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MAX WEBER ON LAW AND THE RISE OF CAPITALISM

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Max Weber on Law and The Rise of Capitalism

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Today there is a growing scholarly interest in the relationship between law and development. While nineteenth century scholars like Maine, Durkheim and Weber considered law a major variable in the process of modernization, until recently legal studies and social science failed to carry on this tradition. In the last few years, however, the issue has been raised anew, and a small, but growing literature has emerged which tries to probe the relationships between legal systems and the major social, economic, and political changes which are generally styled "modernization".[1]

The contemporary literature owes a great debt to the work of Max Weber. Whether they acknowledge it or not, the authors of contemporary essays on "law and modernization" draw heavily on Weber's concepts and theories, as well as on the historical studies of law in the rise of capitalism which make up the core of his sociology of law.[2] Despite this renewed interest in Weber's work and the burgeoning general scholarship on Weber, we have no systematic account of his theory of law. As a result, his ideas on this subject are 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 discussed at various points

in the three volumes of Economy and Society, and even where the treatment is most specific -- i.e. in the section entitled "The Sociology of Law" -- it is frequently incomplete and extremely hard to follow. Since Weber never finished this work, it is no surprise that subsequent scholars have found it a difficult starting point for further thought.

Yet it is an essential taking off point for further work. No other writer has yet to match or excell the scope and power of Weber's treatment. Once we penetrate 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 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 identifies the main analytic dimensions of society and the concrete structures that correspond to them. Weber focused on polity, society, economy, religion and law, and the political, social, economic, religious, and legal structures of given societies. These dimensions, with their associated structures, he felt, must be separated and investigated so that their interrelationships in history can best be understood. Using these methods, he argued, we can explain particular events in history.

The issue that intrigued him was the rise of the capitalist system. Law, he felt, had played a part in this story. Thus, in his monumental treatise, Economy and Society, An Outline of Interpretative Sociology, he developed concepts of law in society, and outlined a theory of the relationship between "law" and the rise of industrial capitalism.[3] In the sections on law, Weber shows how autonomous legal institutions enforcing general rules emerged in Europe and contributed to the rise of capitalism.

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 the sociology of law and the sociology of religion. The latter examines the relationship 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.[4]

Weber believed that Western law had unique features helped explain why capitalism first arose in Europe. He did not, however, believe that the West alone had "law". Weber had a broad concept of law that embraced a wide range of phenomenon 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 differes 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), <u>only</u> Europe developed this particular type of law.[5] Since, at the same time, capitalism arose first in Europe, this analysis suggested very strongly that "law" played an important role in the emergence of the capitalist type of economic system.

Weber denied that the unique features of European legal systems

were the result or reflex of the rise of capitalism. He explicitly rejected a Marxian deterministic theory of law in society,[6] and demonstrated that what was unique in the European legal systems could not be explained solely by economic factors. Rather, he asserted, the rise of European law had to be traced to a number of factors, which included such non-economic variables as internal needs of the legal profession, and the necessities of political organization. Economic factors -- specifically the economic needs of the bourgeois classes - were important but not determinative in shaping the particular legal institutions of Europe.

(II) The Nature of European Law

European law, Weber believed, differed from law in other civilizations in several key dimensions. These included: (i) "Autonomy" in three senses: autonomy in rule making from immediate political interference; autonomy from such foci of social control as church, family, guild, village: and finally, organizational autonomy (structural differentiation); (ii) the generality of the rules developed; (iii) the universality of the application of these rules. Not only did Europe develop legal systems that displayed a high degree of autonomy, generality, and universality; such systems could only develop originally in Europe which, alone, contained the type of political and intellectual structure in which such a legal system could function. And since capitalism thrives with a legal system of this type - or perhaps absolutely requires one - the rise of European law helps explain why capitalism arose first in Europe.

(III) Reconstructing Weber's Analysis: The Concept of Law and Its Relationship to Domination

To understand how Weber reached these conclusions, we must reconstruct the details of his argument. The position I have stated in the proceeding paragraphs emerges from a synthetic analysis of the various discussions of law and capitalism in his work. Weber did not give us a finished, systematic discussion of these themes; I shall, therefore, 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, 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. "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 normativity, and with rationality. Let us look at these elements separately.

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.7

Taken by itself, this definition seems both over and under-inclusive. 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, 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 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 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 "normative order," a term Weber uses to refer to any structured source of guides to right conduct.

Thus, in the Weberian scheme, "law" is a subclass of a category called "legitimate" or normative orders. All such "orders" are (i) socially structured systems which contain (ii) bodies of normative propositions that (iii) to some degree are subjectively accepted by members of a social group as binding "for their own sake," i.e. without

regard for purely utilitarian calculations of the probability of coercion.[8] "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 says, "endowed with certain specific guarantees of the probability of its empirical validity."[9] Coercion is introduced to distinguish law from convention - a line Weber explicitly indicates is 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 adequate to catch Weber's idea of law.[10]

Thus, the stress on coercion in the original definition should not mislead us. Weber thought of law, like custom and convention, as one of the basic sources of normative guidance in society, the places where men look to determine how they ought to behave. "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 must interested in the reasons why men might accept legal obligations as binding without specifically being threatened with sanctions. In exploring Weber's discussion of law, we must, therefore, look at law's normative aspect as well as its coercive features.

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 will show us 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 being a broad, generic category), the major way we distinguish among types of law is by their capacity to develop a system of universally applicable rules.

To recapitulate, therefore, the essential elements of Weber's broad concept of "law" are that it be a body of standards, maxims, principles, or rules of conduct (an order), to some degree accepted as obligatory by the persons to which it is addressed (legitimate), backed by a specialized enforcement agency employing coercive sanctions (coercive and differentiated). To the extent that sanctions are applied in accord with a system of rules we say that law tends 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. Let us see how Weber discussed historical variations in these dimensions, and what significance he thought these variations had for the rise of capitalism.

B. Variations in legal "rationality" - the types of legal "thought"

From the complexities of the legal systems of historical societies, Weber abstracts four basic types of "systems" which he wants to compare and contrast. These types unify certain key features of legal systems; the typology classifies systems along the following dimensions: (i) the law "making" process, (ii) the judicial process, including modes of justification and actual determinants of decision-making,

(iii) the political process, and (iv) the relative importance of law and other sources of normative ordering in society.

How does one classify concrete systems in accord with this typology? What observable traits are relevant for the classification? The focus for classification is what we would call the "judicial process." The relevant considerations are the extent to which decisions are (i) determined by prior existing general rules of universal application, (ii) established by differentiated "legal" organs and (iii) binding upon the parties.

Thus Weber is really asking:

(i) to what extent do societies construct systematic bodies of general rules to govern social life;

(ii) to what extent are disputes determined by official dispute settlement agencies and to what extent do these agencies determine cases in accordance with general rules; and

(iii) to what extent are these systems of general rules, when they exist, formulated in such a way that actors can determine in advance the results of their application.

While these are the major issues Weber was concerned with, he expressed himself in a very different way. The Weberian typology organizes legal systems in accordance with what Weber calls the "rationality" of law making and law finding, and is labeled a typology of "legal thought." 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 autonomy, generality, and universality. If we do this, however, we will see the argument more clearly.

Weber himself classifies 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 (i) formally or (ii) substantively irrational, or (iii) substantively or (iv) formally rational. Finally, formally rational law can be "formal" either in an "extrinsic" or "logical" sense.[11]

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 we examine what is meant by these terms, we conclude 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. We can thus show the relationship between Weber's typology and the concepts of autonomy and generality by the following chart.

CHART I

THE TYPOLOGY OF LEGAL SYSTEMS CLASSIFIED BY FORMALITY AND RATIONALITY OF DECISION MAKING PROCESSES

		Degree of Generality of Legal Norms	
		HIGH	LOW
Degree of Autonomy of Legal Norms	HIGH	LOGICALLY FORMAL RATIONALITY	FORMAL IRRATIONALITY
	LOW	SUBSTANTIVE RATIONALITY	SUBSTANTIVE IRRATIONALITY

Formally irrational legal decision making 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 decision making is "intrinsic" to the legal system but unknowable; there is no way the observer can predict or understand the decision. Substantively irrational decisions apply observable criteria but these are always based on concrete ethical and practical considerations of the specific cases. We can understand these decisions after the fact, but unless a system of precedent arises, we cannot generalize from the concrete cases. Substantively rational decision making 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. Since we can understand the overarching principles of the external thought system, we can, to a limited degree, rationally apprehend how the system will function. But we can never be sure, for we cannot know how the precepts of the external system will be translated into legal decisions. Thus, while this type is more capable of formulating general rules than the previous two types, it is less likely to do so than logically formal rationality. In comparison to this fourth type, these three types of legal systems, therefore, display a low degree of autonomy, a low degree of generality of rules, or both. As a result it is hard to predict the types of decisions they will reach.

This is not true of <u>European law</u>, which Weber identifies with "logically formal rationality." This type of system combines a high degree of legal autonomy (in all three senses) with a substantial

reliance on pre-existing general rules in the determination of legal decisions. Indeed, as we shall see, 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 prior existing, unambiguous rules, formal to the extent that the criteria of decision are intrinsic to the legal system, and logical to the extent both (a) that rules or principles are constructed by logical systemization, and (b) decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established 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 both based on rules, and these will be both general and derived from autonomous legal sources.

C. The relationship between political structure and the legal system - the types of domination and the types of law

Now that we have a general idea of the special features of "European" law and, consequently, have learned something about "European" society as well, let us examine Weber's theory of the genesis of this structure. Under what conditions did "European law" arise? Why did this system only develop in Europe? To answer these questions we must examine 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.

In his political sociology Weber constructs ideal types of political systems or forms of "domination." 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, i.e. the primary justification regimes offer for their power over others.

Weber identifies 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 rational, legal enactment.

Since legal decisions are part of the total structure of domination, they, like all actions of the rulers, must be legitimated 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, decision-making 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 the extraordinary (charismatic) leader, and takes the form of case-by-case or ad hoc decision making.

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

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

This becomes clear only when we examine these two ideal types in detail. First, let us look at domination. "Legal" domination is said to exist when the following conditions prevail:

(i) there are established norms of general application;

(ii) 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;

(iii) the "superior" is himself subjected to an impersonal order;

(iv) obedience is to the law as such and not to some other form of social ordering;

(v) obedience is owed only within rationally delimited spheres (jurisdiction).12

Thus we can see that 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 guaranty that they, and only they, will determine the outcome of legal decisions.

In surveying the other forms of "law" or legal thought, Weber makes clear that they differ from the "modern, rational" type in their failure to generate a system of general rules. Formal irrationality (revelation) does not know the notion of general rules.[13] Substantive irrationality is case-oriented and concerned only with the equities of the individual situation.[14] Substantive rationality 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 (religion, ethical philosophy, ideology)[15] and this type of "law" will be constantly tempted to reach specific results dictated by the value premises of this external set of principles which are neither general or predictable.[16] Since there is no cognitive system permitting observors to predict when such specific results will occur, this type of law displays a low order of "rationality."

Weber underscores the relationship between legal domination and "European law" when he describes the other types of domination. Just as formally rational law is necessary to create a situation under which domination can be rationally legitimated, so other forms of

legitimation discourage the rise of rational law. Traditionalism "places serious obstacles in the way of formally rational regulations."[17] In traditional societies, he says, you 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."[18] 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 concludes, "breaks down the formal rationality which is oriented to a technical legal order."[19] Charismatic authority, too, discourages the rise of modern rational law; Weber observes that bureaucratic (or legal) authority "is rational in the sense of being bound to intellectually analysable rules, while charismatic authority is "specifically irrational in the sense of being foreign to all rules."[20]

From this analysis, we can see that "modern" or "European" law differs from other types of "law" in several dimensions. Unlike other types of "law," modern law develops bodies of rules, which are applied through formal procedures which guarantee that the rules will be followed in all cases. For these reasons, modern law curbs the arbitrary action of the ruling groups, and is, partly as a result, highly predictable. Thus, under "modern law" the rules governing economic life are easily determined; modern law reduces one element of economic uncertainty. As we shall wee, the calculability of modern law is its major contribution to capitalist economic activity.

The following chart 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.

CHART II

Administration, Law and Economic Regulation
Under The Pure Types of Domination

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/form of justification of decisions	"Empirical"/Traditional Decision making on a case by case basis considering established precedent	Case Oriented/Revalutory Formally concrete case by case judgments justified as revelation	General/Rational Cases decided by formal rules and abstract principles and justified by the the rationality of the decision making 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	Bureacratic 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

D. 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 fashiong. These rules are created using highly specialized forms of thought which allow the construction of an intellectual system which can be applied only be 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. And ultimately, it requires that law supercedes 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 because otherwise it cannot reach its goal of formulating and maintaining unambiguous, general rules. Weber constantly stressed that "power has its reasons that reason cannot understand," i.e. that rulers will constantly be tempted to sacrifice universal principles for particular, expedient goals.[21] In the language of American constitutional theory, power wielders will be "result-oriented." Where law is mixed with religion, similarly, pressures will emerge to sacrifice generality for concrete

ethical ends.[22]

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; thus they must come to control all social life, and law must supercede other forms of normative order.[23] Otherwise, legal rules will have limited social impact.

Autonomy entails a differentiated legal structure. Unique skills, roles, 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.[24]

We shall call this model "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 decline 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 coercion will be employed.

Unique conditions in European history, Weber argued, led to the emergence of legalism. 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 alliance with rising bourgeois interests. To further their own self interest, the administrative staff and the merchant groups both 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." The universities of continental Europe had developed a systematic study of Roman law, employing highly abstract, logical techniques. The existence of a group of legal "notables," trained in these methods of legal analysis, 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 bureacratic state, which lays its claim to obedience on the ground that it can and does create and maintain a system of rational rules. Rational law and legal domination developed in a symbiotic relationship.

(IV) 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 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 the economic sociology, in which the dynamics of the market are developed. This analysis will show us why capitalism and legalism are intimately related.

In his economic sociology, Weber stressed the importance of two aspects of "law" for capitalist development. These were:

(i) its relative degree of calculability, and

(ii) its capacity to develop substantive provisions, principally those relating to freedom of contract, which were necessary to the functioning of the market system.

Of these, the former was the most important. 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.[25]

Legalism is the only way to provide the degree of certainty necessary for the operation of the capitalist system. Weber states 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."[26] And he further

specified that: "the 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."[27]

Weber never worked in detail a model of capitalist production which might explain why legal calculability was so important to capitalist development. Elsewhere I have developed such a model,[28] and I believe that underlying Weber's repeated stress on legal calculability lies 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 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 egoistically to further his interests if at the same time he can't be sure that other actors will supply him the necessary inputs for production and consume his product. If suppliers don't provide promised raw materials, if workers won't work, if customers fail to pay for

goods delivered, all the ruthless, rational self-interest in the world won't help 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. They would play their roles in the scheme and he would come out alright. But this may not always happen because they are, by hypothesis, as selfish as he is. Thus, they, like him, will do whatever leads to the highest profit; if this means failing to perform some agreement, so be it. And since we can assume that there will frequently be opportunities for them 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 similar selfish, profit-seekers reduce the uncertainty that threatens to rob the capitalist system of its otherwise great productive power? What, this is, permits 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 moves to the level of sociological analysis. The problem of the conflict between the self interest of individuals and social stability - what Parsons calls "the Hobbsian problem of order"[29] - is one of the fundamental problems of sociology, and, to deal with it, Weber constructed his

basic schemes of social action.[30] Weber recognized that predictable uniformities of social action can be "guaranteed" in various ways, and that these methods of social control all may influence economic activities. Actors may internalize normative standards, thus fulfilling social expectations "voluntarily" as it were. Or they may be subjected to some form of "external effect" if they deviate from 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 observes may be due to custom, to the play of interests, or convention or to law.[31]

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: "...though 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."[32]

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 us no clearcut 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 the answers to the questions can be given which fit coherently with other aspects of the analysis.

"Coercion" is necessary because of the egoistic conflict I have identified above. While Weber never clearly identifies 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 egotistic 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 measures 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 calculation 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 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 non-performance.

In this context, we can see 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, Church, etc. 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 not tend to act in stable and predictable ways. Legalism offers the optimum combination of coercion and predictability.

Here we see clearly the significance of legal autonomy. 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 thus mechanical manner

Weber presented, its results will be highly predictable. If it constantly is subject to interference by forces which seek to apply coercion for purposes inconsistent with the rules, it loses its predictable quality. Thus Weber observes 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.33

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 is 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 guaranty these, and only a universal and supreme structure could guaranty that these norms would be adhered to. Thus the legal system must 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 must 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 superceded other sources of social control, and at the same time

be limited so that it did not trench on areas of economic action. Contained in the idea of an autonomous legal order are fundamental paradoxes of the nineteenth century idea of the liberal state.[34]

(V) 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 points repeatedly to aspects of legal life that were both important for capitalist development, and inconsistent with a high degree of logical formalism. For example, at one point, he explicitly recognizes 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.[35] He also noted how legal autonomy can frustrate economic expectations.[36] But these insights, which might have caused a more fundamental reappraisal of the model, did not affect his tendency constantly to stress the importance of legal calculability, and the identification of calculability with logical formalism.

Since we are interested in his methods as much as in his theory, it is useful to examine the "deviant case" that troubled him especially in this regard. This was the problem of English development. Nowhere 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. In his somewhat ambiguous and contradictory discussion of this issue we see Weber the historian battling with Weber the sociological theorist.

As Weber analyzed the relationships between law and economy in English history, this 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, the emergence of capitalism in England did not appear to have had any appreciable effect on the "rationalization" of English law.[37]

From his perspective, the English legal system presented a stark contrast to the continental systems. "The degree of legal rationality is essentially lower than, and of a type different from, that of continental Europe."[38] 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."[39] Nevertheless, capitalism had first emerged in England, and England was undoubtedly a formidable capitalist regime.[40]

These findings presented several logical possibilities. First, they could refute the notion of any systematic relationship between

law and economy. Secondly, 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. Thirdly, 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 suggests all of the following:

(i) the English legal system offered a low degree of calculability but assisted capitalism by denying justice to the lower classes:41

(ii) 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;42

(iii) the English legal system, while far from the model of logically formal rationality, was sufficiently calculable to support capitalism since judges were favorable to capitalists <u>and</u> adhered to precedent.43

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 this with one mode of legal "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, substantive rules, etc. - 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 saving the importance of calculability while sacrificing the centrality of logical formal rationality with its stress on logical techniques as means to guarantee autonomy. But this position is basically consistent with the overall analysis, since a system controlled by capitalists will presumptively be quite predictable, at least from their point of view.[44] 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 observors have argued that England did develop a timely "modern" 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.[45]

(VI) Legalism and the Legitimation 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, 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 legitimating capitalist domination.

Legalism served more than purely economic functions under capitalism. Weber shows how the idea of an autonomous legal system dispensing formal justice legitimates the political structure of capitalist society.

Legalism legitimates 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 strengthened it, and while the system guaranteed formal equality, it also legitimated 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. "By virtue of the principle of formal legal equality...the propertied classes obtain a sort of factual autonomy," Weber observes.[46]

The political effects of legalism stem from the fundamental antinony 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 decision-making, 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 area to sleep under the bridges of Paris, Weber observes:

> 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. (emphasis added)47

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; it necessarily infringes upon the ideals of substantive justice.[48] Thus certain democratic values and types of social justice could only be achieved at the cost of sacrificing strict legalism.[49] He also pointed out that formal legalism could stultify legal creativity, and that legal autonomy could lead to results opposed both to popular and capitalist values.

(VII) Weber's Methodology and Perspective

As the foregoing has made clear that Weber approached the problem of law in society and economy from a perspective that was holistic, historical, and comparative. The basic structure 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 resultant of the interaction of many forces, and at the same time an autonomous 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 set about to explain why China had never developed the corporate concept.

The explanation lay in the interrelationship of several factors. First was political organization. While the political systems of Rome and medieval Europe had encouraged the rise of autonomous "corporations," the Chinese patrimonial state discouraged all such association. Secondly, Chinese social structure militated against the rise of autonomous legal entities, and thus of the treatment of groups as legal "persons." 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 decision makers. 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 both the rise of specifically contractual forms of relationships. Accordingly, more complex corporation notions, that a group is an entity that can enter into legal relationships separate from

those of the individuals that comprise it, as well as the ideas of limited liability, failed to rise in China. Purely economic factors contributed to this development for, as a result of prevailing economic attitudes and organization, there were no strong forces in China pressing for some form 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.[50]

The same approach was taken to the study of corporate law in Europe. No simple 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."

(VIII) Conclusion

My restatement of Weber has necessarily been condensed and abstract. I have been unable to present all the complexity of the argument, and have condensed or eliminated 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

Bendix has put it, he saw sociological concepts as "Clio's handmaiden," as a tool by which we conduct historical and comparative research. Ideal types and theories of the sort I have set forth here are devices by which we examine specific historical events. They are, additionally, necessarily limited in their utility to the problems the researcher is addressing.[51]

If we bear in mind this fundamental tenet of the Weberian analysis we will be in a better position to evaluate his work and its contribution to current research. We will, that is, learn how to use Weber without abusing him.

There is no doubt that a fuller understanding of Weberian theory will help us 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, the Weberian typologies of law, domination, and capitalism will help us in further unravelling these issues of European and English social and legal history.

When we turn to the contemporary world, however, we must be more cautious. 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, the model of capitalist dynamics -- on which the whole structure depends -- is linked to a competitive market of actors of relatively equal economic power. Such conditions are the exception, not the rule, in the Third World. Similarly, the model of the state and its economic role is closely

related to nineteenth century laissez-faire ideas. Once again, we must be cautious in approaching contemporary problems in terms Weber found appropriate for historical research.

Finally, we must realize 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," no state rests its legitimacy purely on the rationality of its legal enactments. History constantly escapes from the neat boxes that theory wants to trap it in.

But as we continue Weber's historical studies, and as we probe the relevance of law to contemporary processes of development, we will be able to take much from Weber. First, we will want to continue the typological approach, even if we must develop new typologies. Secondly, we must recognize that we can only understand the relevance of "law" in any society by careful analysis of the interrelationships between the many spheres and structures in society. Weber's unique contribution was to analyze law as one of the interrelated aspects of society seen as a whole. This perspective, which respects at the same time the autonomy and the interrelatedness of legal life in society, is his most lasting contribution to the sociology of law, and to the study of "law and development."

FOOTNOTES

1 See, e.g., Galanter, "The Modernization of Law" in Myron Weiner, ed., Modernization: The Dynamics of Growth (Voice of America, N.P. 1966); Karst, "Law in Developing Countries", Law Library Journal 60:13-20 (1967): Friedman, "Legal Culture and Social Development", Law and Society Review 4:29-44 (1969), "On Legal Development", Rutgers Law Review 24:11-64 (1969); Konz, "Legal Development in Developing Countries," Proceedings of the American Society of International Law 1969:91-100; Mendelson, "Law and the Development of Nations", J. of Politics 32:223-38 (1970); Seidman, "Law and Development: A General Model", Law and Society Rev. 6:311-42 (1972); Steinberg, "Law, Development and Korean Society", J. Comparative Administration 3:215-256 (1971); Steiner, "Legal Education and Socio-Economic Change: Brazilian Perspectives", Am. J. Comparative Law 19:39-90 (1971). For a critical appraisal of some of this literature, see Trubek, "Law, Planning and Economic Development", Yale Law Journal 1972 (forthcoming).

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

3 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, Wirschaft and Gesellschaft, Grurdriss der verstehenden soziologie which contains a number of extended discussions of law in economy and society, including an extended section explicitly titled Sociology of Law. In this paper, I have relied primarily on the recent English edition of the complete work, Max Weber, Economy and Society (N.Y., Bedminister, 1968) (3 vols.) (Roth & Wittich, eds.) (hereinafter cited as E&S). The sections of Economy and Society specifically dealing with law are also available in a separate, earlier English edition, translated by Max Rheinstein. Rheinstein, ed., Max Weber on Law in Economy and Society, (Cambridge, Mass., Harvard, 1954).

4 The program of inquiry is explicitly set forth in Weber's introduction to his sociology of religion. This is reprinted in Weber, The Protestant Ethic and the Spirit of Capitalism, (N.Y., Scribners, 1958) pp. 13-34.

5 Ibid., p. 25.

6 Weber's relationship to Marxism is complex, and his concern for Marxist ideas heavily influenced his sociology of law. Weber rejected the Marxist philosophy of history and the idea that law was a "super-structure" 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 Giddens, Capitalism and Modern Social Theory (Cambridge, Cambridge U. Press, 1971); Roth, "The Historical Relationship to Marxism" in Bendix and Roth, Scholarship and Partisanship: Essays on Max Weber (Berkeley, U. Calif. Press, 1971) pp. 227-252); Vincent, "Remarques Sur Marx et Weber, comme theoriciens du droit et de l'etat," Archive de la Philosophie du Droit, 1964, pp. 229-241.

7 E & S, p. 28.

8 E & S, pp. 31-36.

9 Ibid., p. 313.

10 Ibid., pp. 34-5.

11 E & S. pp. 653-658. 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 nineteenth century. Certain aspects of his definition of law relate it to power (coercion); others place it within the sphere of authority (legitimacy). While the resulting 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 Nisbet, The Sociological Tradition (Basic Books, N.Y.; 1960) pp. 107-173. 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 must 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. E & S, p. 892. For a discussion of Marx and Weber in this context, see Giddens, op.cit. note 13, supra., pp. 190-195; 205-223.
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 Neuman has pointed out that political conditions in nineteenth century German had a strong impact on the approach taken by German thinkers attempting to develop a concept of what I have referred to as "legalism." Neuman 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. Neuman, "The Change in the Function of Law in Modern Society" in The Democratic and the Authoritarian State (N.Y.; Free Press, 1964). For an attempt to explain "logically formal rationality" in terms of notions drawn from Anglo-American jurisprudence, see Rheinstein, op.cit, note 1, supra, pp. li-lxiii.

12 Ibid., pp. 217-18.

13 Ibid., p. 970.

14 This is what Weber calls "kadi" justice, or "informal judgments rendered in terms of concrete ethical or other practical valuation." E & S 976. This type of law making "knows no rational rules of decision" ibid.

15 E & S, p. 657.

16 Weber drew a distinction between "law" and "administration." Administration was government "pursuing concrete objectives of a political, ethical, utilitarian," or other kind. E & S, p. 645. Government only becomes "law" when the government promulgates general rules. Ibid. Substantively rational justice is associated with administration rather than law, in this latter sense. Weber says that, although "system of justice 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" Ibid., 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 reach substantive goals." Ibid., p. 811.

17 E & S, p. 239.

18 Ibid., p. 240.

19 Ibid..

20 Ibid., p. 244.

21 See, e.g. E & S, p. 811.

22 Weber observed that "the 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 chances 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 expedential 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 theocratically influenced legal systems, which are characterized by a combination of legal rules and ethical demands." E & S 810.

23 The Weberian perspective is quite evident in Talcott Parsons' discussions of the relationship between law and "development," as set forth in Societies, Evolutionary and Comparative Perspectives, (Englewood Cliffs, Prentice Hall, 1966). Thus, 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." Ibid., 18. Parsons seems to be saying (1) you only have norms when you 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, modern, and sees the emergence of "legalism" as the major criteria marking the evolution of societies from "intermediate" to "modern." Ibid., 26. His explanation of why this should be so is both Weberian in inspiration and characteristically Parsonian in its abstractness:

> law when developed to the requisite level, furthers the independence of the normative components of the society's structure from the exigencies of political and economic interests and from the personal, organic and physical environmental factors operating through them. Ibid., p. 27

Only "highly generalized" law, organized according to "universalistic principles," can achieve this. This requires, of all things, "formal rationality." Ibid.
Parsons has taken over, at a very superficial level, the Weberian analysis, but has generalized it to all societies and made the development of logically formal rationality a criteria of "modernity." The dangers of this are apparent. In the first place, it would seem that England never became "modern," since it never developed formal rationality. Second, it links the concept of modernity to societies which develop autonomous legal orders, thus denying the possibility of "modernization" without "legalism." Unger has conclusively demonstrated the ethnocentric quality of this idea. Unger, The Place of Law in "Modern" Society (forthcoming).

24 Formal rationality is the product of a specific form of legal specialization and legal education, found on the Continent. This 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 that "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, systemic 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." E & S, p. 789.

25 Ibid., p. 847. Formal rational law does not come into existence merely because it serves the needs of the bourgeoisie for "calculable" law. Ibid., p. 855. Rather, it emerges as the resultant of this need, in connection with the needs of patrimonial administration for rational schemes and 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.

26 E & S, p. 65.

27 Ibid., p._____.

28 Trubek, "Law, Planning, and Economic Development," op.cit. note 1, supra.

29 Parsons, The Structure of Social Action (N.Y., Free Press, 1968) p. 89.

30 E & S, p. 68.

31 Ibid., pp. 63-69.

32 Ibid., p. 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. Parsons, op.cit. note 61, supra, pp. 656-8.

33 E & S, p. 811.

34 For a discussion of these ideas see Neuman, "The Change in the Function of Law in Modern Society" in The Democratic and Authoritarian State, (N.Y., Free Press, 1964). Neuman sets forth the 19th century German liberal view of the "rule of law," views which Weber shared to a significant debree. This body of thought was concerned with guaranteeing economic liberty without 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 only to govern 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 law-finding would guaratnee that the autonomous machine would remain autonomous.

35 E & S, p. ____.

36 Ibid., p. 688.

37 Ibid., p. 892.

38 Ibid., p. 890.

39 Ibid., p. 891.

40 Ibid., p. 977.

41 Ibid., pp. 814, 977.

42 Ibid., p. 814.

43 Ibid., p. 1395.

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

45 Ibid.

46 E & S, p. 699.

47 Ibid., p. 812.

48 Ibid., pp. 979-80.

49 Ibid., p. 980.

50 Ibid., pp. 726-7.

51 See Weber, "Objectivity in Social Science and Social Policy" in Shils & Finch, eds., The Methodology of the Social Sciences: Max Weber, (N.Y., Free Press, 1949), pp. 50-112.

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