MAX WEBER ON LAW AND THE RISE OF CAPITALISM†

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The common tendency to think of "law and development" as the study of problems unique to the 20th century often results in our neglect of the groundwork already established by scholars of an earlier age facing similar problems. Professor Trubek's concise distillation of Max Weber's contribution to law and development theory demonstrates the continued viability of Weber's analysis for contemporary use.

Today, scholars are once again speculating on the relationship between law and development. In the 19th century, thinkers such as Maine, Durkheim, and Weber, who studied the emergence of industrial civilization, considered law a major factor in the processes they examined and, accordingly, made significant contributions to our knowledge about the social role of law. Until recently, however, legal studies and the social sciences failed to carry on this tradition, and little was added to the initial work done by the classical social theorists. In the last few years the issue has been rasied anew, and a small but growing contemporary literature has emerged which tries to probe the relationships between legal phenomena and those major social, economic, and political changes associated with industrialization generally called modernization.[1]

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1. *See, e.g.*, Galanter, *The Modernization of Law*, in MODERNIZATION: THE DYNAMICS OF GROWTH (M. Weiner ed. 1966); Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29 (1969); Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969); Karst, *Law in Developing Countries*, 60 LAW LIB. J. 13 (1967); Konz, *Legal Development in Developing Countries*, 1969 PROC. AM. SOC'Y INT'L L. 91; Mendelson, *Law and the Development of Nations*, 32 J. POL. 223 (1970); Seidman, *Law and Development: A General Model*, 6 LAW & SOC'Y REV. 311 (1972); Steinberg, *Law, Development, and Korean Society*, 3 J. COMP. AD. 215 (1971); Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AM. J. COMP. L. 39 (1971). For a critical appraisal of some of this literature see Trubek, *Towards a Social Theory of Law: An Essay on the Study of Law and Politics in Economic Development*, YALE L.J. (forthcoming).

The contemporary literature owes a great debt to the work of Max Weber. Of all the classical writers, Weber was most interested in law and legal life. Whether they acknowledge it or not, the authors of recent essays on "law and modernization" draw heavily on his concepts and theories, as well as on his comparative historical studies of the role of law in the rise of capitalism.[2] Despite this renewed interest in Weber's work and the burgeoning general scholarship on Weber, there is no systematic acccount of his ideas on the relationship between law and capitalist economic organization.[3] As a result, his ideas on this subject are often either overlooked or misunderstood and misused.

Given the nature of Weber's work on law, this is not surprising. While he had very clear ideas about the relationship between law and economic development, Weber never set these forth in one easily accessible discussion. His views on this issue are analyzed at various points in the vast corpus of his work. Even his extended discussions of law, while full of striking and suggestive conclusions, are incomplete and extremely hard to follow. Thus, it is no surprise that subsequent scholars have found Weber a difficult starting point for further thought.

Yet Weber's work provides an essential beginning for further work. No other writer has yet to match or excel the scope and power of Weber's treatment. Beneath the difficult prose and unfamiliar terminology, his writings are as fresh as the contemporary literature, and usually more enlightening. My goal in this essay is to make Weber's thought on the relationship between law and economic development more generally accessible to legal scholars and social scientists. To this end, I have tried to set forth the concepts he employed, the methods he used, the theories he developed, and the conclusions he reached about the role of legal institutions in the rise of capitalism. I shall examine his basic ideas about law in economy and society, the specific role of law in capitalism, and the manner in which legal developments in Europe facilitated the rise of the modern industrial, capitalist system. I hope this analysis will contribute not only to the study of law and modernization, but also to its parent discipline, the general sociology of law.

I. LAW IN *Economy and Society*

Max Weber dedicated much of his energy to explaining why industrial capitalism arose in the West. While he recognized that

2. *See, e.g.*, the essays by Friedman, Galanter, Seidman, Steinberg, and Steiner cited note 1 *supra*.

3. The most detailed secondary treatment of Weber's theories of law can be found in Rheinstein, *Introduction* to MAX WEBER ON LAW IN ECONOMY AND SOCIETY, (M. Rheinstein ed. 1954), and R. BENDIX, MAX WEBER, AN INTELLECTUAL PORTRAIT 385-457 (1962) [hereinafter cited as BENDIX]. I

this was an historical issue, Weber did not limit himself to historical methods. Rather, he attempted to construct a sociological framework which could guide historical research. This framework identified the main analytic dimensions of society and the concrete structures that correspond to them. Weber focused on polity, social structure, economy, religion, and law, and the political, social, economic, religious, and legal structures of given societies. He felt that these dimensions, with their associated structures, must be separated and investigated so that their interrelationships in history can best be understood. Using these methods, he argued, particular events in history can be explained.

The "event" he sought to explain was the fact that the modern system of industrial (or "bourgeois") capitalism emerged in Europe but not in other parts of the world. Law, he felt, had played a part in this story. European law had unique features which made it more conducive to capitalism than were the legal systems of other civilizations. To demonstrate and explain the significance of these features for economic development, Weber included the sociology of law within his general sociological theory. Thus the monumental treatise *Economy and Society*, which sets forth a comprehensive analysis of his sociological thought, includes a detailed discussion of the types of law, a theory of the relationship between law and the rise of industrial capitalism, and comparative sociological studies which attempt to verify his theory.[4]

Weber's decision to include law within a general sociological theory can be explained not only by his personal background as lawyer and legal historian, but also by the methods he employed to trace the rise of the distinctive form of economic activity and organization he called bourgeois capitalism. Weber was concerned with explaining the rise of capitalism in the West. This meant he had to discover why capitalism arose in Europe and not in other parts of the world. The way to do this, he thought, was to focus on those aspects of European society which were unique, and which, therefore, might explain why capitalism developed there. This technique is clearly seen in his sociology of law and sociology of religion. The latter examines the relation-

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have relied substantially on these excellent discussions, and have, at the same time, focused on aspects of the relationship between law and economy not dealt with by Rheinstein and Bendix.

4. As a legal scholar and historian, Weber wrote on specific questions of legal history. But his most significant attempt to deal with the interrelationships between law and what we call today "development" or "modernization" are contained in his outline of interpretative sociology, *Wirtschaft und Gesellschaft*, which contains a number of extended discussions of law in economy and society, including an extended section explicitly entitled "Sociology of Law." In this paper, I have relied primarily on the recent English edition of the complete work, 1-3 M. WEBER, ECONOMY AND SOCIETY (G. Roth & R. Wittich ed. 1968) [hereinafter cited as ECONOMY AND SOCIETY].

ship between unique features in Western religious life and "the spirit of capitalism," while the former identifies unique features of Western legal systems which were especially conducive to capitalist activity.[5]

While Weber believed that Western law had particular features which helped explain why capitalism first arose in Europe, he did not think that the West alone had "law." Weber had a broad concept of law that embraced a wide range of phenomena in very different societies. Nevertheless, he drew sharp distinctions between the legal systems of different societies. Most organized societies have "law," but the European legal system differs significantly from others. He developed typologies that permitted him to distinguish European law from the legal order of other civilizations, and then conducted historical studies designed to show the origins of the unique features of European law.

At the same time, through parallel theoretical analysis, Weber found it possible to show how a certain type of legal system fitted the needs of capitalism. Finally, he returned to history in order to demonstrate that, of all the great civilizations—Europe, India, Islam, China—*only* Europe developed this particular type of law.[6] Since, at the same time, capitalism arose first in Europe, this analysis suggested very strongly that European law played an important role in the emergence of the capitalist economic system.

Weber stressed his belief that the unique legal aspects of European society were not the mere result or reflex of economic phenomena. He explicitly and repeatedly denied that the special features of European legal systems were caused by capitalism itself. Rejecting the Marxian deterministic theory which held that legal phenomena were caused by underlying economic forces,[7] he demonstrated that what was unique in the European legal systems had to be explained by such noneconomic factors as the internal needs of the legal profession, and the necessities of political or-

5. The program of inquiry is explicitly set forth in Weber's introduction to his sociology of religion. This is reprinted in M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 13-34 (1958). Bendix sees the sociology of law as an extension of the basic program that began with the sociology of religion. BENDIX 279.

6. M. WEBER, *supra* note 5, at 25.

7. Weber's relationship to Marxism is complex, and his dialogue with Marxist ideas heavily influenced his sociology of law. Weber rejected the Marxist philosophy of history and the idea that law was a "superstructure" reflecting an economic "base," but incorporated substantial elements of the Marxian analysis of capitalist society. For a general discussion of the relationship between Weber and Marxism see A. GIDDENS, CAPITALISM AND MODERN SOCIAL THEORY (1971); Roth, *The Historical Relationship to Marxism*, in R. BENDIX & G. ROTH, SCHOLARSHIP AND PARTISANSHIP: ESSAYS ON MAX WEBER 227-52 (1971); Vincent, *Remarques Sur Marx et Weber, comme theoriciens du droit et de l'etat*, 1964 ARCHIVE DE LA PHILOSOPHIE DU DROIT 229.

ganization. Economic factors—specifically, the economic needs of the bourgeois classes—were important but not determinative in shaping the particular legal institutions of Europe.[8]

These institutions differed from those of other civilizations in their formal and structural qualities—or as Weber somewhat misleadingly put it, in their degree of "rationality." The uniqueness of European law—and the affinities between this system and capitalism—lay not so much in the content of substantive provisions as in the forms of legal organization and the resulting formal characteristics of the legal process. Weber's contrasts between the legal systems of Europe and such civilizations as China did not focus on the presence or absence of specific rules of law, although these were not ignored.[9] Rather he was concerned with such questions as whether legal organization is differentiated or is fused with political administration and religion, whether law is seen as a body of manmade rules or as a received corpus of unvarying tradition, whether legal decisions are determined by prior general rules or are made on an ad hoc basis, and whether rules are applied universally to all members of a polity or if specialized law exists for different groups.

The European legal system was distinct in all these dimensions. Unlike the legal systems of other great civilizations, European legal organization was highly differentiated. The European state separated law from other aspects of political activity. Specialized professional or "status" groups of lawyers existed. Legal rules were consciously fashioned and rulemaking was relatively free of direct interference from religious influences and from other sources of traditional values. Concrete decisions were based on the application of universal rules, and decisionmaking was not subject to constant political intervention.

Thus Weber believed that European law was more "rational" than the legal systems of other civilizations, that is, it was more highly differentiated (or autonomous), consciously constructed, general, and universal. But he also attempted to show that no other civilization had been capable of developing this type of legal order. European law was the result of the interaction of many forces. Its ultimate form was shaped not only by very distinct features in Western legal history—especially the Roman law tradition and aspects of medieval legal organization—it was also molded by general and often distinct trends in the religious, economic, and political life of the West. The other civilizations he studied lacked this special legal heritage, and failed to develop the religious ideas, political structures, and economic interests which facilitated the growth of rational law in Europe.

8. *See, e.g.*, 2 ECONOMY AND SOCIETY 883; M. WEBER, THE RELIGION OF CHINA 149-50 (1951) [hereinafter cited as THE RELIGION OF CHINA].

9. *See, e.g.*, THE RELIGION OF CHINA 100-04, 147-50.

The failure of other civilizations to develop rational law helped explain why only in Europe could modern, industrial capitalism arise. Weber believed that this type of capitalism required a legal order with a relatively high degree of "rationality." Since such a system was unique to the West, the comparative study of legal systems helped answer Weber's basic question about the causes of the rise of capitalism in Europe.

II. RECONSTRUCTING WEBER'S ANALYSIS: THE CONCEPT OF LAW AND ITS RELATIONSHIP TO DOMINATION

To understand how Weber reached these conclusions, it is necessary to reconstruct the details of his argument. The position I have stated in the preceeding paragraphs emerges from a synthetic analysis of the various discussions of law and capitalism in his work. Because Weber did not give us a finished, systematic treatment of these themes, I shall attempt a reconstruction that will permit us to understand why Weber chose to focus on the autonomy, generality, and universality of the European legal system; why he felt that such a system could only have come into existence in Europe; and why such a system should be necessary for, or at least highly conducive to, capitalist economic development.

A. Weber's Concept of Law: Coercion, Legitimacy, and Rationality

Despite his predilection for careful definitions, I do not believe Weber had one, clear-cut notion of "law." While he specifically defines law at several points, the discussion at other places in his work overflows the neat boundaries he himself sets up. The term "law" is used to describe rather varied phenomena; it is, however, possible to identify the essential elements of law and to show the areas in which legal phenomena display their most important variations.

There are certain central themes in the Weberian discussion of law. Law is associated with organized coercion, with legitimacy and normativeness, and with rationality. These elements deserve separate consideration.

Weber is frequently cited for the famous definition of law set forth in chapter I of *Economy and Society*, in which law is identified merely with organized coercion, or power. In establishing the fundamental concepts of his sociological system Weber stated that:

> An order will be called . . . *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.[10]

10. 1 ECONOMY AND SOCIETY 34.

Taken by itself, this definition seems both over and underinclusive. On the one hand, it fails to distinguish law from commands backed by threats, and thus seems to deny its relationship with rules. On the other hand, it holds that rules without organized coercive machinery are not law. Thus it can be attacked both by those who wish to find law without organized political force, *and* by those who do not want law to refer to every coercively backed action, whether of political authority or not.

There is no doubt that Weber stressed the coercive quality of law. As I shall demonstrate, legal coercion is a key feature of Weber's model of a functioning market economy. Nevertheless, further analysis reveals that Weber used a much more complex concept of law than the one quoted. Indeed, seen in context, the very definition itself suggests that coercion was only one pole of Weber's idea. The other was a concept of law as one form of "legitimate order," a term Weber uses to refer to any structured source of guidelines for right conduct.[11]

Thus, in the Weberian scheme, law is a subclass of a category called legitimate or normative orders. All such orders are (1) socially structured systems which contain (2) bodies of normative propositions that (3) to some degree are subjectively accepted by members of a social group as binding for their own sake, without regard for purely utilitarian calculations of the probability of coercion.[12] "Law" is distinguished from other forms of normative orders on the grounds that it *additionally* involves specialized agencies enforcing norms through coercive sanctions. "'Law' . . . is simply an 'order'," he said, "endowed with certain specific guarantees of the probability of its empirical validity."[13] Coercion is introduced to distinguish law from convention—a distinction Weber explicitly indicated was purely arbitrary—but both law and convention must be legitimate. Since it combines legitimacy and coercion, law is both power and authority: neither of these polar concepts is by itself adequate to catch Weber's idea of law.[14]

Thus, one should not be misled by the emphasis on coercion in the original definition. Weber thought of law, like custom and convention, as one of the basic sources of normative guidance in society, a place where men look to determine how they ought to be-

11. *Id.* at 31-36.
12. *Id.*
13. *Id.* at 313.
14. *Id.* at 34-35. From the text, it should be clear that Weber, like other founders of modern sociology, struggled with the contrast between authority and power that had become vivid in the 19th century. Certain aspects of his definition of law relate it to power (coercion); others place it within the sphere of authority (legitimacy). While this ambiguity may complicate the task of interpretation, the resulting definition probably catches well the dual character of modern law. For an excellent discussion of the contrast between power and authority in Weber and others see R. NISBET, THE SOCIOLOGICAL TRADITION 107-73 (1966).

have. "Orders" which have coercive powers were called "law," but not all law was coercion. Precepts and principles may be stated by the legal order and yet men may accept them as obligatory without actual coercion. Weber saw that law can be a source of legitimate authority in society, and was very much interested in the reasons why men might accept legal obligations as binding without specifically being threatened by sanctions. In exploring Weber's discussion of law, therefore, its normative aspect must not be overlooked.

The final dimension of law in Weber's scheme was its "rationality." Weber distinguished various types of law in terms of relative degrees of rationality. Close analysis shows that Weber's notion of legal rationality really measures the degree to which a legal system is capable of formulating, promulgating, and applying universal rules. Thus, while in Weber's analysis "law" is not necessarily a matter of rules (the term law describing a broad, generic category), the major distinction among types of law is their capacity to develop a system of universally applicable rules.

To recapitulate, the essential elements of Weber's broad concept of "law" are that it be a system of standards, maxims, principles, or rules of conduct, to some degree accepted as obligatory by the persons to whom it is addressed, and backed by a specialized enforcement agency employing coercive sanctions. To the extent that sanctions are applied in accord with a system of rules, law is said to be "rational."

Weber was concerned with possible variations along two dimensions of this definition. Law, as Weber conceived it, can be said to vary in its degree of *rationality* and in the nature of its *legitimacy*. The degree of law's rationality is, furthermore, related to the nature of its legitimacy. Weber discussed historical variations along these dimensions in order to determine their significance for the rise of capitalism.

1. VARIATIONS IN LEGAL RATIONALITY: THE TYPES OF LEGAL "THOUGHT"

In order to explore the historical significance of legal systems, Weber constructed ideal types of different legal orders. These types were methodological artifices which permitted him to examine and compare the legal systems of concrete societies. They did not reflect any particular concrete legal system, but rather included complexes of typical features that can be found in real systems and which highlight the problems that Weber wanted to explore.

Weber's typology of legal systems must be seen in the context of his overall analysis of legal "rationality." It attempts to differentiate those dimensions of legal organization and the law-society re-

lationship which he believed influenced rationality. The various types, therefore, chart differences that exist between the way legal systems handle the characteristic problems of formulating authoritative norms ("lawmaking") and of applying such norms to specific instances ("lawfinding"). These are distinguished in ways that are designed to measure degrees of rationality.

There are a number of possible approaches to norm formulation or lawmaking. A society may or may not have an explicit set of legal precepts that are thought to be obligatory on its members. To the extent that it has such precepts, they may be viewed as consciously constructed or they may be thought to have been handed down by some primal law giver and thus have a sacred, unchanging quality. And to the extent that precepts are recoguized as consciously wrought, they may seem merely instrumental to the achievement of some extrinsic set of concrete goals, such as religion or political ideology, and thus should be obeyed only to the extent that they fulfill this purpose. Alternatively, the set of precepts may be seen as autonomous from a specific set of social purposes and thus should be obeyed for their own sake.

Similarly, lawfinding, or the application of norms, has its characteristic variations. Decisions may be reached on magical grounds. Cases may be decided by individuals who are thought to have some form of extraordinary power and their judgments are obeyed because of a belief in their magic. On the other hand, decisions may be based on more secular grounds. Once again, within a secular orientation, variations are possible. Thus lawfinding may be oriented toward the resolution of specific conflicts and the determination of the concrete equities of a situation, toward the more-or-less stereotypical application of precedent, or toward the application of general rules through cognitive techniques.

Weber was concerned with differentiating these variations in legal systems, and specifically in measuring for any actual system the extent to which decisions are (1) determined by prior existing general rules of universal application and (2) established by differentiated legal organs.

Although these are the major issues Weber was concerned with, he expressed himself in a very different way. The Weberian system is labeled a typology of "legal thought" and organizes legal systems in accordance with what Weber called the rationality of lawmaking and lawfinding. This aspect of the discussion has led to great confusion about what he was driving at. In the discussions of Weber's work, it is rare to see the categories of rationality related to the underlying theories of differentiation, generality, and universality. If this is done, however, Weber's argument becomes clearer.

Weber himself classified legal systems into distinct categories depending on how law is both made and found. Law may be found and made either *irrationally* or *rationally*. Law can be either (1) formally or (2) substantively irrational, or (3) substantively or (4) formally rational. Finally, formally rational law can be "formal" either in an "extrinsic" or "logical" sense.[15]

There are thus two major dimensions of comparison: the extent to which a system is formal, and the extent to which it is rational. If these terms are analyzed, one finds that "formality" can be considered to mean "employing criteria of decision intrinsic to the legal system" and thus measures the degree of systemic autonomy, while "rationality" means "following some criteria of decision which is applicable to all like cases" and thus measures the generality and universality of the rules employed by the system. The relationship between Weber's typology and the concepts of differentiation and generality can be shown by the following table:

TABLE I

THE TYPOLOGY OF LEGAL SYSTEMS CLASSIFIED BY FORMALITY AND RATIONALITY OF DECISIONMAKING PROCESSES

DEGREE OF DIFFERENTIATION OF LEGAL NORMS	DEGREE OF GENERALITY OF LEGAL NORMS: HIGH	DEGREE OF GENERALITY OF LEGAL NORMS: LOW
HIGH	LOGICALLY FORMAL RATIONALITY	FORMAL IRRATIONALITY
LOW	SUBSTANTIVE RATIONALITY	SUBSTANTIVE IRRATIONALITY

Formally irrational legal decisionmaking is associated with prophetic decisions or revelation. Decisions are announced without any reference to some general standard or even to the concerns of the parties to the dispute. The criteria of decisionmaking is intrinsic to the legal system but unknowable; there is no way the observer can predict the decision, or understand why it was reached. Substantively irrational decisions apply observable criteria but these are always based on concrete ethical and practical considerations of the specific cases. It is possible to understand these decisions after the fact, but unless a sytem of precedent arises, it is difficult to generalize from the concrete cases. Substantively

15. 2 ECONOMY AND SOCIETY 653-58. "Extrinsic" rationality, which means ritualistic reliance on such things as seals and other legal formalities, is not central to Weber's overall analysis and is not discussed in the subsequent analysis.

rational decisionmaking employs a set of general policies or criteria, but these are of some body of thought extrinsic to the legal system—religion and political ideology are examples of such extrinsic systems. To the extent that the overarching principles of the external thought system are understood, it is possible to apprehend rationally how the system will function. But this is only true to a limited degree, for the manner in which the precepts of the external system will be translated into legal decisions may vary. Thus, while this type is more capable of formulating general rules than the previous two, it is less likely to do so than logically formal rationality. In comparison with this fourth type, these three types of legal systems, therefore, display a low degree of differentiation, a low degree of generality of rules, or both. As a result it is difficult to predict the types of decisions they will reach.

This is not true of European law, which Weber identified with logically formal rationality. This type of system combines a high degree of legal differentiation with a substantial reliance on preexisting general rules in the determination of legal decisions. Indeed, these two features are closely related.

What did Weber mean by "logically formal rationality"? And why does it lead to general, universally applied rules? Legal thought is *rational* to the extent that it relies on some justification that transcends the particular case, and is based on existing, unambiguous rules; *formal* to the extent that the criteria of decision are intrinsic to the legal system; and *logical* to the extent that rules or principles are consciously *constructed* by specialized modes of legal thought which rely on a highly logical systemization, and to the extent that decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles. Since in such a system, court decisions can only be based on previously established *legal* principles, and since the system requires these to be carefully elaborated, normally through codification, legal decisions will be based on *rules*, and these will be general as well as derived from autonomous *legal* sources.

Weber cited the German legal system of the late 19th century as a concrete example of a legal system of the logically formal-rational type. This system was animated by the theories of German legal science and what Weber called "the legal science of the Pandectists' Civil Law," which proceeds from five basic postulates:

(1) Every concrete legal decision is the application of an abstract legal proposition to a concrete fact situation; (2) it must be possible in every concrete case to derive the decision from abstract propositions by means of legal logic; (3) the law is, or must be treated as, a gapless system; (4) whatever cannot be "construed"

rationally is legally irrelevant; and (5) all human action is *ordered* by law.[16]

In this system, "abstract" legal propositions are organized systematically in the form of a civil code; judges are to apply the code using specific modes of professional logic; not only is all human action "ordered by law," but what law allows no other social force can deny.

2. THE RELATIONSHIP BETWEEN POLITICAL STRUCTURE AND THE LEGAL SYSTEM: THE TYPES OF DOMINATION AND THE TYPES OF LAW

With the special features of European law in mind, Weber's theory of the genesis of this structure must be examined. Under what conditions did European law arise? Why did this system only develop in Europe? The answers to these questions require analysis of Weber's political sociology, for, in this part of his work, Weber asserted a mutual relationship between political and legal structures. The European or "modern" legal system could only emerge under distinct political conditions. Its existence was intimately linked to the rise of the modern bureaucratic state. Yet, at the same time, this type of state was itself dependent on a legal system of the modern type.

16. *Id.* at 657-58. In a more extended discussion of Weber's thought it would be important to trace the origins of his decision to equate legalism primarily with a mode of legal thought, and to select the German Pandectist model as the zenith of the thought of legalism. I can only suggest possible directions such an inquiry might take. The first issue that would have to be examined is why he chose to examine the growth of types of legal thinking, rather than focusing directly on the substantive aspects of a legal system for which legal thought is, in some degree, a proxy. This strategy might be explained immediately in terms of parallels with his sociology of religion, where the dependent variable is a particular type of religious belief; and ultimately in terms of Weber's complex dialogue with Marxism, which led him to focus on the independent role of ideas in history. Note that he wished to show that legal thought contributed to the rise of capitalism, not the reverse. 3 *Id.* at 892. For a discussion of Marx and Weber in this context see A. GIDDENS, *supra* note 7, at 190-95, 205-23.

Alternatively, there may have been features of German legal thought itself which encouraged an emphasis on a systematic, abstract mode of legal thinking as the hallmark of legalism. Franz Neumann has pointed out that political conditions in 19th-century Germany had a strong impact on the approach taken by German thinkers attempting to develop a concept of what I have referred to as "legalism." Neumann sees these thinkers as representatives of a rising middle class that had to confront the reality of a more-or-less absolute state which was controlled by other strata. This political impotence led them to stress formal and logical rather than substantive techniques to constrain arbitrary state action. *See generally* F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 22-68 (1957). *See also* note 48 *infra*. For an attempt to explain "logically formal rationality" in terms of notions drawn from Anglo-American jurisprudence see Rheinstein, *supra* note 3, at li-lxiii.

In his political sociology Weber constructed ideal types of political systems or forms of "domination" (legitimate authority). These are organized in accordance with the basic claim these systems or regimes make to have their commands obeyed. The classification is made by the typical conditions of legitimacy, the primary justification regimes offer for their power over others. Weber selected this aspect of political systems as the basis for classification because, he felt, it constitutes "the basis of very real differences in the empirical structure of domination."[17]

Weber identified three ideal or pure forms of legitimization. These are called traditional, charismatic, and legal "domination." Members of a social organization will treat commands as legitimate because they are issued in accordance with immutable custom, because they are issued by an individual with extraordinary or exemplary characteristics, or because they rest on conscious legal enactment.[18]

Since legal decisions are part of the total structure of domination, they, like all actions of the rulers, must be legitimized; and since they form part of the total pattern of domination, this legitimization must be consistent with the basic claim the system makes on men's loyalties. Thus, in this ideal-typical analysis, law is associated with all three types of domination, and each pure type has a characteristic form of judicial process, and basis for legitimization of legal decisions. Under traditional domination decisionmaking is characterized as empirical and is justified as based on immutable tradition. Under charismatic domination law is accepted by the populace as binding because it originates from an extraordinary leader and takes the form of case-by-case or ad hoc decisionmaking.

In these two types, law is legitimized by something, as it were, outside itself. But when "law" in a generic sense becomes rational law, it becomes its own legitimizing principle, and the basis of all legitimate domination. This is the nature of "modern" law and, thus, the "modern state."

Weber established a close relationship between the types of domination and the types of "legal thought." Legal domination is based on logically formal rationality, which can exist only in the context of legal domination. Moreover, he suggested that as "law" (in the generic sense) evolved to modern, rational law, so the form of domination evolved toward the modern state, a creation and creature of this type of law.[19]

17. 3 ECONOMY AND SOCIETY 953.

18. 1 *Id.* at 215-16. For an excellent summary of the three types of domination see BENDIX 294-97.

19. Although Weber generally took issue with the evolutionary trends in late 19th-century social thought, he occasionally posited evolutionary processes. One of these was his tentative schema of the development of

This becomes clear only upon detailed examination of these two ideal types. Legal domination is said to exist when the following conditions prevail: (1) There are established norms of general application; (2) there exists a belief that the body of law is a consistent system of abstract rules, and that administration of law consists in the application of these rules to particular cases and is limited to these rules; (3) the "superior" is himself subjected to an impersonal order; (4) obedience is to the law as such and not to some other form of social ordering; and (5) obedience is owed only within rationally delimited spheres (jurisdiction).[20]

Thus, the particular concept of "law" contained in the notion of logically formal rationality is included as one of the essential elements of a system of legal domination. And, at the same time, only logically formal rationality can maintain the "consistent system of abstract rules" necessary for legal domination. No other type of legal thought can create systematic general norms and guarantee that they, and only they, will determine the outcome of legal decisions.

In surveying the other forms of law, or legal thought, Weber made clear that they differ from the modern, rational type in their failure to generate a system of general rules. Formal irrationality (magic and revelation) does not know the notion of general rules.[21] Substantive irrationality is case oriented and concerned only with the equities of the individual situation.[22] Substantive rationality, on the other hand, is in some sense governed by rules—that is why it is "rational"—but these are the principles of some body of thought outside the law itself, such as religion, ethical philosophy, or ideology.[23] This type of law will be con-

legal domination in the West. In this schema four stages are identified: (1) Charismatic legal revolution through law "prophets"; (2) empirical creation and finding by honoratiores (notables); (3) imposition by secular and theocratic powers; and (4) specialized, professional, and logical systematization. 2 ECONOMY AND SOCIETY 882-83. These seem to parallel the four principal types of "legal thought." Although Weber himself did not stress this evolutionary scheme, Bendix considers it the key to the sociology of law, and has organized his restatement of Weber's thoughts on law in terms of these stages. *See* BENDIX 385-457.

20. 1 ECONOMY AND SOCIETY 217-18.

21. 3 *Id.* at 976.

22. This is what Weber calls "*Kadi*-justice," or "informal judgments rendered in terms of concrete ethical or other practical valuations." *Id.* at 976. The following passage gives a vivid picture of *Kadi*-justice:

> [T]he Chinese judge, a typical patrimonial judge, discharged business in thoroughly patriarchal fashion. That is, insofar as he was given leeway by sacred tradition he precisely did not adjudicate according to formal rules and "without regard to persons." Just the reverse largely obtained; he judged persons according to their concrete qualities and in terms of the concrete situation, or according to equity and the appropriateness of the concrete result.

THE RELIGION OF CHINA 149. This type of lawmaking and lawfinding "knows no rational rules of decision." 3 ECONOMY AND SOCIETY 976.

23. 2 ECONOMY AND SOCIETY 657.

stantly tempted to reach specific results, dictated by the value premises of this external set of principles, which are neither general nor predictable.[24] Since there is no cognitive system permitting observers to predict when such specific results will occur, this type of law displays a low order of rationality.

Weber underscored the relationship between legal domination and European law by describing the other types of domination. Just as formally rational law is necessary to create a situation under which domination can be rationally legitimized, so other forms of legitimization discourage the rise of rational law. "Traditionalism places serious obstacles in the way of formally rational regulations . . . ."[25] In traditional societies, according to Weber, one cannot have specific, purposefully enacted law (legislation), for such a procedure would be inconsistent with the ruler's claim to legitimacy. Commands will only be obeyed if they can be related to unchanging, eternal principles. Furthermore, the traditional ruler must base any actual regulation of the economy on "utilitarian, welfare, or absolute values."[26] This is true because, while his legitimacy is based on adherence to traditional principles, successful domination requires him also to maintain the economic welfare of his subjects. Such a situation, Weber concluded, "breaks down the type of *formal* rationality which is oriented to a technical legal order."[27] Charismatic authority, too, discourages the rise of modern rational law; Weber observed that bureaucratic (or legal) authority "is specifically rational in the sense of being bound to intellectually analyzable rules; while charismatic authority is specifically irrational in the sense of being foreign to all rules."[28]

From this analysis, it is apparent that European law differs from other types of law in several dimensions. Unlike other types, European law develops bodies of rules, which are applied through formal procedures guaranteeing that the rules will be followed in

24. Weber drew a distinction between "law" and "administration." Administration was government pursuing "concrete objectives of a political, ethical, utilitarian," or other kind. 2 *Id.* at 645. Government only becomes "law" when the government promulgates general rules. *Id.* Substantively rational justice is associated with administration rather than law, in this latter sense. Weber says of the patriarchal system of justice that, although "[it] can well be rational in the sense of adherence to fixed principles, it is not so in the sense of a logical rationality of its modes of thought but rather in the sense of the pursuit of substantive principles of social justice . . . ." *Id.* at 844. Systems of this type "refuse to be bound by formal rules . . . . They are all confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to realize substantive goals." *Id.* at 811.

25. 1 *Id.* at 239. *See also* THE RELIGION OF CHINA 100-04.

26. 1 ECONOMY AND SOCIETY 240.

27. *Id.*

28. *Id.* at 244.

all cases. For these reasons, it curbs the arbitrary action of the ruling groups, and is, partly as a result, highly predictable. Thus, under European law, the rules governing economic life are easily determined; this type of legal order reduces one element of economic uncertainty. This calculability of European law was its major contribution to capitalist economic activity.

The following table shows the relationship between law and the types of political structure (domination), indicating the degree of discretion the system gives to rulers and the relative degree of calculability of rules governing economic life. The political structure determines the type of legal order that can prevail, and thus affects the economic function it can play.

TABLE II

ADMINISTRATION, LAW, AND ECONOMIC REGULATION UNDER THE PURE TYPES OF DOMINATION

	TYPE OF DOMINATION		
	TRADITIONAL	CHARISMATIC	LEGAL
Obedience owed to	*Individuals* designated under traditional practices.	*Individuals* considered to be extraordinary and endowed with exceptional powers.	*Enacted rules* formulated in accord with rational criteria.
Law legitimated by its	*Origin in tradition.* All law is considered to be part of previously existing norms.	*Origin from charismatic leader.* All law is declared by the leader and regarded as divine judgment or revelation.	*Origin in rational enactment.* All law is consciously "made" through logical techniques by an authority which itself is established by law and which acts in accordance with legal rules.
Nature of the judicial process and form of justification of decisions	*Empirical/Traditional.* Decisionmaking on a case-by-case basis. (Precedent may or may not be considered.)	*Case Oriented/ Revelatory.* Concrete case-by-case judgments justified as revelation.	*General/Rational.* Cases decided by formal rules and abstract principles and justified by the rationality of the decisionmaking process.
Structure of administration	*Patrimonial.* Staff recruited through traditional ties. Tasks allocated by discretion of master.	*No Structured Administration.* Ad hoc selection of staff on charismatic qualifications, with undifferentiated tasks.	*Bureaucratic.* Highly structural administration by professionals in hierarchic system with rationally delimited jurisdiction.
Degree of discretion of ruler	High	High	Low
Calculability of rules governing economic life	Low	Low	High

B. *The Rise of "Legalism"*

What emerges from this complex system is the picture of the growth of a certain kind of society. In this society, the primary source of normative ordering is a logically consistent set of rules constructed in a specialized fashion. These rules are created by the use of highly specialized forms of thought which allow the construction of an intellectual system which can be applied only by trained professionals. While the values reflected in this set of norms have their source outside the specialized profession, they only become reflected in rules to the extent that they are incorporated in the intellectual system constructed by the professionals. And only legal rules so constructed are employed in the resolution of disputes between members of the society. All behavior not so regulated is formally free.

If this system is to function, there must be a clear differentiation of law from other sources of normative ordering. Ultimately, law must supersede other systems that might have a grip on men's loyalties. Law must become both autonomous and supreme.

Law must become separate from power and religion if it is to reach its goal of formulating and maintaining unambiguous, general rules. Weber constantly stressed that "power has its reasons that reason cannot understand," that rulers will constantly be tempted to sacrifice universal principles for particular, expedient goals.[29] In the language of American constitutional theory, power wielders will be "result oriented." Similarly, where law is mixed with religion, pressures will emerge to sacrifice generality for concrete ethical ends.[30]

But it is not enough for law to become separate from other sources of social control. It is not enough that rules exist in some abstract sense. They must come to control all social life, and law must supersede other forms of normative order.[31] If it does not, legal rules will have limited social impact.

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29. *See, e.g.*, 2 *Id.* at 811.

30. Weber observed that

> [T]he rationality of ecclesiastical hierarchies as well as of patrimonial sovereigns is substantive in character, so that their aim is not that of achieving that highest degree of formal juridical precision which would maximize the changes for the correct prediction of legal consequences and for the rational systematization of law and procedure. The aim is rather to find a type of law which is most appropriate to the expediential and ethical goals of the authorities in question. To these carriers of legal development the self-contained and specialized (juridical) treatment of legal questions is an alien idea, and they are not at all interested in any separation of law from ethics. This is particularly true, generally speaking, of theoretically influenced legal systems, which are characterized by a combination of legal rules and ethical demands.

Id. at 810.

31. The Weberian perspective is quite evident in the discussions of the relationship between law and "development," set forth in T. PARSONS,

Such legal autonomy entails a differentiated legal structure. Unique skills, roles, and modes of thought are necessary if a society is to create and maintain universal rules. A highly specialized profession must exist to nurture and maintain these qualities. Since unique modes of thought are an essential element of the social structure of modern law, highly specialized training must exist.[32]

This model may be called "legalism," to suggest a society dominated by an autonomous rule system. In this model, rules are obeyed because they are believed to be rationally enacted. Given the high degree of differentiation of legal machinery, and the de-

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SOCIETIES: EVOLUTIONARY AND COMPARATIVE PERSPECTIVES (1966). Parsons distinguishes "norms" and "values," and says "norms . . . are primarily social. They have regulatory significance for social processes and relationships but do not embody 'principles' which are applicable beyond *social* organization . . . . In more advanced societies, the structural focus of norms is the legal system." *Id.* at 18. Parsons seems to be saying: (1) We only have *norms* when we separate law (external obligations) from ethics; (2) "advanced" societies rely primarily on law for normative ordering; (3) law and ethics are separated in modern society, and social force stands only behind *law*. Parsons suggests that societies evolve through three stages: primative, intermediate, and modern. He sees the emergence of "legalism" as the major criterion marking the evolution of societies from "intermediate" to "modern." *Id.* at 26. His explanation of why this should be so is Weberian in inspiration and characteristically Parsonian in its abstractness:

> [L]aw, when developed to the requisite level, furthers the independence of the normative components of the societal structure from the exigencies of political and economic interests and from the personal, organic, and physical-environmental factors operating through them.

Id. at 27.

The organization of this law must be "highly generalized according to universalistic principles." This requires, of all things, "formal rationality." *Id.* Parsons has taken over, at a very superficial level, the Weberian analysis, but has generalized it to *all* societies, making the development of logically formal rationality a criterion of "modernity." Applying this criterion, it would seem that England never became "modern," since it never developed formal rationality. This approach also links the concept of modernity to societies that develop autonomous legal orders, thus denying the possibility of "modernization" without "legalism." Unger has conclusively demonstrated the ethnocentric quality of this idea. R. UNGER, THE PLACE OF LAW IN "MODERN" SOCIETY (forthcoming).

32. Formal rationality is the product of a specific form of legal specialization and legal education, found on the Continent. This specialization fosters autonomy of legal norms from other norms. The abstract and general quality of logically formal rationality made possible the increasing differentiation of legal life from other social forces. Weber noted:

> The legal concepts produced by academic law-teaching bear the character of abstract norms, which, at least in principle, are formed and distinguished from one another by a rigorously formal and rational logical interpretation of meaning. Their rational, systematic character as well as their relatively small degree of concreteness of content easily result in a far-reaching emancipation of legal thinking from the every day needs of the public.

2 ECONOMY AND SOCIETY 789.

cline of other forms of social control, men in this lawyer's utopia live in a highly calculable universe. They know, or can learn, what their rights and duties are, for they can predict with a high degree of certainty when legal coercion will be employed, and, at the same time, know that no other source of social control will constrain the behavior law allows.

Unique conditions in European history, Weber argued, led to the emergence of legalism.[33] Religious, political, economic, and legal factors contributed to this development. In the West, religious and secular law were separated, thus allowing a divorce of legal and ethical norms. At the same time, the bureaucratization of the Catholic Church, and its Roman law heritage, led canon law to become significantly more rational than most theocratic legal orders. And European kings, in their struggles for power with other groups in the polity, found it necessary to create bureaucratic staffs and to enter into alliances with rising bourgeois interests. To further their own self-interest, both the administrative staff and the merchant groups demanded more rational and calculable legal systems, demands which patrimonial rulers found difficult to refuse, even though the result was in some way a limitation of their powers.

Finally, autonomous developments in legal life provided an element essential to realization of this thrust toward legal rationality. A major development was the separation of lawfinding and lawmaking, a phenomenon Weber found especially accentuated in early German law. This development was a necessary condition for the establishment of conscious lawmaking and thus for the secularization of the law. This differentiation occurred more fully in Western systems. Only in the West, moreover, did there arise the idea of a universal "natural" law that suggested the possibility of transcending particularistic rules and time-honored traditional norms. Additionally, the influence of Roman law, with its special logical techniques, added another unique feature to European law. The universities of continental Europe had developed a systematic study of Roman law, employing highly abstract, logical techniques. From these universities emerged specialized practitioners trained to think of law as a science. It was the existence of this group of legal notables, trained in methods of legal analysis, that made possible the codification and rationalization of the law which was demanded by the various political and economic groups. A viable, rational legal technique, merged with strong political and economic needs, gave birth to modern legal rationality. These developments, in turn, strengthened the modern bureaucratic state, which lays its claim to obedience on the ground that it can and does create and maintain a system of rational rules. Thus, ra-

33. *Id.* at 882-83. For a careful reconstruction of Weber's account of the rise of formally rational law see BENDIX 391-416.

tional law and legal domination developed in a symbiotic relationship. And as they developed, they superseded other forms of social control.

One of the most important elements of European legal history, and one of the key concepts for an understanding of legalism, is Weber's treatment of the emergence of a distinct legal profession. This event was not only unique; it was absolutely essential for the emergence of logically formal rationality and underlies much of the contemporary dynamics of legalism.

Weber argued that only in the West did lawyers emerge as a distinct "status group." A status group is an organization founded on the basis of formal education, occupational prestige, or a distinct style of life.[34] Status groups may be formed on the basis of shared ideas, such as political belief or religious faith. Since men form concrete interests as a result of membership in such groups, they become committed to the ideas that have shaped the organization. In this way these groups become historical factors by which ideal—as opposed to material—interests become the basis of social conflict. Status groups affect history because men will struggle to maintain the ideas that underlie the groups to which they belong.[35]

Ideas about the nature of law may have this group-forming quality, and group needs may foster the development of distinct legal conceptions. The emergence of a distinct legal profession in the West not only fostered the growth of the idea of law as an autonomous technique of social ordering; it also meant that such an idea became the basis of real social conflict. Logically formal rationality is an extreme version of the basic idea that law is a consciously shaped autonomous technique that can be applied to resolve social conflict. Such an idea could only arise where the legal profession becomes differentiated,[36] and once it arises it becomes the basis of the social cohesion of the lawyers as a status group. Thus, once legalism is established, conflicts can arise between the lawyers, with their commitment to the idea of a fixed and formally derived law, and political and economic factions that advocate specific substantive policies or economic results which threaten the legal autonomy formalism tries to maintain.[37]

III. LEGALISM AND CAPITALISM: A RECONSTRUCTION OF WEBER'S THEORY OF LAW IN ECONOMIC LIFE

We now have most of the elements needed to understand Weber's theory of the relationship between the rise of modern law and capitalism. We have examined his legal sociology, which identifies distinctive types of legal systems, and his political sociology, which

34. 1 ECONOMY AND SOCIETY 305-07.
35. BENDIX 85-87.
36. 2 ECONOMY AND SOCIETY 775-76.
37. *See generally id.* at 865-95.

shows that the structure of power determines to some degree the type of legal order that can exist. We have seen why Weber thought legalism developed in Europe. Now we must turn to his economic sociology, in which the dynamics of the market are developed. This analysis will show why capitalism and legalism are intimately related.

In his economic sociology, Weber stressed the importance for capitalist development of two aspects of law: (1) its relative degree of *calculability,* and (2) its capacity to develop *substantive* provisions—principally those relating to freedom of contract—necessary to the functioning of the market system.

The former reason was the more important of the two. Weber asserted that capitalism required a highly calculable normative order. His survey of types of law indicated that only modern, rational law, or logically formal rationality, could provide the necessary calculability. Legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure.[38]

Legalism is the only way to provide the degree of certainty necessary for the operation of the capitalist system. Weber stated that capitalism "could not continue if its control of resources were not upheld by the legal compulsion of the state; if its formally 'legal' rights were not upheld by the threat of force."[39] He further specified that: "[T]he rationalization and systematization of the law in general and . . . the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of . . . capitalistic enterprise, which cannot do without legal security."[40]

Weber never worked out in detail a model of capitalist production which might explain why legal calculability was so important to capitalist development. I have developed such a model,[41] and I believe that underlying Weber's repeated emphasis on legal calculability is a vision similar to this latter-day ideal type.

The essence of the model is the conflict of egoistic wills, which is an inherent part of competitive capitalism. In pure market capitalism of the type idealized in micro-economics texts, each participant is driven to further his own interests at the expense of

38. *Id.* at 847. Formal rational law does not come into existence merely because it serves the needs of the bourgeoisie for "calculable" law. *Id.* at 855. Rather, it emerges as the result of this need, in connection with the needs of patrimonial administration for rational schemes. It is also a product of the pressure of a specific form of legal education which is in turn a result of a specific form of professional organization. A capitalist class is necessary but not sufficient for the emergence of legal rationality.

39. 1 *Id.* at 65.

40. 2 *Id.* at 883.

41. Trubek, *supra* note 1.

all other participants in the market. Theoretically, the profit motive is insatiable, and is unconstrained by any ethical or moral force. Thus, each actor is unconcerned with the ramifications of his actions on the economic well-being of others.

At the same time, however, economic actors in this system are necessarily interdependent. No market participant can achieve his goals unless he secures power over the actions of others. It does little good, for example, for the owner of a textile plant to act egocentrically to further his interests if at the same time he cannot be sure that other actors will supply him with the necessary inputs for production and consume his product. If suppliers do not provide promised raw materials, if workers refuse to work, if customers fail to pay for goods delivered, all the ruthless, rational self-interest in the world will be of little value to the textile producer in his striving for profits.

Now if all the other actors were nice, cooperative fellows, our textile manufacturer might not have to worry. Others would play their roles in the scheme and he would come out all right. But this may not always happen because they are, by hypothesis, as selfish as he is. Thus, they, too, will do whatever leads to the highest profit; if this means failing to perform some agreement, so be it. And since one can assume that there will frequently be opportunities for other actors to better themselves at the expense of providing him with some service or product necessary to the success of his enterprise, our hypothetical businessman lives in a world of radical uncertainty.

Yet, as Weber constantly stressed, uncertainty of this type is seriously prejudicial to the smooth functioning of the modern economy. How can the capitalist economic actor in a world of similarly selfish profitseekers reduce the uncertainty that threatens to rob the capitalist system of its otherwise great productive power? What will permit the economic actor to predict with relative certainty how other actors will behave over time? What controls the tendency toward instability?

In order to answer these questions, Weber moved to the level of sociological analysis. The problem of the conflict between the self-interest of individuals and social stability—what Parsons calls "the Hobbesian problem of order"[42]—is one of the fundamental problems of sociology, and, to deal with it, Weber constructed his basic schemes of social action.[43] Weber recognized that predictable uniformities of social action can be "guaranteed" in various ways, and that all of these methods of social control may influence economic activities. Actors may internalize normative standards, thus fulfilling social expectations "voluntarily." Or they may be subjected to some form of "external effect" if they deviate from

42. T. PARSONS, THE STRUCTURE OF SOCIAL ACTION 89-94 (1968).
43. 1 ECONOMY AND SOCIETY 68.

expectations. These external guarantees may derive from some informal sanctioning system or may involve organized coercion. Law is one form of organized coercion. All types of control may be involved in guaranteeing stable power over economic resources; factual control of this type, Weber observed, may be due to custom, to the play of interests, to convention, or to law.[44]

As I have indicated, however, Weber believed that the organized coercion of *law* was necessary in modern, capitalist economies. While internalization and conventional sanctions may be able to eliminate or resolve most conflict in simpler societies, it is incapable of serving this function in a way that satisfies the needs of the modern exchange economy. For this function, law, in the sense of organized coercion, was necessary. Weber stated:

> [T]hough it is not necessarily true of every economic system, certainly the modern economic order under modern conditions could not continue if its control of resources were not upheld by the legal compulsion of the state; that is, if its formally "legal" rights were not upheld by the threat of force.[45]

Why is coercion necessary in a market system? And why must this coercion take legal form? Finally, when we speak of *legal* coercion, do we mean state power, regardless of how it is exercised, or do we mean power governed by rules, or legalism? Weber gives no clear-cut answer to these questions. The discussion suggests answers but the issues are not fully developed. And the most crucial question, the interrelationship between the need for coercion and the model of legalism, is barely discussed at all. However, I think answers to the questions can be given which fit coherently with other aspects of his analysis.

Coercion is necessary because of the egoistic conflict I have identified above. While Weber never clearly identified this conflict, he himself was aware of it. Some principle of behavior other than short term self-interest is necessary for a market system. Tradition cannot function to constrain egoistic behavior because the market destroys the social and cultural bases of tradition. Similarly, the emerging market economy erodes the social groupings which could serve as the foci for enforcement of conventional standards. Indeed, the fact that the type of conflict I have described comes into existence is evidence of the decline of tradition and custom. Only law is left to fill the normative vacuum; legal coercion is essential because no other form is available.

A second reason why the necessary coercion must be legal is tied to the pace of economic activity and the type of rationalistic cal-

44. *Id.* at 63-69.

45. *Id.* at 65. Parsons has stressed that one of the main lines of difference between Weber and the classical economists was his concern for the importance of *coercion* in economic life. T. PARSONS, *supra* note 31, at 656-58.

culation characteristic of the market economy. It is not enough for the capitalist to have a general idea that someone else will more likely than not deliver more or less the performance agreed upon on or about the time stipulated. He must know exactly what and when, and he must be highly certain that the precise performance will be forthcoming. He wants to be able to predict with certainty that the other units will perform. But given the potential conflict between their self-interests and their obligations, he also wants to predict with certainty that coercion will be applied to the recalcitrant. The predictability of performance is intimately linked to the certainty that coercive instruments can be invoked in the event of nonperformance.

In this context, it becomes clear why a calculable legal system offers the most reliable way to combine coercion and predictability. Here the model of legalism and the model of capitalist dynamics merge. A system of government through rules seems inherently more predictable than any other method for structuring coercion. Convention is inherently too diffuse, and, like custom, was historically unavailable given the market-driven erosion of the groups and structures necessary for effective constraint of egoism. Like Balzac, Weber saw how the decline of family, guild, and Church unleashed unbridled egoism. Pure *power*, on the other hand, is available in the sense that the state is increasingly armed with coercive instruments. But untrammeled power is unpredictable; wielders of power, unconstrained by rules, will tend not to act in stable and predictable ways. Legalism offers the optimum combination of coercion and predictability.

It is here that the significance of legal autonomy can be seen. Autonomy is intimately linked to the problem of predictability. The autonomous legal system in a legalistic society is an institutional complex organized to apply coercion only in accordance with general rules through logical or purely cognitive processes. To the extent that it truly functions in the purely logical and, consequently, mechanical manner Weber presented, its results will be highly predictable. If it is constantly subject to interference by forces which seek to apply coercion for purposes inconsistent with the rules, it loses its predictable quality. Thus Weber observed that authoritarian rulers (and democratic despots) may refuse to be bound by formal rules since:

> They are all confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to realize substantive goals. Juridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions.[46]

46. 2 ECONOMY AND SOCIETY 811.

Of course, the idea of legal autonomy is a much more complex one than this simplified model suggests. In Weber's work, the emergence of the autonomous legal order is correlated with other important phenomena. An autonomous legal order was essential if certain norms of a certain type were to emerge. Neither theocratic nor patrimonial rulers would allow the development of the substantive norms of economic autonomy contained in the idea of freedom of contract. Only an independent structure of normative order could guarantee these, and only a universal and supreme structure could guarantee that these norms would be adhered to. Thus the legal system had to be autonomous of other sources of normative order on the one hand, and of pure power on the other, and simultaneously control the adverse effects of both for capitalism. At least some areas of social life had to be freed of the bonds of kinship, religion, and other foci of traditional authority, and, at the same time, insulated from the arbitrary action of the state. This required that the state, as legal order, be strengthened, so that it superseded other sources of social control, and at the same time be limited, so that it did not encroach upon areas of economic action. The state was to provide a formal order, or facilitative framework within which free economic actors could operate.[47] Contained in the idea of an autonomous legal or-

47. In his definition of the necessary sociological conditions for capitalism, Weber sketched out a model of law as a "formal order" which facilitates but does not influence economic action. *See generally* 1 *id.* at 63-211. What he called the pure type of capitalist rationality can be seen to be a sociological model for the functioning of the economist's ideal of perfect competition. In it one sees elements of Weber's idea of "law" as an economically neutral structure of state action which is necessary to the effective functioning of a market system.

The key to the discussion is the concept of economic rationality. Employing terminology by now familiar, Weber distinguished two types of economic rationality: formal and substantive. He was primarily concerned with the concept of "formal rationality," which he defined as "the extent of quantitative calculation" that is technically possible and employed in an economic system. *Id.* at 85. Substantive rationality, on the other hand, refers to the extent to which a given economy satisfies wants as judged by some set of value criteria, of which there are many possible alternative sets. *Id.* at 85-86. "Formal" rationality for Weber appears to have been a value-free "scientific" term in that the presence of this quality could be objectively verified; but appraisal of substantive rationality is purely a function of the specific values of the observer. This terminology would permit a scientific statement such as, "The economic system of X is more formally rational that that of Y," but it only allows one to say that X is more "substantively rational" than Y *as measured from* the point of view of a given set of values or social group.

I think Weber here was reaching for ideas that can be found in the contemporary distinction between the efficient allocation and equitable distribution of resources. *See, e.g.*, R. DORFMAN, PRICES AND MARKETS (1967). Weber had the idea that a certain form of economic organization would lead to the most "rational" allocation of resources, but recognized that there is no necessary relationship between that state of affairs and a "just" distribution of economic benefits. He made clear that the existence

der are fundamental paradoxes of the 19th-century idea of the liberal state.[48]

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of "formal rationality . . . does not tell us anything about real want satisfaction unless it is combined with an analysis of the distribution of income." 1 ECONOMY AND SOCIETY 109.

The most rational form of organization seems to reflect the contemporary economist's notion of perfect competition. This interpretation receives support from Weber's specification of the "substantive conditions" necessary for an economic organization to be formally rational: (1) Competition of autonomous market units; (2) absence of any form of monopoly; (3) output of production to be determined by demand of consumers; (4) free labor market and freedom of selection of managers; (5) absence of any substantive regulation of consumption, production or pricing ("substantive freedom of contract"); (6) rational and calculable technology; (7) completely calculable public administration and legal order, and a reliable "purely formal" guarantee of all contracts by the political order ("formally rational administration and law"); and (8) differentiation of firm and family. *Id.* at 161-64.

While Weber's discussion lacks the elegance of modern statements of price theory, and includes elements implicit in most neoclassical economic thought, one can see key aspects of contemporary micro-economics and welfare economics in his discussion.

Within this theoretically pure model, law assumes the role of a "formal order," a theoretical concept Weber identified with the laissez-faire state. *Id.* at 74-75. "The pure laissez-faire state," he said, "would leave the economic activity of individual households and enterprises entirely free and confine its regulation to the formal function of settling disputes connected with the fulfillment of free contractual obligations." *Id.* at 75. Under such a system "all *non-human* sources of utility are completely appropriated so that individuals can have free disposal of them, in particular by exchange . . . ." *Id.* The state confines itself to enforcement of such appropriations (property) or exchanges of them (contract). While legal guarantees of control over resources are not strictly necessary in theory (they can come from convention, custom, or enlightened self-interest) in practice, legal guarantees are necessary under "modern" conditions. *Id.* at 63-69.

This model leaves all decisions on consumption and production to the autonomous economic actors. The state does not "regulate" economic activity. Weber did not believe that such a situation was empirically possible; he pointed out that law must of necessity substantively affect economic activity, and that the modern state in fact engaged in economic "regulation." *Id.* at 75. But the notion of a formal order within a system of perfect competition presents a theoretical concept that linked together some of the otherwise disparate strands of the analysis of law.

Weber did not explore the role of "law" in a possible parallel pure model of socialist organization. He really rejected the possibility of a rational economic order under socialism, since he could not imagine how socialist states could develop allocative systems without prices and markets; he assumed that a socialist economy would have to use "calculations in kind," and would not be able to solve problems of allocation since there would be no criteria for the evaluation of the "opportunity cost" of specific uses of capital. *Id.* at 100-13. Perhaps because he did not see how socialism could be rational in this sense, he did not attempt to construct an ideal-typical model of a socialist system.

48. For a discussion of these ideas see F. NEUMANN, *supra* note 16, at 22-68. Neumann sets forth the 19th-century German liberal view of the "rule of law," a view which Weber shared to a significant degree. This body of thought was concerned with guaranteeing economic liberty without

IV. A DEVIANT CASE AND THE PROBLEMS OF HISTORICAL VERIFICATION: LEGALISM AND CAPITALISM IN ENGLAND

Weber's ideal-typical analysis of economy, polity, and law told him that law contributed to capitalism in large measure because of its calculability. Moreover, he stressed that only logically formal rationality, the autonomous legal system with universal and general rules, could guarantee the needed legal certainty. When he tried to verify this historically, the record did not completely support his analysis. This led him to qualify but never really abandon his basic thesis.

In his attempts to struggle with the historical record, Weber pointed repeatedly to aspects of legal life that were important for capitalist development, but inconsistent with a high degree of logical formalism. For example, at one point, he explicitly recognized that there is a potential conflict between legal rationalism of the logically formal type and a legal system's creative capacity to generate the new substantive concepts and institutions required by changing economic situations.[49] He also noted the way in which legal autonomy can frustrate economic expectations.[50] But these insights, which might have caused a more fundamental reappraisal of the model, did not affect his tendency to stress repeatedly the importance of legal calculability, and the identification of calculability with logical formalism.

Since his methods are as important as his theory, it is useful to examine the deviant case that particularly troubled him in this area. This was the problem of English development. Nowhere

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necessarily seeking guarantees for political liberty. As a result, thinkers in this tradition sought to create conceptual enclaves within which economic activity could function free from arbitrary interference. Economic action was separated from other types of action, "law" was identified with the model of legalism, and "law" was separated from the state. A special enclave was established for economic action, which was to be governed only by "law" and not by the state. And legalism, expressed through carefully constructed civil codes, was to be primarily limited to governance of economic activity. Economic life could only be governed through the rule of law, and the rule of law was to govern only economic life. The basic postulate of the regulation of economic activity was the maintenance of maximum freedom for economic actors. The state was only to intervene through the construction of a framework for economic activity, but this framework was to be general and neutral. It was contained in codes carefully constructed in accordance with the system of "legal science," so that they could be applied by use of the methods Weber called "logically formal rationality," in which the judge's role is reduced to purely cognitive, and thus highly predictable, tasks. The basic postulates of the free market were built into the machine constructed by jurists of this persuasion. The elimination of any judicial discretion and the banning of any value considerations from lawfinding would guarantee that the autonomous machine would remain autonomous.

49. 2 ECONOMY AND SOCIETY 688.

50. *Id.*

in his sociology of law is the struggle between concept and history, between theory and fact, more apparent than in his attempts to deal with the relationship between the English legal system and capitalist development in England. He returned to this issue several times. His somewhat ambiguous and contradictory discussion of this issue presents a picture of Weber the historian battling with Weber the sociological theorist.

As Weber analyzed the relationships between law and economy in English history, the nation's growth presented two major problems for his theories. On the one hand, England seemed to lack the calculable, logically formal, legal system that he frequently identified as necessary for initial capitalist development. On the other hand, capitalism, once it became established in England, had little, if any, appreciable effect on the rationalization of English law.[51]

From Weber's perspective, the English legal system presented a stark contrast to the continental systems. "[T]he degree of legal rationality is essentially lower than, and of a type different from, that of continental Europe."[52] In its "fundamental formal features" the English system differs from the judicial formalism of the continental system "as much as is possible within a secular system of justice . . . ."[53] Nevertheless, capitalism had first emerged in England, and England was undoubtedly a formidable capitalist regime.[54]

These findings presented several logical possibilities. First, they could refute the notion of any systematic relationship between law and economy. Second, they might suggest that the ideal type of logically formal rationality did not focus on the truly important features of legal life in economic development. Third, they might indicate that England was in some way an exception to an otherwise historically valid set of generalizations. In his discussion of the "England problem," Weber adopted all three of these mutually inconsistent positions.

In a series of brief and contradictory passages, Weber suggested all of the following hypotheses: (1) The English legal system offered a low degree of calculability but assisted capitalism by denying justice to the lower classes.[55] (2) England was unique in that it achieved capitalism "not because but rather in spite of its judicial system." The conditions allowing this, however, did not prevail anywhere else.[56] (3) The English legal system, while far from the model of logically formal rationality, was sufficiently cal-

51. *Id.* at 892.
52. *Id.* at 890.
53. *Id.* at 891.
54. 3 *Id.* at 977.
55. 2 *Id.* at 814; 3 *id.* at 977.
56. 2 *Id.* at 814.

culable to support capitalism since judges were favorable to capitalists *and* adhered to precedent.[57]

If these contrasting positions indicate that Weber had no clear image of English history in mind, they also reflect his concern with the issue of legal calculability and his tendency to equate it with one mode of legal thought—a mode of thought which clearly was not well developed in England. His constant temptation was to maintain the key importance of calculability, and deal with England either as an exception to the theory that legal calculability and capitalism are related, or as an exception to the idea that logically formal rationality and calculability necessarily go together. Although clearly aware of other possible economically relevant dimensions of English legal life, class control or substantive rules for example, he returned time and again to the feature that his underlying model told him was crucial. His last statement on the issue adopted the third position, thus maintaining the importance of *calculability* while sacrificing the centrality of logically formal rationality with its emphasis on logical techniques as a means to guarantee autonomy. But this position is basically consistent with the overall analysis, since a system controlled by capitalists will presumably be quite predictable, at least from the capitalists' point of view.[58] Since Weber thought such capitalist control was rarely possible, he did not see the English situation as a threat to the basic model. Moreover, the English judiciary was to a significant degree independent of the state, so that autonomy in this sense remains part of the model. Because of this latter aspect of English legal life, some observers have argued that England did develop a truly "rational" legal system before the rise of capitalism, and that the major flaw in Weber's analysis was the false distinction he drew between English and continental law.[59]

V. LEGALISM AND THE LEGITIMIZATION OF CLASS DOMINATION

Up to this point, "capitalism" has been presented as a vague abstraction. While Weber thought that capitalism was in some ways the most rational possible economic system,[60] he was no apologist for it. He could be scathingly critical of the moral effects of this system. These criticisms can be seen in several points; they emerge clearly in another part of the sociology of law where Weber takes up an issue raised by Marx: the role of legalism in legitimizing capitalist domination.

Legalism served more than purely economic functions under

57. 3 *Id.* at 1395. *See also* THE RELIGION OF CHINA 102.

58. *See* Guben, The "England Problem" and the Theory of Economic Development, Yale Law School Program in Law and Modernization, Working Paper No. 9 (1972).

59. *Id.*

60. *See* note 47 *supra.*

capitalism. Weber showed how the idea of an autonomous legal system dispensing formal justice legitimizes the political structure of capitalist society.

Legalism legitimizes the domination of workers by capitalists. The relationships between law, the state, and the market are complex. Legalism, while seeming to constrain the state, really strengthens it, and while the system guaranteed formal equality, it also legitimized class domination. Legalism strengthens the state by apparently constraining it, for the commitment to a system of rules increases the legitimacy of the modern state and thus its authority or effective power. And as the liberal state grows stronger, it reduces the hold of other forces on the development of the market. This strengthens the position of those who control property, since market organization increases the effective power of those individuals and organizations that control economic resources. "[B]y virtue of the principle of formal legal equality . . . the propertied classes . . . obtain a sort of factual 'autonomy' . . . .," Weber observed.[61]

He believed that these effects of legalism stem from the fundamental antinomy between formal and material criteria of justice, and the negative aspects of purely formal administration of justice under modern conditions. Formal justice is advantageous to those with economic power; not only is it calculable but, by stressing formal as opposed to substantive criteria for decisionmaking, it discourages the use of the law as an instrument of social justice. In a passage reminiscent of Anatole France's famous quip that the law forbids both rich and poor to sleep under the bridges of Paris, Weber observed:

> Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, *which the system of formal justice legalizes*, this very freedom must time and again produce consequences which are contrary to . . . religious ethics or . . . political expediency.[62]

Formal justice not only is repugnant to authoritarian powers and arbitrary rulers; it also is opposed to democratic interests. Formal justice, necessarily abstract, cannot consider the ethical issues raised by such interests; such abstention, however, reduces the possibility of realizing substantive policies advocated by popular groups.[63] Thus, certain democratic values and types of social justice could only be achieved at the cost of sacrificing strict legalism.[64] Weber also pointed out that formal legalism could stul-

61. 2 ECONOMY AND SOCIETY 699.
62. *Id.* at 812.
63. 3 *Id.* at 979-80.
64. *Id.* at 980.

tify legal creativity, and that legal autonomy could lead to results opposed to both popular and capitalist values.

VI. WEBER'S METHODOLOGY AND PERSPECTIVE

As the foregoing discussion has made clear, Weber approached the problem of law in society and economy from a perspective that was holistic, historical, and comparative. The basic structure of his analysis identified key features of society and economy and indicated how law is related to these distinct yet interrelated spheres of social life. The ideal-types of law, economy, and polity gave him tools by which he could make sense of the historical record; "law" was seen as the result of the interaction of many forces, and at the same time as a distinct structure which contributed independently to the shape of society.

Weber not only used these methods to show how legalism developed in Europe; he also employed them to analyze why the form and substance of modern law did not emerge in other great civilizations. An example of this, which vividly illustrates perspective and method, can be seen in his discussion of why the Chinese legal system failed to develop true freedom of contract and the concept of the corporation—two related and essential elements of modern law.

Weber believed that the legal concept of the corporation had made an important contribution to capitalist development in Europe. Comparative analysis showed that this concept had not emerged in China, and that this fact had consequences for Chinese economic development. He then sought to explain why China had never developed the corporate concept.

The concept of a corporation as a legal person has two elements. First, it implies free contractual relations between legally recognizable entities. Second, it asserts that groups may enter into such relations. Weber showed how Chinese political organization and social structure discouraged the development of this legal idea.

Social structure discouraged the rise of contractual relations. Unlike Europe, Chinese society was rigidly organized on a kinship basis. Weber had observed that kinship organization discourages the resolution of disputes through law, that is, through bodies of rules enforced by autonomous decisionmakers. The decline of kinship organization had been an important factor in the rise of forms of contractual organization in Europe; the continued strength of these groups in China discouraged the rise of specifically contractual forms of relationships. Moreover, Chinese political organization discouraged the formation of legally recognized groups. While the political systems of Rome and medieval Europe had encouraged the rise of autonomous corporations, the Chinese patri-

monial state discouraged all such association, which would have threatened its hegemony. For these reasons, the idea of a corporation as a legal "person," as well as the related concept of limited liability, failed to develop in China.

Weber recognized that purely economic factors contributed to this situation for, as a result of prevailing economic attitudes and organization, there were no strong forces in China pressing for some type of legally recognized corporate form. But this was only significant in light of other factors; Chinese legal development—or rather the lack of it—could not be attributed to any one factor, but had to be seen as the result of the interaction of all these separate features of the society.[65]

The same holistic approach was applied to the study of corporate law in Europe. No single feature of European society explained why European law solved the crucial problem of developing a concept of juristic personality. Political, social, and economic factors, as well as autonomous developments within the law itself, were all seen as contributing to this crucial, and uniquely Western, breakthrough. From this analysis it should be clear that even the most technical legal ideas had to be understood in the context of a multidimensional perspective on law in society, a perspective which emerged out of, and was confirmed by, careful comparative study.

VII. CONCLUSION

My restatement of Weber's work has necessarily been brief and abstract. I have been unable to present all the complexity of the argument, and have merely suggested the historical analysis by which Weber showed how legalism emerged in Europe, and the comparative research through which he tried to show why other major civilizations failed to develop legalism.

Yet I hope I have suggested that historical and comparative analysis were central to Weber's discussion. As I indicated at the beginning of the essay, Weber's principal task was historical. As Roth has put it, Weber saw sociological concepts as "Clio's handmaiden,"[66] as a tool by which to conduct historical and comparative research. Ideal-types and theories of the sort I have set forth here are devices with which to examine specific historical events. They are, additionally, necessarily limited in their utility to the problems the researcher is addressing. The ideal-type is not a universal theory of society, although it may be used to construct one.[67] Weber's legal ideal-types were constructed to deal with the problems he was investigating, and may not mechanically be employed in other contexts.

65. 2 *Id.* at 726-27.
66. Roth, *Introduction* to 1 *id.* at xxxi.
67. *See* Weber, *Objectivity in Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 50-112 (E. SHILS & H. FINCH ed. 1949).

If this fundamental tenet of Weber's analysis is kept in mind, contemporary authors will be in a better position to evaluate his work and its contribution to current research. In other words, it will be possible to use Weber without abusing him.

There is no doubt that a fuller understanding of Weber's theories will help contemporary scholars continue the task he himself was engaged in: the analysis of the role of law in the rise of capitalism. As my discussion of the deviant case of England suggests, that task is far from completed. Undoubtedly, Weber's typologies of law, domination, and capitalism will help to further unravel these issues of European and English social and legal history. However, as my reconstruction has indicated, the particular concepts he used in setting forth the "types of legal thought" may create more confusion than clarity, and we may wish to employ more detailed and precise measures for comparative historical studies of legalism.

Even more caution should be exercised in applying Weber's typologies to the contemporary world.[68] The conditions of contemporary development, or modernization, differ substantially from those prevailing in the period which Weber studied. Many of the elements of his typologies are not found in contemporary developing states. For example, Weber's entire theory of the economic role of law was, as I have noted, tied to a competitive market in which the participants all had relatively limited economic power.[69] Such conditions are the exception, not the rule, in the Third World. Similarly, the model of the state and its economic role was closely related to 19th-century laissez-faire ideas.[70] Once again, caution is needed in approaching contemporary problems in terms Weber found appropriate for historical research.

It should not be forgotten, moreover, that even for Weber and the period he examined, these ideal-types were only that. They were intellectual constructs to be employed for heuristic purposes. None of these pure types can be found in the real world; no legal system is purely logical, formal, and rational, and no state rests its legitimacy purely on the rationality of its legal enactments. History constantly escapes from the neat boxes in which theory wants to trap it.

Finally, we may want to question Weber's emphasis on the formal qualities of modern law, a perspective which understates its purposive or instrumental qualities.[71] Influenced perhaps by the

68. For a detailed discussion of these problems see Trubek, *supra* note 1.
69. *See* note 47 *supra*.
70. *See* notes 47-48 *supra*.
71. This point has been made by Roberto Mangabeira Unger in a lecture given on Weber at Harvard Law School in 1972. *See also* R. UNGER, *supra* note 31. For a discussion of the relevance of legal instrumentalism as a criterion of "modernity" see Friedman, *On Legal Development*, *supra* note 1.

idea of law as a "formal order," and overemphasizing the importance of legal calculability in economic life, Weber tended to overstress the formal characteristics of European law, and, as the English example may show, to give undue emphasis to the economic significance of marginal improvements in legal calculability.

But as modern scholars continue Weber's historical studies, and as they probe the relevance of law to contemporary processes of development, they will be able to take much from Weber's work. First, his typological approach is still valuable, even though the development of new typologies may be necessary. Second, Weber insisted that propositions must be verified by comparative sociological analysis. Finally, he maintained that the relevance of "law" in any society can only be understood by careful analysis of the interrelationships between the many spheres and structures in society. Weber's unique contribution was to analyze law through a holistic, social perspective in which legal phenomena are neither wholly independent of, nor completely dependent on, other aspects of social life. This approach, which respects at the same time the autonomy and the dependency of legal life in society, may be Weber's most lasting contribution to the sociology of law, and to the study of "law and development."