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**"THE ENGLAND PROBLEM" AND THE
 THEORY OF ECONOMIC DEVELOPMENT**

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This is the ninth in a series of papers reporting works in progress by persons associated with the Yale Law School Program in Law and Modernization. Jerold Guben is a graduate of the Harvard Law School and a doctoral candidate in sociology at the University of California (Berkeley). He is currently a Russell Sage Research Fellow at the Yale Law School.

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"The England Problem" and
The Theory of Economic Development

The "England problem" in the writings of Max Weber provides the student of sociology not only with the opportunity for reformulating the Weberian thesis relating law and economic development, but also affords us a vehicle for discussion of the logic of social scientific methodology.

In any scientific investigation, it is incumbent on the researcher to focus on cases or empirical instances which are inconsistent with the general argument; observations which cannot be satisfactorily reconciled with the predictions of the investigator's argument. Once these exceptions are discovered, the researcher must reformulate his propositions and hypotheses either to incorporate the deviant case or to account somehow for the observed exception in a manner which harmonizes the empirical findings with the original argument.

It is Weber's failure to deal adequately with the England-problem which provides the student of law and economic development with an empirical case on which to reformulate Max Weber's theory relating the form of the legal system and the emergence of a rational economic order.

Briefly stated, Weber argued that capitalist development in seventeenth century England was anomalous because Stuart England lacked a systematic-continental type of legal code. Weber hypothesized that the English common law system did not provide a satisfactory legal framework for the emergence of rational capitalism. Despite the inconsistency

of theory and fact in the English experience, Weber never retreated from his basic assumption of the intimate relationship of a continental legal code-system and the rise of rational capitalism.

Weber, a student of social science methodology, recognized and acknowledged that Elizabethan England did not fit into his theory relating the structure of the legal system to the creation of a rational capitalistic economic order. Rather than squarely confronting the inconsistency, Weber equivocated and dodged the issue. Throughout the corpus of his writings, Weber never provided a definitive reconciliation of seventeenth-century England and his theory of law and economic development.

Yet, to incorporate the English exception into the theory would have necessitated that Weber undertake a major reformulation of his hypothesis. The incorporation of the "deviant" English experience would have compelled Weber to move to a more general level of analysis, a level of analysis which is at one and the same time more inclusive and abstract. This reformulation would have explained not only the English case, but created an analytic framework for examining the interrelation of law and economic development in the modernizing nations.

As a starting point for a reconstruction of Weber's thesis, we must examine his notion of rational capitalism. As I interpret Weber's discussion of this concept the core element or "essence", if you will, is the ability or capacity of the "manager" of the economic enterprise to plan, to predict and to calculate the consequences of his action with a high degree of certitude.

If we have correctly isolated the critical dimension of the rational capitalist system, it is then possible to perceive how a social system

employing a legal code achieves the functional imperative of calculability and predictability by logically requiring that every factual dispute of an economic nature be subsumed and resolved within the confines of the language of the code. While the rational capitalist might not necessarily approve of the substantive result dictated by the code, the capitalist is able to order his primary activity with the assurance that the existing code will require only a predictable range of legal consequences, ascertainable in advance.

The underlying explanation for a code system's predictability and calculability inheres in the fact that a code, once promulgated, is theoretically an autonomous body of principles, maintaining an integrity and logic of its own. It is this quality of autonomy, or ideological differentiation, which imparts to a code system the degree of certitude which Weber felt essential to the emergence and maintenance of a rational economic order.

But in the absence of a code, we must inquire as to what form of legal ordering will be the functional equivalent of a code and create the necessary predictability, calculability and certitude for the establishment of a rational economic system. In other words, what is the functional analogue of a systematic code in a non-code legal system? Or are we forced to conclude that there is no functional equivalent and consequently agree with Weber that rational capitalism will not appear in the absence of a formal legal code. I propose to argue that the functional equivalent of a legal code, in a non-code system, is the structural or institutional differentiation of the legal role structure of a society and their "capture and manipulation" by that strata

of society concerned with economic development and modernization.

What I mean by structural differentiation is the formulation of an institutional arrangement which maintains a boundary and autonomy with respect to other systemic role structures, including the capacity to monitor boundary exchanges and penetration from exogenous institutional arrangements. It connotes a separation, a cleaving off.

This description of institutional differentiation resembles the qualities which I imputed to the operation of a "legal code", only in the structural sphere, rather than in the realm of ideology. This, of course, is no accident. Because I propose to argue that where a functionally autonomous legal code is absent, rational capitalism can only develop where the system's legal institutions are differentiated from other institutional arrangements. Once the legal roles have been separated from other political, religious and social institutions, they become available for manipulation by an emergent entrepreneurial strata.

In England, the common law was differentiated from the politico-religious institutions in the late sixteenth and early seventeenth centuries. In this differentiating process, the legal system was "captured" by the rising gentry and bourgeoisie and channelled in a direction promotive of economic growth and rational ordering.

This "capture", which I use for lack of a better imagery, of the common law by the commercial strata permitted manipulation of a relatively fluid system of law in such a manner so as to create a legal climate congenial to the emergent mercantile interests. The "common law", separated from its politico-religious origins, became a "free-floating resource" of the incipient capitalist classes. The legal system was

embraced by the rising gentry and bourgeoisie as a tool to secure advantages in their contests with the Crown, the Church, the peasants and the inhibitive medieval legacy.

The common law, once it insulated itself from monarchical control, became a valuable resource to assist the rational capitalist in realizing his economic objectives.

It was this differentiated, autonomous and insulated common law system of the early Stuart period which provided the emergent capitalist class with the necessary predictability, calculability and certitude which Weber felt essential to the growth of rational capitalism.

By including the deviant English experience, we have been able to formulate a more inclusive theory relating legal ordering and economic development. My thesis is that the continental legal systems achieved the requisite legal differentiation by means of a self-contained, logically-inclusive code. In England, this differentiation was achieved through decades of long conflict with the Crown, the Church and traditionalistic elements of the Elizabethan social system. Once the common law system achieved this autonomy and institutional integrity, it was captured by the mercantile interests, manipulated in their own behalf and thereby fulfilled the functions that a legal code performs in the context of the continental nations.

To see the operation of this process of differentiation of the common law from its anti-mercantile bases, I propose to look briefly at four substantive areas and draw out certain implications for the development of rational capitalism in the Elizabethan period.

USURY

Critical in the development of an advanced economic system is the availability of flexible financial resources. It is the existence of the money market which provides the lubricant for entrepreneurial activity. With a system of frozen wealth, the emergent capitalist finds it almost impossible to generate a widespread internal market for his products nor secure sufficient capital to produce items for foreign commerce. Thus, one of the essential prerequisites of a rational capitalist system was the supersession of the elementary medieval money market and the creation of a free-market of monetary exchange.

The emergence of a rationalized money market was inhibited in the Elizabethan period by a web of medieval moral and ethical norms. Borrowing from Classical Aristotelianism, scholastic economists argued that money was a sterile commodity, unable to generate or produce anything, especially interest. If money was sterile, then interest, or a return on money, was illegitimate and unwarranted. In fact, in the medieval period the collection of interest on money was proscribed. So long as money and monetary transactions were embedded in the anti-commercial value system of the medieval period, economic development, while not completely inhibited, was forced to proceed under the constraints of a variety of legal subterfuges.

This anti-commercial ethic implicit in the Catholic Church's usury legislation converged with the Tudor monarch's effort to establish a static hierarchical social structure, with a minimum of social mobility and dislocation. After suffering years of internal war, including a variety of chiliastic and millenarian movements, the enclosure movement

and the consequent depopulation of the countryside, the English Crown was desperate for stability. To counter the broad-scale turmoil, the Tudors attempted to freeze the English social system in the image of the early sixteenth-century. This "freezing process" was manifested in the passage of the Statute of Artificers of 1562 and the revival of more restrictive gild regulations and prohibitions.

The logic behind the usury prohibitions of the early Elizabethan era involved an attempt to inhibit non-governmental economic activity. If the capital market was restricted, the gentry and bourgeoisie would be stymied in their efforts to expand their agricultural, extractive and commercial enterprises. Therefore, it became imperative that the emergent capitalists rationalize the money market by insulating it from political manipulation of the Crown and the deadening weight of the medieval value scheme.

The effort to remove "money" and the capital market from its political and moral basis was finally realized in England during the second half of the sixteenth century. In divorcing the issue of "return on money", or interest, from religious considerations, the mercantile groups of Tudor England won a major centuries-long battle to create a rationalized, autonomous money market. This contest with the Crown and Church was spearheaded in the House of Commons by the common lawyers, a group long-identified with the rising gentry class. The separation of capital from the politico-religious restrictions under which it had been operating for centuries signalled a victory for the capitalists.

This legislative victory was later "confirmed" by a judicial decision, thereby placing the imprimatur of the common law and the weight

of the "ancient constitution" on the side of a rationalized money market.

For our purposes, the usury debate and the consequent court decisions were significant insofar as they:

1. Indicated the separation of a critical substantive area of commercial law from restrictive political and religious considerations. In our terminology, the money market became rationalized and thereby differentiated from other institutional spheres.
2. The protection of this secularized sphere of economic activity was cleaved off from political and religious demands through the efforts of the common lawyers and the mercantile interests, a coalition which was aligned for future struggles with the Crown, Church and other anti-commercial groups.

MONOPOLIES

Of more immediate interest to the Elizabethan capitalist was the growth of state-granted economic monopolies. Monopolization presented a major threat to the growth of rational capitalism. If the Crown could control the operation of the internal and foreign market by means of state-sanctioned patents of monopoly, large segments of the emerging commercial class could be excluded from the market by the mere signing of a state paper.

The granting of the patent of monopoly accomplished a number of objectives for the Tudor monarchy:

1. It raised revenues for the operation of government by requiring the patentee to pay an annual fee for the privilege of the patent.
2. The patent served as a device for rewarding service to the Crown at a minimum of actual specie payment. Salaries would often be supplemented by a monopoly over a sector of the economy.
3. The patent of monopoly provided a strategy whereby the Crown could control economic activity by manipulating the terms of the grant, as well as the conduct of the patentee.

It soon became apparent that the right of the Crown to create

patents of monopoly must be abrogated if rational capitalistic enterprise was to remain viable. Rational economic activity, as we have defined it, could not be realized if the Crown could parcel out a sphere of economic life to a court favorite or Crown official, to the exclusion of all other entrepreneurs. A man's life-time training, his capital investment, his very existence remained in a most precarious state so long as the monarch was able to arrogate for himself exclusive control over internal and foreign markets.

It is at this point that the common lawyers' emphasis on a free-market system becomes intelligible. The common law courts in a series of decisions beginning in the late Elizabethan period and extending into the early Stuart period fostered the principle of the market and simultaneously insulated the issue of market entry from monarchical interference. In our scheme, the common law courts were able to separate the operation of the market from the control of the Crown and establish it as an independent institutional arrangement, with a logic and an internal dynamic of its own. The creation of a proto-market bias in the common law accomplished three major objectives for the mercantile classes.

1. It undermined the unilateral right of the Crown to restrict the operation of the market by removing from the royal prerogative the right to control and allocate domestic and foreign markets by means of the patent monopoly.
2. It extended the jurisdiction of the common law courts over economic arrangements. This expansion of the commercially-oriented common law courts and common lawyers came at the expense of the prerogative courts, such as the court of Star Chamber and Courts of Chancery, which had claimed exclusive jurisdiction over monopoly-related disputes.
3. The substantive decisions provided the emergent market-economy a degree of autonomy and independence. Freeing the market from royal interference allowed the rational capitalist to plan, calculate and orient his future activities without the fear that the Crown would intercede and nullify vested economic rights by granting a patent of monopoly.

In sum, the common law decisions in the monopoly cases imparted to the Stuart economic system a stability, a regularity which was missing when the Crown was permitted to unilaterally intervene in the workings of the economy.

CORPORATIONS

The law of corporations seems to be a rather abstract subject in the context of the volatile and politically-charged contest over monopolies, yet in its own fashion, the maintenance of an independent, and autonomous theory of associational life was a crucial ingredient in the promotion of rational capitalism in the seventeenth century.

Traditionally it has been assumed that the English common law of organizations had adopted the so-called "concession" or "fiction" theory of corporations. Basically the "concession" theory posits that all organized group life in the social system is derived from a grant or "concession" from the sovereign. The sovereign imparts to a collection of individuals a corporate personality, a legal existence which would not exist outside of the sovereign's grant. The implications of the concession theory of associational life are far reaching for the operation of a rational economic order predicated upon large-scale complex-organization. For the "fiction" theory provides that not only can the sovereign create the corporation, it can, through use of "Quo Warranto" proceedings dissolve the corporation. This theory of corporations is essentially Romanist or civilian in nature.

However, the "concession" theory of corporate life has not been without its challengers. The major opposing theory of associational life is the so-called "realist" conception of corporations. In the modern

era, the German jurists Otto Von Gierke and Eugen Ehrlich and the great English legal historian Frederic Maitland have been the noted proponents of this legal position.

The logic of the "realist" theory of group life posits that the interaction of individuals, in and of itself, is sufficient to create an independent, viable corporate life. A corporation, of whatever form is not derived from a grant of the sovereign. Under the "realist" position, a group acquires an autonomy and continuity independent of the sovereign power. For the emergence and maintenance of rational capitalism it was essential in the Stuart period that organizational life preserve its autonomy and integrity vis-a-vis the centralizing monarchy. In one case, the Massachusetts Bay Company in the seventeenth century faced three separate Quo Warranto proceedings, each action threatening the very existence of the corporate body. Under these conditions, no capitalist could calculate the existence of his corporate vehicle with any certitude.

It therefore became essential that the common law provide the emergent capitalist with some organizational protections, and these protections were forthcoming.

In the early years of the seventeenth century, it was possible to discern a tension between the Crown-sponsored "concession" theory of corporations and the common lawyers "realist" theory of corporations. Under rulings by Chief Justice Coke, the common law courts came down early in the Stuart reign in favor of the realist position and opted for the independence of group life. This common law victory was short-lived and was soon overtaken by the political developments in the post-1660

Restoration. However, James II's victory over the Realist theory of corporations proved ephemeral and the Quo Warranto controversy of the 1680's cost him his throne. Since the Glorious Revolution of 1688, the English Crown has been most circumspect in interfering with the associational life of corporations and municipalities.

For all practical purposes, the English law is much in the same state as proposed by Coke in the early corporation cases.

The corporation controversy adds to our analysis the following points:

1. During the period of emerging rational capitalism, the common lawyers and common law courts were attempting to insulate associational life from monarchical interference and thereby establish the principles of corporate autonomy in English law.
2. While the differentiation of corporate life from royal control was judicially short-lived, later political events insured the emergence and independence of group life.

AGRICULTURE

In the latter part of the fifteenth century an element of commercialization was injected into English agricultural life. This growing concern for the production of commodities for market was most noticeable in the expanding wool trade. Enterprising landlords sought to convert the arable or tillable land, the waste and the commons to enclosed pasture land in order to provide feed for the growing herds of sheep. The creation of the enclosed pasture dramatically effected centuries old customs and land holding patterns in the English countryside.

Given the Tudor commitment to a static social structure, it was only natural that there would be royal resistance to the growing economic rationalization of the manor and the concomitant pauperization of the peasantry.

When the early legislation and Parliamentary commissions failed to halt the accelerating depopulation movement, the monarchy resorted to the prerogative courts to protect the copyholder, or manorial tenant, in his possession. By deploying the Star Chamber, the Court of Pequests, and the Council of the North, the Crown hoped to preserve the medieval pattern of tenantry in the face of entrepreneurial agriculture. Of course, the Crown was not unaware of the political implications of a large mass of dispossessed peasants, on the one hand, and a growing body of modern gentry seeking to circumscribe the powers of the Crown.

But the commercially oriented bourgeoisie and gentry were aided in their efforts to rationalize the countryside by the common law courts and the common lawyers. The conflict between the tenant-supporting prerogative courts of the Crown and the modernist oriented common law courts was resolved in favor of the common law by the Civil War of 1640.

Notwithstanding the heart-rendering plights of the dispossessed peasant, it must be acknowledged that it was in the agricultural sector that the scientific and industrial revolution first took effect. Through the rationalization of production by way of land aggregation, crop rotation and use of new modes of fertilization, the agricultural capitalists were able to feed the expanding English population, provide the wool for the developing industry and supply the needed capital for industrial expansion.

Yet these developments could only occur through the common laws insulation of agricultural law from royal interference. It was this process of differentiation of the law of land tenure which gave capitalism in the countryside its needed boost.

COMMON LAWYERS

There was little doubt that there was a great deal of hostility between the common lawyers and the Crown. In the late Elizabethan and early Stuart period, one area after another was removed from the ambit of royal control and appropriated by the common law courts. With each passing year the royal prerogative was progressively circumscribed by the common lawyers.

It was only natural that the Crown resist this movement and it was out of this crucible of conflict that the common law was able to provide the requisite legal protection for rational capitalist growth.

The common lawyers were not engaging the Crown for abstract ideological reasons. Given the convergence of the social origins of the common lawyers and the emergent capitalist, it became apparent that behind the abstract conflict of jurisdictions was a substantial conflict of material interests. If the common lawyers were successful in insulating the commercial life of England from the unilateral intercession of the Crown, the gentry and bourgeoisie would have a free reign to expand and control the economic activity of the country. It therefore became central to the development of Stuart capitalism that the common law system differentiate or separate itself from the influence of the Crown. By creating this autonomous legal sphere, the gentry and their natural allies, the common lawyers, formed a coalition of modernizing forces.

I contend that in the process of structural or institutional differentiation we can identify the dynamic for the creation of a rational capitalist system in seventeenth-century England. On the continent, the needed differentiation of the legal system from political, religious

and social groups was achieved through an ideological differentiation, through the creation of a body of legal principles divorced from outside interference.

It is at this point that we can proceed one step beyond Weber, to reformulate his thesis to take account of the English exception. The hypothesis briefly stated is that in the absence of a systematic legal code rational capitalism will only develop in those systems where the legal order has been structurally or institutionally differentiated from the traditional or anti-modernist elements in the society. And further, this differentiated and autonomous legal system is available for capture and manipulation by the capitalist strata of the developing nation.

Now that the deviant English experience has been incorporated into a more inclusive analytical scheme, the next task is to examine this hypothesis in the light of the developing nations of the modern world and its relevance for rational socialist economies. Only then will the social scientist be in a position to formulate a general theory of legal form and economic development.

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