germ of these ideas is
& Soc'y 24 at 30-31.
11 One of “a motley collection of maxims to disguise our epistemological nakedness” from
Reason, Generalization from the Single Case: Some Foundational Considerations, (paper
presented at the Conference on The Formal Analysis of Qualitative Data, University of Surrey,
Guildford, Apr., 1983) at 32.
certain other social forms are conditions of its existence. The prison and the capitalist labour relation will be used as examples. The next step involves showing that the relations between bourgeois legality and these other social forms are contradictory. Bourgeois legality depends on social forms that tend to undermine it. The case of the dependency of other social forms on law is considered only incidentally. In the next section, the analysis becomes more concrete in its consideration of the operative modes taken by the contradictory relations of opposition and support. The present analysis is only a beginning, an open and preliminary enquiry the coverage and bounds of which are not comprehensive. It celebrates the particular, and pries open holistic, unitary conceptions of law. As such, this exercise is not at one with mainstream pluralism for it does not seek to deny overarching and integrating structures of domination.12

To ground the analysis, I will begin by looking briefly at bourgeois legality and the prison before taking the wage labour relation as my main example. There are several, more or less subtle ways in which bourgeois legality depends on the prison but, in the broad approach being used here, it is sufficient to point to the prison, in particular, as the ultimate enforcer of law. Moreover, it is an exemplar of a pervasive, disciplinary power that typifies modern society and that effects particularist coercions which leave bourgeois legality ‘free’ to assume its aspects of equality and universality.13 The relation of bourgeois legality to the prison is a contradictory one. It is increasingly evident that prisons in ‘liberal democracies’ necessarily operate on the basis of arbitrary, authoritarian and Draconic power and that their operation would be impossible if the rule of law extended to relations within the prison.14 Conversely, if bourgeois legality did so extend, it would lose identity as bourgeois legality. The prison is part of the necessary “dark side” of bourgeois legality.15 Yet it is of the essence of bourgeois legality that the rule of law be universal. Consequently, bourgeois legality is asserted through the legal supervision by law of relations in the prison. This supervision is, however, always limited and marginal in its operation. It serves to set boundaries beyond which law will not proceed. When the judiciary reach these bounds, its inability to proceed further is justified on such evasive, but indicative grounds as the public interest


13 For a fuller treatment see Fitzpatrick, supra note 5.


15 Foucault, Discipline and Punishment: The Birth of the Prison (1979) at 222.
and the smooth running of the prison regime.\textsuperscript{16}

To approach, in good company, the relation between bourgeois legality and the labour relation,

Marx reveals that the fundamental condition of existence of the legal form is rooted in the very economic organization of society. In other words, the existence of the legal form is contingent upon the integration of the different products of labour according to the principle of economic exchange. In so doing, he exposes the deep interconnection between the legal form and the commodity form.\textsuperscript{17}

Bourgeois legality derives its constituent elements of freedom and equality from commodity exchange. Where labour power cannot be obtained 'freely' through its exchange as a commodity, direct compulsions in the field of production become necessary. However, this is incompatible with bourgeois legality. Commodity exchange can only be the realization of what is produced and production under capitalism is based on coercion and inequality. The freedom and equality imported by commodity exchange has to be kept separate from immediate relations of production. Bourgeois legality depends on the separation. The separation is achieved in an enthrallingly neat manner. Immediate relations of production, characterized by coercion and inequality, are necessarily entered into via the elements of freedom and equality imparted by commodity exchange. The element of compulsion, the necessity to labour for a wage, is general; it is not confined to or even specific to any particular employment relation.

Immediate relations of production come into being through the 'voluntary' and 'personal' commitment of the worker as an individual legal subject entering into a contract of employment. Bourgeois legality creates what is opposed to it, but it blunts the contradiction by investing its creation with its own aura. Life within the workplace becomes a matter of 'private' and 'economic' relations; outside is a matter of 'public' and 'political' relations. But immediate relations of production are also political relations which are ultimately based on compulsion. They are political relations of control over the worker and over production of hierarchic subordination and inequality.\textsuperscript{18} They have to be kept apart from the contrary rationalities of bourgeois legality. If relations of equality and freedom pervaded the workplace or if there were a reverse process, there would be a very different type of law to that characterized by bourgeois legality. This is revealed in the necessary respect


\textsuperscript{17} Pashukanis, \textit{Law and Marxism: A General Theory} (1978) at 63.

\textsuperscript{18} See Wood, \textit{The Separation of the Economic and the Political in Capitalism} (1981), 127 New Left Rev. 66.
which bourgeois legality shows for the integrity of the regime of the work-place in the severely limited effect of anti-discrimination law on the labour relation. Such legislation cannot displace the opposing practical rationalities of the immediate relations of production.\textsuperscript{10}

IV. MODES OF RELATION

To make the analysis more concrete and more complex, I will present a more historically specific aspect of the wage labour relation. There has been a remarkable increase in the formalization of “work-place discipline” in British factories in the last twenty years.\textsuperscript{20} Stuart Henry charts “a dramatic change . . . in the form of disciplinary technology during the period in question towards the formalization of rules and procedures.”\textsuperscript{21} These are rules and procedures internal to the factory. During the same period, there was a large increase in external state regulation of the labour relation. A guiding code of practice was promulgated, legislation on “employment protection” was enacted (providing, for example, a remedy against “unfair dismissal”) and “industrial tribunals” were established to deal with a range of employment disputes.

The main thrust of these developments is the link between internal and external changes. Henry finds that “the evidence . . . supports the view that formalization takes place as a result of government and legislative pressure.”\textsuperscript{22} The how of it is fascinating. The state’s code of practice provides recommended rules and procedures only. However, internal disciplinary proceedings tend to follow the code since, as one manager put it, “going about these things in a different way might lead towards an Industrial Tribunal.”\textsuperscript{23} Such an outcome does not seem a matter of direct justiciability, but a breach of the code could be damaging evidence in a justiciable claim, such as in one for unfair dismissal. Yet the state’s involvement does not seem to constrain management greatly. As the same manager put it: “[t]he Code does in fact reflect the practice of industry . . . there has been a pressure on us to mold things into the shape of the Code but only minor things. The general


\textsuperscript{21} Id. at 369.

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 370.
philosophy is identical to the Code.” Indeed, Henry considers that formalization has operated to support management by giving it, in the face of counter-assertions of power by workers, a ‘legitimate’ means to dismiss. To generate such legitimacy internally, it would be necessary for formalization to be of some, even if mixed, benefit for workers. This is the case. There are many measures supporting workers and, in a related development, there has been a growth in the participation of workers “in rule creation,” “in establishing procedures” and “in administration.”

Henry emphasizes the limits of these changes. Thus, he found that “what is formalized is largely procedural,” and “the due process-like model typically has representative participation only in its warning, procedural and appeals stages, and crucially important, not in its rule making or sanctioning stages.” As well, “unions participate far more in creating procedures than in making rules, and far more in representing employees, than in deciding their fate.” There is a strong suggestion that these changes are, in total, a strategy for containing workers and unions. Not that this is a fixed resolution. Henry finds some “tension” between the involvement of workers and the potentiality of the situation to “undermine managements’ ability to control.” “Automatic employee self-discipline” does, however, restrain the demands put on participation. Overall, it seems there has been no significant change in the type of behaviour punished nor in the nature of the sanctions imposed. There is continuity in the substantive law of the factory despite procedural changes. As for substantive law, it is indicative to find the law of the workplace dealing with such matters as “theft of company property . . . violence and assault, fraud . . . [and] damage to property.”

These and other instances can be used to map out modes of relation between law and other social forms. In fact, this mapping could be developed into a complex of contradictions. I will do little more than intimate that conclusion. The mapping is founded on the dichotomy of convergence and separation between law and other social forms. The dichotomy is further divided into positive and negative aspects. This

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24 Id.
25 Id.
26 Id. at 371-73.
27 Id. at 370-71, 377.
28 Id. at 374.
29 Id. at 371-73.
30 See, id. at 375-77.
31 Id. at 375.
creates a quadruple division: convergence/positive; convergence/negative; separation/positive; separation/negative.

Integral relations of mutual support between law and another social form tend towards their convergence. It is not such a matter of distinct influence operating from the outside. Elements of law are elements of other social forms and vice versa. So, with Bohannan’s “double institutionalization of norms,” some state law results by absorbing material by custom. Custom supports law, but law transforms the elements of custom that it appropriates into its own image and likeness. Law in turn supports other social forms, but becomes in the process part of the other forms. Henry’s account of the strategic intervention of law in support of the regime of the workplace showed law subsuming itself to the alien rationalities of this other form. Non-state legal orders will often appropriate legal contents and techniques taken from the state. For instance, Santos provides a case study of how an urban community in Brazil constructed its own legality in drawing considerably on state law. Supportive interactions are, however, much more complex, layered, and even dialectical. So, to use Henry’s case study, the state “code” applying to the factory was derived largely from the practice of the factory, but it modified that practice. This becomes relevant to claims before the State’s industrial tribunals and their treatment of such claims shapes the practice. And so it goes on.

To take another example, law, in support of the regime of the workplace, is supporting that which supports it. As we saw in Henry’s account, the workplace deals with much crime on behalf of the state. More generally, I have considered the dependence of bourgeois legality on the wage labour relation. Along with the labour relation, I would suggest that a further example is the most significant for societies of advanced capitalism. It is not infrequently said that law is increasingly dependent on and being displaced by ‘science’, that is, by the operation of the sciences of man and society in such forms as state administration and therapy. Doubtless, law is integrally dependent on science, but science depends also on law and law’s coercive power for its social operation. If science had to effect its own coercion, it would

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32 Bohannan, supra note 7.
33 See note 42, infra.
35 Fitzpatrick, supra note 5.
36 A formidable statement of the case can be found in Thomson, Law and Social Sciences - The Demise of Legal Autonomy (paper presented at the Conference on Critical Legal Scholarship, University of Kent at Canterbury, Mar.- Apr., 1981).
lose its essential concern for the neutrally or objectively factual. Its political constitution would be revealed, the basis of its legitimation in modern society would disappear and its own identity would change radically. With an audacity matching law’s part in constituting the wage labour relation, that very coercion is also a social expression of freedom. For bourgeois legality has it that such coercive interactions in the lives of ‘free’ legal subjects must be justified in law. So the sphere outside of this legal coercion is one of ‘freedom’, but within that sphere come the myriads of ‘normal’, often more subtle, but still deeply coercive operations of science.

Accordingly, law and other social forms take identity from each other in positively supportive ways, but the resulting convergence has its negative aspect in its tendency towards dissolution. Hence, much of the lamentation over ‘the death of the law’ sees bourgeois legality being inexorably undermined by the intrusion of administration or science. Such unidirectional scenarios do accurately perceive that law is open to penetration by corrosive social forms. However, they are at best preemptory. Law relates to opposing social forms in ways that constitute it positively. In this, law is separated from other social forms. It assumes some separate and autonomous identity in positive constitutive relations to other social forms. These are the relations of separation in their positive aspect. Law would not be what it is if related social forms were not what they are. This argument has just been illustrated in the instances of the prison, the wage labour relation and, summarily, that of science.

This leaves the last relational mode in our quadruple division, that of separation in its negative aspect. In this mode, identity is asserted or maintained in the rejection of other social forms. The most straightforward case is that of outright rejection. Law’s coverage is confined by formal jurisdictional limits and in the range of issues recognized as legally significant. Some legal systems, such as that of Imperial China, drastically limit the range of state law and fundamentally discourage resort to law. For legal systems with pretensions to popular access and broad coverage, especially those committed to a ‘universal’ rule of law, oblique rather than direct rejections are necessary if law is to exclude elements threatening its identity. Most obviously, this occurs in the vaunted problem of access to legal services and the exclusion of many people through the differential effect of the cost of litigation, lack

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of cultural compatibility with law’s processes and the allocation of inadequate resources to handle disputes. The Hunts’ graphic account of the state court system in a region of Mexico illustrates this rejection. More exactly, I will take one strand of the case study, the relation between the state court and the local Indian community. Their incompatibility may be dramatic, but it is not atypical. The state court operates along highly formalized and bureaucratic lines. It serves the dominant group in the region adequately. In the operation of the court, that group’s local interests tend to override the state’s interests. Yet the socially subordinate Indian community almost always dislikes taking cases to the court. This is partly a manifest matter of Indian custom. For example, customary marriages are not recognized in state law and cannot be dealt with in state courts. Also, the court usually imposes fines that Indians cannot afford or metes out inept punishments. Elopement, although deserving only passing admonition in the Indian view, is punished in state courts with prison sentences ranging from six months to six years and with heavy fines. There are other more covert and illuminating rejections. When the state court does recognize Indian claims, these will often be distorted in ways alien to the community. An action brought against a witch who failed to bring rain, when paid to do so, was treated as one of fraud. In the Indian view, the resulting fine was too light. An application to the court for protection from charges of witchcraft was treated inadequately as libel.

Nor does the court modify its own demands to be more accommodating. If Indians tried to overcome the usual inability to pay a fine in cash by tendering corn, they would be mocked by officials and even imprisoned. More subtly, the very constitutive rationalities of the court serve to repel Indian involvement. For an Indian, coming to court as a witness is put aside if some significant agricultural task has to be carried out. It is not too speculative to say that something as basic as different and incompatible notions of time are involved. The same incompatibility underlies the complaint of a judge who claims not to have time to accommodate Indian modes of disputation. In peasant societies, time fits within social relations; in capitalist societies, social relations fit within time. Cumulatively, these rejections encourage Indians to settle

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41 These two examples are from another region. Indians from the region studied would not even bring such cases because of the courts’ inability to deal aptly with them, id. at 131-32.
disputes within their own community. Judges believe that by rejecting Indian cases, they are eliminating Indian law. They are doing the opposite.

Outright rejection is not the only mode of effecting separation. There remains the paradoxical mode of rejection through acceptance. The Hunts’ case study also illustrates this. The cases of witchcraft were accepted by the state court, but transformed in its own terms. Also, there are many studies showing that when custom is penetrated by state law, its nature changes fundamentally and it becomes part of state law.42 The mere formal presentation of custom is incompatible with the persistence of custom.43 This point has profound resonances in debates over the use of folk classifications in legal anthropology.44 Nor is the inability of custom to survive in an encodified world only a matter of presentation. The issue of presentation is integral to a more comprehensive division between worlds. This is aptly encapsulated in the admonition of a magistrate of the Village Court in Papua New Guinea to a crowd outside the courthouse. The magistrate applies ‘custom’ through formal legal procedures characteristic of capitalist societies and this contrasts with the traditional mode of dispute settlement through popular participation. He said:

[t]his is not the good old times when every person, whether he is a party to the dispute or not, could crowd around to hear and talk about the disputes. The village court is a completely different institution running under a new law. We must all respect the village court. It is only those people who are concerned that can come to the village court to settle their disputes. Everybody else must go home and involve themselves in coffee gardening, businesses and their families.45

Legal procedures characteristic of capitalist societies are incompatible with the communal expression of interest and, hence, with the


adequate expression of communal interests. More broadly, these are simply instances of reification in and through law. Law transforms social issues into its own terms of communication or substantive content. In this way, law protects its own identity against contrary demands made on it. Also, there are other ways in which such demands can be absorbed and their danger contained. One admits the demand initially, but then allows it only an anaemic existence at the level of enforcement, as in the failures of enforcement in racial discrimination actions. Another mode of shaping what is allowed into the sanctum of law and of rejecting what is not apt involves the use of broad discretionary standards, such as reasonableness and good faith. Such obfuscating forms of dispute settlement as conciliation and the judicial review of administrative action also allow a broadly similar discretion.

The implied term in contract law is another example which serves to instance the most oblique type of rejection through acceptance. The mechanism of the implied term imports the immediate relations of production into the contract of employment; workers thereby ‘agree’ to their own subjection in those relations.

In such instances, law sets and maintains an autonomy for opposing social forms, keeping them apart from itself and purporting to exercise an overall control. Yet this control is merely occasional and marginal. In such instances, the balance between autonomy and control is most often struck by law’s intervention being comprehensive in terms but limited in operation. Administrative law provides numerous examples. Again the analysis of Henry’s case study showed that law’s intervention in factory ‘discipline’ was limited operatively to procedural elements, leaving substantive elements unchanged. The balance can be more intricate. In the same case study, the law’s immediate intervention in factory ‘discipline’ took the form of a non-obligatory code which was nevertheless enforced obliquely through its relevance to cases before industrial tribunals; in this way state law came to the aid of capital without being compromised in too intimate and too revealing an involvement in the regime of the workplace and without manifestly undermining the integrity of that regime. In the limited nature of its involvement with other social forms, law accepts the integrity of that


48 See Arthurs, Rethinking Administrative Law: A Slightly Dicey Business (1979), 17 Osgoode Hall L.J. 1, and, e.g., Mullard, Black Britain (1973) at 75-87.

49 See Napier, Discipline (1980).
which it controls. Its penetration is bounded by the integrity of the opposing social form. In exceptional instances, such bounds are explicit, even audacious. Accordingly, the maintenance of secrecy in the operation of the prison or of the capitalist enterprise has been given explicit protection and law will rarely penetrate beyond those bounds of secrecy. In judicial review of administrative action, the law's restraint in deference to the integrity of administration is on occasion open and unqualified. More often the bounds are fudged in terms of what is "reasonable" and other such discretionary gateways. When a judge, or another of law's gatekeepers, leaves the law at the prison gate in "the public interest" or "implies" immediate relations of production in a contract of employment - an operation that would rarely fit law's own constitutive test of an "implied term" - transparencies emerge through which the contingencies of law's identity can be glimpsed. If identity is to be maintained, borders become places of danger and anomaly, not to be too often explicitly confronted. Indeed, the (common) law is not "a brooding omnipresence in the sky," but law's operatives have to view it so because of the dangers of confronting law's terrestrial connections. Law cannot bear very much reality.

V. ACADEMIC UTILITIES

There are various academic strategies which protect law from too much reality and serve to maintain its integrity as an object of study. An extreme is 'legal positivism.' It asserts the self-contained nature of law and law's moral and political neutrality. However, I will concentrate on and explore critically a cluster of academic strategies in the field of 'law and society' to test the utility of the idea of integral plurality. These comprise the gap between law and social reality, the link between law and consensus, and the conception of modern law as a stage of legal development.

The gap between law and social reality is sometimes seen as the law's lack of responsiveness to society and sometimes in terms of its efforts to bring society into line with it. Other approaches partially en-

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82 Cf. Napier, supra note 49, at 5 and 12.
84 Holmes as quoted in Megarry, Miscellany-at-Law: A Diversion for Lawyers and Others (1955) at 268.
85 Cf. Eliot, Murder in the Cathedral (1935) at 49.
compass both these, such as the gap between law in books and law in action or between what law says and what it does. For all these approaches, the gap is a bridgeable one. At least, it is held to be so in an unspecified range of relations between law and society. Alternatively, none of these approaches envisages the unbridgeability of the gap in any specific instance. On the contrary, their impetus is a concern to bridge the gap through changing the content or operation of law. No specific challenge to law's integrity is admitted. Law is thus preserved as a unitary object of study immune to the challenges of the plurality of its constitutive social forms. Not being restrained in any specific relation with other social forms, law has an unspecific potential efficacy. This is nothing more than the academic analogue of bourgeois legality. With bourgeois legality, law must appear comprehensively capable of rule or, at least, not be seen to be specifically incapable. There is no need to labour the differences between these approaches and that of integral plurality. For integral plurality, law is constituted in relations of opposition and support with other social forms to the effect that there are necessarily unbridgeable gaps between law and other social forms. Perceptions of a gap are accurate to the extent that they accommodate social forms opposed to law. But the gap cannot be bridged, for law depends on these opposed social forms. It depends integrally on what is contrary to it. The gap is set. There is not in the gap some vague, but remediable derogation from the efficacy of law; rather, there is something constitutive of law itself.

"Consensus" is one way of bridging the gap. "It is possible," Talleyrand said, "to do many things with a bayonet, but one cannot sit on one." So with law, it cannot coerce comprehensively and must depend, so it is said, on consensus. In a valuable and wide-ranging survey, Hunt finds a unity between "contemporary Marxist and non-Marxist theories of law" in a shared and fundamental concern with "the dichotomy between coercion and consent" in the constitution of law. In this, there is a particular concern with consent. The immediate problem in dealing with consent is to give it some content. In "dichotomy between coercion and consent," consent emerges from the framing of the prob-

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66 For illustrations of some of these approaches and an analysis broadly similar to that offered here see Fitzpatrick, "Law, Modernization and Mystification" in Spitzer, supra note 46, at 161.

67 See, for an analysis of some instances, Gurvitch, Sociology of Law (1947) at 122-35.

68 As quoted in Nwafor, History and the Intelligence of the Disinherited (1975), 7 The Rev. of Radical Political Econ. 43.

lematic. Coercion is not sufficient to secure compliance with law. Therefore, there must be consent as well. Consent acquires identity and coherence in binary opposition to coercion. For the non-Marxist theories of law, this leaves consent conveniently vague. Any compliant behaviour not coerced through law becomes consent. Hence, the operative or factual validity of bourgeois legality is given in the constitution of the problematic. To adopt Foucault’s argument, power is presented through law as a negative constraint, leaving a measure of freedom intact. In this way, the coercive operation of other social forms is masked and the exercise of a coercive, disciplinary power outside of law is rendered acceptable. 60

Marxist theories of law fare little better. They seem to rely on a similar constitutive dynamic in the formation of 'consent'. The emphasis on consent, as Fryer et al. indicate, emerges in reaction against a so-called “rather naive and instrumental version of Marxism, which treated law exclusively as a coercive apparatus wielded at will by a malevolent ruling class.” 61 The emphasis on coercion cannot account, as Gramsci has argued, for “the ‘spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group.” 62 With the Marxist variant, consent seems to merge into the oblique or elusive coercions of some Gramscian notion of “hegemony”, but ‘consent’ still means a significant consent and it is still set against coercion. 63 Under such a view then, law must be seen, as constituted, in significant part through general consent. This general consent maintains law as autonomous or ‘relatively autonomous’ both as an object of study and as a field of political action. 64 Law cannot be reduced to dominant class and economic elements. Thus, the integrity and unitary nature of ‘law’ is maintained.

62 As quoted in Hunt, supra note 59, at 62.
63 Cf. Althusser’s neo-Gramscian notion of Ideological State Apparatuses which comprise such as educational and religious institutions and the family and operate basically as “ideology”. These are contrasted with a “Repressive State Apparatus” (emphasis added). Law functions in both the “ideological” and the “repressive” spheres. See, Althusser, Lenin and Philosophy and Other Essays (1971) at 124-49.
64 Hunt, supra note 59, at 62-65 and 67-72. General consent is not necessarily the sole support for such autonomy. Engels, among others, would add there is a need for modern law to be “an internally coherent expression”; letter to Conrad Schmidt, as quoted (with the emphasis) in Cain and Hunt, Marx and Engels on Law (1979) at 57. It is not infrequently also said that some ‘relative autonomy’ of the state and of law is needed because of the limited rule of the bourgeoisie; see, e.g., Poulantzas, Political Power and Social Classes (1973) at 284-85; this is congruent with a need for some general consent. Compare, infra note 78.
In the perspective of integral plurality, consenting persons are normalized through a diversity of coercions operating in a constellation of social forms, usually constituted and maintained by law, and in the general standards cited in these forms. Such social forms include the prison, the workplace, the family, various therapeutic regimes, monitoring schooling and state welfare regimes. The effect is that consent is pre-shaped to conform to extant structures of domination. It is not a matter of people being influenced by other social forms and then adopting an attitude of consent towards law, either specifically or as a diffused part of "the general direction imposed on social life by the dominant fundamental group." Rather, it is a more contemporaneous and more intimate matter. Consenting persons are constituted in and by these social forms, which interact concurrently with-in law and so operate to constitute law. In short, the inter-relations between law, consent and coercion are closer and more complex than the simple dichotomy between coercion and consent can even remotely allow. These same inter-relations undermine the efficacy of solitary consent as a basis for the autonomy and integrity of law.

The analysis of the conception of modern law as a 'stage' in legal development can be stated with the words of Karl Marx:

The so-called historical presentation of development is founded, as a rule, on the fact that the latest form regards the previous ones as steps leading up to itself, and, since it is rarely and only under quite specific conditions able to criticize itself — leaving aside, of course, the historical periods which appear to themselves as times of decadence — it always conceives them one-sidedly. The Christian religion was able to be of assistance in reaching an objective understanding of earlier mythologies only when its over self-criticism had been accomplished to a certain degree. ... Likewise, bourgeois economics arrived at an understanding of feudal, ancient, oriental economics only after the self-criticism of bourgeois society had begun. In so far as the bourgeois economy did not mythologically identify itself altogether with the past, its critique of the previous economies, notably of feudalism, with which it was still engaged in direct struggle, resembled the critique which Christianity levelled against paganism, or also that of

The argument is developed further in Fitzpatrick, supra note 5. There are other relevant aspects which deserve some mention but are not immediately relevant to "the dichotomy between coercion and consent." Generally, the positing of a vague, unitary 'consent' has a flattening effect in analytical and political terms. That is, such 'consent' obscures a significant diversity of behaviour. In an illuminating analysis of the limits of the notions of consensus, legitimacy and the like, Rootes draws attention to a large "dissensus ... even in those states that are apparently politically stable": Rootes, *Intellectuals, the Intelligentsia and the Problem of Legitimacy*, (paper presented to the Workshop on "The Politics of Intellectuals, the Intelligentsia and Educated Labour," European Consortium for Political Research, Joint Session, Freiburg-im-Breisgau, Mar., 1983, at 1 (his emphasis)). And he proceeds to consider how compliance is secured short of active consent. For example, "Subordination to authority at work does ... have consequences for the way working people think: it promotes the ... inability to conceptualize either the structural sources of their troubles or the alternatives to them." Id. at 4.

See, supra note 62, and the accompanying text.
The modern age is not unique in its self-conception as both the culmination and rejection of all that has preceded it. Modern law is at one with the age. Its culmination is as a universalist, unitary and state-centred form. In this, law is seen as evolving from, yet set against, a plurality of particularist social forms. Its integrity as a distinct stage of legal development is achieved, in part, in the ostensible rejection of such social forms. It is possible to provide an initial indicative sketch of the emergence of modern law in its relation to this plurality. I will use the sketch to account for the stage of modern law as a unitary, state-centred conception and introduce alternative conceptions of law responsive to the idea of integral plurality.

The sketch of the emergence of modern law is presented around the three merging lines of the economic, the political and the line of mentalities. It has been said that modern law emerges in the triumph of the bourgeoisie. Law, developing closely with the constitution of individual property, becomes and takes identity as an instrument in the historically necessary universalism of the rule of the bourgeoisie. It becomes so as a distinct form of law and not as operatively integrated with other social forms. As such, law is not only a social presentation set against lesser, particularist orders, but is used in their elimination and in the constitution of an alternative site of power. Giddens pithily adds the wider perspective and points towards deeper dimensions:

The vast extension of time-space mediations made structurally possible by the prevalence of money capital, by the commodification of labour and by the transformability of the one into the other, undercuts the segregated and autonomous character of the local community of producers. Unlike the situation in most contexts in [pre-capitalist] class-divided societies, in capitalism class struggle is built into the very constitution of work and the labour setting.

Jakubowski finds that the “dissolution of traditional entities such as the corporations and estates places individuals alongside each other as independent, private persons whose special links take mainly legal forms” and the constitution of the “individual” as legal subject are, in

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turn, integrally tied to "commodification." Law encompasses and mediates between the individual and the general relations made possible by "the prevalence of money capital, by the commodification of labour and by the transformability of the one into the other." Law is implicated in that basic contradiction in the constitution of modern society so vividly described by Marx:

> Only in the eighteenth century, in 'civil society', do the various forms of social connectedness confront the individual as a mere means towards his private purposes, as external necessity. But the epoch which produces this standpoint, that of the isolated individual, is also precisely that of the hitherto most developed social (from this standpoint, general) relations.

Other heralds of modern society have, of course, discerned a similar division and have seen law as of particular significance in this. For Durkheim, progress towards "organic solidarity" entails increasing collaboration between individuals through law which, in turn requires increasing "administration" by the state as the operative representation of general social relations. This utter centrality of law is revealed in a Marxist perspective for it is one that squarely confronts class division. Class division cuts across the idylls of "organic solidarity" or "civil society," and the like positing of an harmonious integration, through law or otherwise, of the individual and general social relations. No longer is class division contained in "the segregated and autonomous character of the local community of producers" but "is built into the very constitution of the 'work and labour setting'." This setting is founded on coercion and inequality. Further, there results from this change in the effectivity of class division a potential for the working class to act at the level of general social relations. The combination of this potentiality and this subordination in relations of coercion and inequality is ominous for the dominant class. It is in the prospect of class division that modern law, as bourgeois legality, comes into its own in effecting the 'voluntary' and 'equal' adherence of the legal subject to certain coercive and unequal relations of production and in guaranteeing equal and universal rule outside of those relations, countering, in both instances, the effects of class subordination. In this, law cannot be reduced to a strategic position adopted by the bourgeoisie for it is also something won by the working class. As well as operating directly or in its own right,

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73 Pashukanis, *supra* note 17.
74 Giddens, *supra* note 71, at 121.
75 Marx, *supra* note 67, at 84.
77 Giddens, *supra* note 71, at 121.
78 See, e.g., Weitzer, *Law and Legal Ideology: Contributions to the Genesis and Reproduc-
modern law has further significance in mutual inter-connections with the state. It is the state which is the prime mediator between the individual and general social relations and which compensates most comprehensively for the effects of class division or which otherwise acts to contain it. As part of and apart from the state, law is a symbolic and an operative embodiment and guarantor of the equality and universality of state rule and a factor of cohesion in state activity.

In short, a distinct, certain and bounded identity for law is at the core of the making and the maintenance of modern society. Law is an encompassing of the individual and general social relations formalized in universal and equal rule. As such, it is integrally set against social relations of a lesser scale or of a particularistic nature. This opposition was manifested in struggles against agrarian use rights, customs and notions of property antithetical to the advance of the bourgeoisie. However, once so cast, law's identity in opposition could and did extend to comparable social forms whether continuing in spite of law and modernity or appearing as new or as qualitatively different. The family, the penitentiary and various welfare regimes could be taken as instances. For the maintenance of law's identity, these social forms had to be subordinate to law and this subordination is effected in law's constitution and control of such social forms. In the process these social forms are endowed with a supportive aura of universal right.

In terms of mentalities and the supportive complicities of scholarship, law becomes associated with what is effective, that which acts and controls, rather than that which is acted on and controlled. It dominates rather than reflects nature. It partakes of the rationally constructivist rather than the organic, of the universalist rather than the particularist, of the determinant rather than the contingent, of effective change rather than residual continuity. Once its new stage was secure, law could draw on traditions and arrogate some legitimation in continuity. The fusion of the innovative and stasis was achieved in notions of evolution:

[In the second half of the nineteenth century . . . it is no longer the analysis of the legal form, but, the problem of justifying the binding force of legal regulation which becomes the focal point of interest for juridical theory. The result is a strange mixture of historicism and juridical positivism which is reduced to negation of Capitalism (1980), 25 Berkeley J. Soc. 137 at 146-47. It may be revealing to consider a dynamic "reciprocity" between classes here, instead of a static consensus; see Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-historical Perspective," in Fryer et al., supra note 61, at 92-94.

79 This again (cf. supra note 10) could be seen as Hegel scaled down: see, Wellmer, Critical Theory of Society (1971) at 76-77.
It was in the latter half of the nineteenth century that law's "own self-criticism had been accomplished to a certain degree." Notions of evolution provided some resolution of contradictions between critique and adoption. In terms of the origins of the scholarship of 'law and society,' it is notions of evolution and quasi-Hegelian equivalents that set the seal on the modern idea of law. As Gurvitch shows in his seminal account of the "forerunners and founders" of the sociology of law, contemporary scholarship tied law to the state in a culmination of legal development that displaced or incorporated prior forms of law and custom. This outcome is extended, at least implicitly, to favour generally the claims of the "inclusive" society over all "included" social forms.

To pursue an instance into the twentieth century, this sketch of origins may prompt questioning of the central interest of sociological jurisprudence with the effectiveness of law. The summary response is that this concern is an expression of class interests. The bluntness of the answer can be mitigated, but is not qualified, in placing those class interests and their relation to law at the heart of the constitution of modern capitalist society. The resulting 'law', in a unitary and state-centred conception, continues to set the very bounds for legal scholarship. It elevates certain lines of enquiry and subordinates or excludes others. Sociological jurisprudence and legal realism are certainly concerned with the limiting and undermining effect that other social forms have on law. But the presentation of this concern is precisely limited. Law, as 'law in books,' may be seen as subordinate to interests reflected in law or to what officials actually do about disputes. The focus of the concern remains formal legal process and formal legal doctrine - the

80 Pashukanis, supra note 17, at 69.
81 See note 67 supra, and the accompanying passage. An example of "self-criticism, . . ., to a certain degree" would be von Ihering's influential account of law in terms of "interest": see generally Stone, Social Dimensions of Law and Justice (1966) at 164-98. The self-criticism is preceded and accompanied by law's self-realization to a certain degree, as exemplified in the work of Austin.
82 Gurvitch, supra note 57, at 72-96. Important as Gurvitch's work is, it leaves large gaps which would have to be made good in a less abbreviated account than that offered here. The difficult case of Marx is not considered. Weber is too summarily dismissed: id. at 30. And the central significance of Maine is not adequately confronted: cf., id. at 74-75.
83 The phrase comes from id. at 77.
"prejudices of the dogmatic jurists." The range of social forms considered relevant is set from within a pre-constituted 'law'. Academic legal knowledge is generated by applying a certain idea of law to the world. This approach cannot extend to social forms which do not find expression in terms of legal process or doctrine. The integrity of 'law' is thus obliquely but potently affirmed in areas of scholarship that claim to be fundamentally sceptical of it.

In crude summary, modern law can be seen as a distinct stage of development only because of the conditions of its emergence. These entailed a specific dynamic of identity and a specific constitutive connection between 'law and society.' This specific connection and the resulting distinctness of law cannot be a general basis for a theory of stages or types of law. Yet it is implicitly so used when different stages or types of a reified 'law' are seen to result from different stages or types of 'society'. As Nelken so aptly puts a contrary suggestion, "as we move to an increasingly 'managed' society," it does not follow "that law must necessarily follow suit and be shaped accordingly." Against the more familiar argument, it can be said that the apparent increase in state administration may not promote "bureaucratic-administrative law" at the expense of bourgeois legality. It may lead to an increased reliance on bourgeois legality. In the perspective of integral plurality, there is a range of 'legal' types in society - "a kind of regulatory continuum" - and a persisting interaction between them. Hence Galanter's challenging argument that:

Once we put aside the notion that law is typically public, unified and direct in its operations, we can formulate the question of the change of the role of law in modern society as a question of changing relations between the big (public, national, official) legal system and the lesser normative orderings in society.

Galanter offers an illustration of one such "change of the role of law in modern society." He adopts familiar assertions that there is currently an increasing social ordering through "technocratic controls and communal arrangements." In the perception of this increase, conventional views predict the demise of bourgeois legality. On the contrary, Galanter finds an increasing resort to bourgeois legality "to monitor and oversee" these "alternative" modes of ordering and to effect their

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8 Supra note 37, at 184.
89 Galanter, supra note 4, at 20.
90 Id. at 21.
“articulation . . . to other social ordering.” However, the conventional view does not miss the point entirely. The increasing differentiation and independence of alternative modes of ordering intensify law’s difficulties in controlling these other modes; control through law is increasingly ineffective and consigned to the symbolical. A congruent example will help broaden the analysis. Stewart’s account of “the reformation of American administrative law” deals, in part, with law’s response to the increase in and the intractability of administrative discretion, in the face of which:

[C]ourts have changed the focus in judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests. . . .

This example shows law responding to the claims of another social form by limiting precisely, but not denying, its own power of intervention. This suggests that there is a diversity and a complexity in the relation between law and other social forms lying between a comprehensive control by law of these forms and a retreatist symbolism in the face of their advance. This diversity and complexity have already been explored in the earlier account of modes of relation between law and other social forms. The relation between law and another social form involved a necessary separation between them. If the integrity of the other social form was to be maintained, law could not control it comprehensively. Law would be left with a certain want of power which its own pretentions to comprehensive rule would not allow it to recognize. It is from this fissure in the effective identity of law that a certain symbolism emerges.

Even if, as Galanter says, law is increasingly symbolical, it cannot, in terms of his analysis, be so merely because it takes on a direct effectiveness in the cause of ordering through administration and community. If law’s effectiveness in this changed, such ordering would also change. To provide a full explanation, it is necessary to return to the constitutive, but contradictory relations of support and opposition between law and other social forms. Within these relations, the fixity of such categories as ‘administration’ and ‘community’ as outright challenges to the integrity of law cannot stand. The apparent resort to community ordering has been validly seen, not so much as a challenge to

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91 Id.
92 Id. at 19.
state law but as a mode of its extension. More common, of course, is the assumption that the inexorable advance of state administration is the expense of law. There is much about law that these premature scenarios overlook, but, most immediate to the present analysis, they fail to confront the integral dependence of administration on law.

VI. CONCLUSION

There is no better way to expose the limits of an enquiry than to try to bring it to a close. In my presentation, I have taken a part of the Hegelian notion of dialectical contradiction and transmogrified it in application to a particular social sphere. This contrasts with positing a social form and then seeing its connection to the world as a matter of ‘external’ relations. Rather, “this positedness is in itself.” A social form takes identity “in itself,” yet relationally by being in opposition to the social forms that support it. Accordingly, law establishes identity in conterminous relations of opposition and support with a plurality of other social forms. This integral plurality entails a convergence, yet necessitates separation between law and these other social forms. This method of enquiry does not match the ostensible confidence of that agenda. A specific, operative idea of modern law, that of bourgeois legality, was taken as a starting point. It was found to exist in certain relations of opposition and support with other social forms. From these relations, certain modes of convergence and separation between law and other social forms were identified and explored. The utility of the analysis was tested through an extended application to persistent academic issues about the nature of law and its relation to society.

This was to be an open and an opening enquiry. The exploration of the connections between law and specific social forms cannot claim to

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85 This characterizes even such penetrating accounts as Donzelot, The Policing of Families: Welfare versus the State (1980) at 116 and Foucault, Power/Knowledge, supra note 60, at 107-108.
86 A similar dependence is elaborated on in Fitzpatrick, supra note 5. Habermas provides an analysis relevant here, one sensitive to the identity and limits of social forms, including administration; he finds a particular need in present-day society to maintain separate from administration “expressive symbols” involved in, amongst other things, “the symbolic use of hearings” and “juridical incantations”: Habermas, Legitimation Crisis (1976) at 69-70, et passim. This particular need is based on the perceived politicization of the relations of production within societies of advanced capitalism, a perception that I have implicitly viewed as overdrawn in the earlier analysis of the capitalist labour relation.
87 The difficulties skirted around in this abrupt process are considerable. For an exploration of this, and for literature by and about Hegel that is unusually lucid see Norman and Sayers, Hegel, Marx and Dialectic: A Debate (1980).
88 Hegel, Hegel’s Science of Logic (1969) at 488 - emphasis in the original.
be more than illustrative. No comprehensive claims could be made about law's constitutive relations with other social forms. Similarly, no settled alternative view of law could be offered, nor the identification of some stage or tendency in the development of law. Instead, the concern was to employ and to establish in use the idea of integral plurality in the 'deconstruction' of such conceptions and of related academic complicities. As Marx said, the dialectic "lets nothing impose upon it." Nonetheless, I have asserted, the central significance of modern law's relation to particular social forms, especially the capitalist labour relation. Linked with the idea of integral plurality, this assertion serves to identify limits on the necessarily universalistic pretensions of bourgeois legality and serves to explain the hold and the obduracy of abstracted, unitary conceptions of law. Not that the analysis has been set against abstraction. It has been set against an abstraction that forgets too much of its beginnings, and loses too much on the voyage out. I have been concerned to show that the selection necessitated by abstraction, the inclusion of some things and the exclusion of others, is itself an arrogation of power. In contrast to the comforts of premature abstraction, I have tried to stress that law is the unsettled product of relations with a plurality of social forms. As such, law's identity is constantly and inherently subject to challenge and change. Our enquiries into law have to be more diverse and more wide-ranging. Although they may seem perpetually open-ended, such inquiries should, dialectically speaking, reveal unifying and cohering elements as well.

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100 Modern law's relation with science was also said to be central but it was touched on only briefly. For a fuller development, see Fitzpatrick, supra note 5.