

File: Weber

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The Disenchantment of Logically Formal

Legal Rationality

or

*Max Weber's sociology in the genealogy of the contemporary mode
of Western legal thought*

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Introduction

Max Weber began his sociology of law with a description of the then present of Western legal thought, along with a brief summary of its previous stages. This appreciation begins with a summary description of the Western legal thought of Weber's time, as it looks from our present 100 years later, emphasizing the contrast between the mainstream of his time, now called Classical Legal Thought, and its critics in the "social current." Part II presents Weber's sociology

of law, comparing and contrasting his approach with that of the social current. The most striking thing about Weber's sociology of law, from the perspective of legal theory a century after he wrote, is his ambivalent endorsement of legal formalism. This entailed rejection of the social current's critique, a critique that is close to universally accepted today. In Part III, I explain Weber's attitude toward legal formalism as motivated by the internal requirements of his theory of domination, in which, after the demise of all earlier modes of legitimation, the Iron Cage of modernity is held together by bureaucrats defined by their adherence to that mode of legal reasoning. Part IV argues that Weber's approach was inconsistent with the irrationalist and decisionist strands in his own theory of modernity, a theory that helps in understanding the current situation of legal thought, if we take the un-Weberian step of applying it to legal formalism. Finally, Part V offers an interpretation of the contemporary mode of legal thought as an episode in the sequences of disenchantment and reenchancement suggested by Weber's philosophy of history, and uses Weberian elements to construct a distinct contemporary ideal type of legal thought. The very brief conclusion suggests the strong affiliation between Weber (read as above) and one of the sects of modern legal theory, namely critical legal studies.

Part I. Western legal thought in 1900

Weber produced his sociology of law at a moment of dramatic transition in Western legal thought. In 1900, there was a well defined mainstream mode, which we now customarily call Classical Legal Thought (CLT) and two challengers: what I will call the "social current," or

“socially oriented legal thought,” and Marxist legal thought. This Part presents the classical and social modes. Weber’s sociology presents CLT as the mode of the present. His analysis of CLT is heavily indebted to the socially oriented critics who developed a rather elaborate picture of their classical opponents, a picture that remains at least largely plausible to this day. But, as we will see in Part II, Weber had his own distinctive critique of CLT, and also a critique of the social.

A. Classical Legal Thought

According to its social critics, according to Weber, and according to most (not all) of today’s historians, the late 19th century mainstream saw law as having a strong internal structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public law, “individualism,” and commitment to legal interpretive formalism. These traits combined in “the will theory.”¹

In the social jurists’ version, the will theory was that the private law rules of the “advanced” Western nation states were well understood as a set of rational derivations from the notion that government should help individuals realize their wills, restrained only as necessary to permit others to do the same. In its more ambitious versions, the will theory made public as well as private law norms follow from this foundational commitment (for example, by generating theories of the separation of powers from the nature of rights).

The will theory was an attempt to identify the rules that should follow from consensus in favor of the goal of individual self-realization. It was not a political or moral philosophy justifying this goal; nor was it a positive historical or sociological theory about how this had

come to be the goal. Rather, the theory offered a specific, will based and deductive interpretation of the interrelationship of the dozens or hundreds of relatively concrete norms of the extant national legal orders, and of the legislative and adjudicative institutions that generated and applied the norms.

“Outside” or “above” legal theory, there were a variety of rationales for the legal commitment to individualism thus understood. Of these, only natural rights theory was also highly relevant on the “inside,” that is, in the development of the technique of legal analysis based on deduction. Natural rights theorists had elaborated the will theory, beginning in the 17th century, as a set of implications from their normative premises, and their specific legal technique was the direct ancestor of the legal formalism that the socially oriented reformers were to attack in its positivized form.

In the 19th century, the German historical school (Savigny) developed a positivist version of normative formalism. National systems of law reflect as a matter of fact the normative order of the underlying society; such a normative order is coherent or tends toward coherence on the basis of the spirit and history of the people in question; “legal scientists” can and should elaborate the positive legal rules composing the system on the premise of its internal coherence. In the late 19th century, the German pandectists (Windschied, Puchta) worked at the analysis of the basic conceptions of the German common law version of Roman law with the aim of establishing that this particular system could be made internally coherent, and also be made to approach gaplessness. Many Continental legal scholars understood the German Civil Code of 1900 as the legislative adoption of this system.

In France, Britain and the United States, the historical school was a minor tendency, but

the same conception of a will theory combining individualism and deductive form gradually supplanted earlier ways of understanding private and, in the United States, public law. The normative or “outside” force for the theory might come from utilitarianism, or from Lockean or Kantian or French revolutionary natural rights, or from a variant of evolutionism (the movement of the progressive societies has been from contract to status; social Darwinism). But however derived, normative individualism was closely connected with logical method in the constitution of some version of the will theory.

The will theory in turn served a variety of purposes within legal discourse. It guided the scholarly reconceptualization, reorganization and reform of private law rules, in what the participants understood as an apolitical rationalization project. But it also provided the discursive framework for the decision of hundreds or perhaps thousands of cases, throughout the industrializing West, in which labor confronted capital and small business confronted big business. And it provided an abstract, overarching ideological formulation of the meaning of the rule of law as an essential element in a Liberal legal order.

B. The “social” as a mode of legal thought

The inventors of the social include Jhering, Ehrlich, Gierke, Geny, Saleilles, Duguit, Lambert, Josserand, Gounod, Gurvitch, Pound and Cardozo.² They had in common with the Marxists that they interpreted the actual regime of the will theory as an epiphenomenon in relation to a “base,” in the case of the Marxists, the capitalist economy and in the case of the social, “society” conceived as an organism. The idea of both was that the will theory in some sense “suited” the socio-economic conditions of the first half of the 19th century. But the social

people were anti-Marxist, just as much as they were anti-laissez faire. Their goal was to save Liberalism from itself.

Their basic idea was that the conditions of late 19th century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of “interdependence.” Because the will theory was individualist, it ignored interdependence, and endorsed particular legal rules that permitted anti-social behavior of many kinds. The crises of the modern factory (industrial accidents) and the urban slum (pauperization), and later the crisis of the financial markets, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence.

From this “is” analysis, they derived the “ought” of a reform program, one that was astonishingly successful, and globalized even more effectively than classical legal thought, through many of the same mechanisms, but also because the social became the ideology of many third world nationalist elites. There was labor legislation, the regulation of urban areas through landlord/tenant, sanitary and zoning regimes, the regulation of financial markets, and the development of new institutions of international law. Just as with CLT’s will theory, the abstract idea of the social appealed to a very wide range of legitimating rhetorics. These traversed the left/right spectrum, leaving out only Marxist collectivism at one extreme and pure Manchesterism at the other. Thus the social could be based on socialist or social democratic ideology (perhaps Durkheimian), on the social Christianity of Protestant sects, on neo-Kantian “situational natural law,” on Comtean positivism, on Catholic natural law as enunciated in *Rerum Novarum* and *Quadragesimo Anno*, on Bismark/Disraeli social conservatism, or on early fascist

ideology.

Regardless of which it was, the slogans included organicism, purpose, function, reproduction, welfare, instrumentalism (law is a means to an end)—and so anti deduction, because a legal rule is just a means to accomplishment of social purposes. A crucial part of their critique of classical legal thought was their claim that it maintained an appearance of objectivity in legal interpretation only through the abuse of deduction. Many advocates of the social argued that various groups within the emerging interdependent society, including, for example, merchant communities and labor unions, were developing new norms to fit the new “social needs.” These norms, regarded as “valid” “living law” (Ehrlich), rather than deduction from individualist postulates, should, and also would, in this “legal pluralist” view, be the basis for legislative, administrative and judicial elaboration of new rules of state law.

While the social was spectacularly successful as a legislative reform program, the social as a mode of legal thought underwent the same kind of brutal discrediting that had befallen CLT. We will take up the reasons for this, and Weber’s role in it, below.

Part II. Weber’s sociology of law

The best way to understand the chapter on “The Sociology of Law” in *Economy and Society*³ is as an analysis of CLT, presented as “just the way we do things now,” combined with an historical narrative of how CLT came into existence, and a critique of the critique then being leveled against it by the social current. This same sociology of law was an important element in

the construction of Weber's broader sociology of domination in modern capitalist society, but this aspect of the story is reserved for Part III.

A. Weber's methodology vs. the methodology of the social current

Weber was substantively in sympathy with a large part of the social legislative reform program.⁴ But, although he never, as far as I know, stated it explicitly, his methodology is well understood as a root and branch attack on and an alternative to that of the social people. First, Weber is famous for his insistence on a sharp distinction between the sociological is and the ethical or political ought. From "The Meaning of 'Ethical Neutrality' in Sociology and Economics,"⁵ and "Objectivity in Social Science and Social Policy"⁶ through to "Science as a Vocation,"⁷ Weber argued that the very maneuver that defined the social—that is, the claim that it was possible to go from an analysis of the modern social mode of interdependence, a fact, to the progressive reform agenda, an ought, couldn't be done. But this is only the beginning of his divergences from the method of the socially oriented critics of CLT.

Weber is also famous for his opposition to "emanationism," that is, to the idea that transpersonal entities like "geist" or "humanity" can figure plausibly in historical or sociological explanation. This is his explicit critique of hegelianism and of the German historical school.⁸ He applied it fully to law.⁹ But Turner and Factor have persuasively argued that, in the development of the sociological categories of action and domination we will present in the next subsection, Weber was systematically and carefully reworking the superficially similar categorical scheme of Rudolf von Jhering, the German founder of the social approach. The point of the reworking was to purge any suggestion that there are "social purposes" or a telos to social

development, or an evolutionary logic that can simultaneously explain and justify legal change.

In this respect, Weber was diametrically opposite to Tonnies, to Durkheim, and also to Talcott Parsons, for each of whom an organicist or functionalist understanding of society allows us to make, if not “objective value judgments,” at least judgments about what to do that are the farthest thing imaginable from mere ideological preferences. For Weber, social change is a resultant of the play of social forces. These include ideals and values as well as diverse material and institutional interests, always in conflict and subject to massive applications of the law of unintended effects. For the socially oriented critics of CLT, on the other hand, there is, at the very least, a logic of social development that law can either facilitate or obstruct.

Finally, it is familiar that Weber was at once an appropriator of¹⁰ and a strong critic of Marxist approaches to economic history. What he most strongly criticized was the mono-causal approach of the “base/superstructure” distinction, in which legal categories reflect the mode of production and legal rules serve the interests of the ruling class.¹¹ This kind of criticism applies *mutatis mutandis* to the social approach, for which law reflects society, albeit sometimes with tragic lags, and ought to serve a depoliticized and universal interest in social development. For Weber, law is, as we might now put it, “relatively autonomous,” and also “constitutive,” rather than merely reflective.

B. The basic categories of Weber's general and legal sociologies

This section briefly lays out the basic ideal typical categories Weber used in constructing his sociology of law. Weber's categories for general sociological and for legal analysis are the basis for the categories of his sociology of domination as well.

1. General sociological categories

Weber usefully distinguishes between action that is *purpose-rational* and action that is *value-rational*.

“[Social conduct] may be determined rationally and oriented toward an end. In that case it is determined by the expectation that objects in the world outside or other human beings will behave in a certain way, and by the use of such expectations as conditions of, or as means toward, the achievement of the actor’s own, rationally desired and considered aims. This will be called purpose-rational conduct.

Or, social conduct may be determined, second, by the conscious faith in the absolute worth of the conduct as such, independent of any aim, and measured by some such standard as ethics, aesthetics, or religion. This case will be called value-rational conduct.”¹²

Contrary to what readers sometimes think, purpose rationality is clearly “higher” than value rationality, for Weber, as the order of presentation in *Economy and Society* shows, and as is confirmed by his discussion of the ethics of acts vs. the ethic of consequences in *Politics as a Vocation*. It is important that purpose rationality is oriented to accomplishing either a single goal in the most effective way, or *some combination of goals through a balancing of costs and benefits*, in each case based on calculating how the situation in which one acts will be modified for good and ill by one’s action.

Value rationality means that the actor has identified a rule that applies to the situation

and proceeds to obey that rule, experienced as internally binding, based on some mode of legitimation that might be religious, ideological, philosophical, ethical or whatever. The key to the conduct is that the actor obeys without considering the consequences. Once authoritatively established, the rule is the rule, and obedience is the only consideration. Action in obedience, say, to one of the Ten Commandments, or to one's conviction that "the right to control your body is absolute" is value rational.

The purest type of value-rational validity is represented by natural law. The influence of its logically deduced propositions upon actual conduct may lag far behind their theoretical claims; that they have had some influence cannot be denied, however. Its propositions must be distinguished from those of revealed, of enacted, and of traditional law.¹³

2. The legal mode of authority (legitimate domination)

This is Weber's typology of the modes of legitimate domination:

The actors can ascribe legitimate validity to an order in a variety of ways:

The order can be recognized as legitimate, first, by virtue of tradition: valid is that which has always been.

Second, the order may be treated as legitimate by virtue of affectual, especially emotional, faith; this situation occurs especially in the case of the newly revealed or the exemplary.

Third, the order may be treated as legitimate by virtue of value-rational faith: valid is that which has been deduced as absolutely demanded.

Fourth, legitimacy can be ascribed to an order by virtue of positive enactment of recognized legality. Such legality can be recognized as legitimate either (a) because the enactment has been agreed upon by all those who are concerned; or (b) by virtue of imposition by a domination of human beings over human beings which is treated as legitimate and meets with acquiescence.¹⁴

Orders based on tradition, affect and value-rationality can be reenforced by enacted law. Also, there are other types of law than enacted law, including especially revealed law and natural law. The mode of legitimate domination through enacted law makes a sharp distinction between “lawmaking” and “lawfinding.”

According to our contemporary modes of legal thought, the activities of political organizations fall, as regards “law,” into two categories, viz., lawmaking and lawfinding, the latter involving “execution” as a technical matter. Today we understand by lawmaking the establishment of general norms which in the lawyer’s thought assume the character of rational rules of law. Lawfinding, as we understand it, is the “application” of such established norms and the legal propositions deduced therefrom by legal thinking, to concrete “facts” which are “subsumed” under these norms. However, this mode of thought has by no means been common to all periods of history. The distinction between lawmaking as creation of general norms and lawfinding as application of these norms to particular cases does not exist where adjudication is “administration” in the sense of free decision from case to case.¹⁵

In a modern system, law making is open ended: “ any given legal norm may be

established by agreement or by imposition, on grounds of expediency or value-rationality or both, with a claim to obedience at least on the part of the members of the organization.”¹⁶ Once the lawmakers have established the system of legal norms, the modern legal mode of authority (legitimate domination) is defined by the further requirement that lawfinding must be “impersonal”:

[E]very single bearer of powers of command is legitimated by that system of rational norms, and his power is legitimate in so far as it corresponds with the norms. Obedience is thus given to the norms rather than to the person [¹⁷].

Again, there is nothing natural or automatic about this conception. It is also possible for lawfinding, like lawmaking power to be “personal:”

Such personal authority can, in turn, be founded upon the sacredness of tradition, i.e., of that which is customary and has always been so and prescribes the obedience to some particular person.

Or, personal authority can have its source in the very opposite, viz., the surrender to the extraordinary, the belief in charisma, i.e., actual revelation or grace resting in such a person as a savior, prophet, or a hero.¹⁸

But in such a case we are not dealing with the ideal type of legal authority.

3. The modes of modern legal thought

The different modes of modern legal thought are ideal typical descriptions of what is done by the specialists in lawfinding (as opposed to lawmaking) when it comes to deciding how to apply enacted law to concrete cases. These can be judges, but they can also be bureaucratic

administrators, or professors critiquing judges, or professors deciding hypothetical cases.

Among systems that have gotten beyond supernatural methods (oracles, trial by ordeal), and also beyond ad hoc decision, Weber distinguishes modes of legal thought according to how close they are to his unequivocally most rational mode, which he calls “logically formal rationality” (LFR):

Present-day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, i.e., those which have been produced through the legal science of the Pandectists’ Civil Law, proceeds from the following five postulates: viz., first, that every concrete legal decision be the “application” of an abstract legal proposition to a concrete “fact situation”: second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic: third, that the law must actually or virtually constitute a “gapless” system of legal propositions, or must, at least be treated as if it were such a gapless system; fourth, that whatever cannot be “construed” legally in rational terms is also legally irrelevant: and; fifth, that every social action of human beings must always be visualized as either an “application” or “execution” of legal propositions, or as an “infringement” thereof. ¹⁹

An aspect of logically formal legal rationality (LFR) that Weber reiterated over and over, but that isn’t found in this definition, is that the lawfinder doing LFR is restricted to the “logical analysis of meaning” performed on a corpus of validly enacted norms that come from the lawmaking institution, whatever it may be. LFR “is found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where,

accordingly definitely fixed legal concepts in the form of highly abstract rules are formulated and applied.”²⁰

LFR is most definitely not necessary in order for the mode of authority to be ideal typically legal. All that is needed is that the mode of lawfinding be sufficiently “formal,” i.e., rule-bound, so that lawfinding is plausibly impersonal. For example, there are types of formal legal rationality that are not “logical,” including particularly the English common law.²¹ Formal rationality in general, whether of the higher “logical analysis of meaning type” (i.e., LFR), or the more primitive British precedential type, contrasts sharply with the very important Weberian category of “substantive rationality” as a mode of legal thought.

“[S]ubstantive rationality” ... means that the decision of legal problems is influenced by norms different from those obtained through logical generalization of abstract interpretations of meaning. The norms to which substantive rationality accords predominance include ethical imperatives, utilitarian and other expedient rules, political maxims, all of which diverge from the formalism ... which uses logical abstraction.²²

In LFR, when the lawfinder acts, by deciding the case or making his academic interpretation of what the law “is,” his action is always “value rational” in Weber’s usage. On the basis of the logical analysis of the meaning of the extant valid norms, he chooses a norm, without regard to the social consequences of his choice, and then applies it to the facts at hand, again without regard to the social consequences. This contrasts sharply with substantively rational legal thought. There, the judge may be, contrary to what some commentators suggest, acting in a value rational way (say, by applying religious commandments such as “thou shalt not kill” or

absolute natural rights such as “respect private property”). But the legal actor is also substantively rational if what he does is to identify a set of societal goals, or a set of partial political objectives of the ruler, and then craft his rule to maximize their accomplishment through a situation-sensitive balancing test.

In other words, substantive legal rationality can be either value rational or purpose rational (whereas LFR is always value rational).²³ The point about substantive rationality is not its mode of orientation to action, but the extra-juristic or “external” derivation of the criteria of decision, that is, their derivation from the general normative practices of society. Weber’s emphasis on this distinction is analogous to the preoccupation in contemporary legal theory with the question of the “autonomy” or “relative autonomy” of legal reasoning and legal institutions, and with the problematics of legal “autopoiesis.”²⁴

4. The three types of inquiry into legal rules

Starting from his three critiques of the social approach (no is-to-ought, no supra-individual social telos, “relative autonomy” of law), and working from the categorical scheme laid out above, Weber sharply distinguished three types of questions that the socially oriented critics habitually blurred.

(a) Legal validity: a juristic inquiry

In a system that is “modern” or of “today,” we can ask what, according to legal dogmatics is the valid legal rule for the legal scientist or the judge interested in deciding how an open legal question or a particular dispute about given facts should be resolved. This is a question of the meaning of the existing norm system—but only because that is the historically current mode of

legal thought, namely LFR. This question has a completely different meaning, or no meaning at all, in other systems and in other periods. While the question of what mode of legal thought will be applied is sociological, the question of the “right answer” within the mode is not. It is a question answered through the application of juristic technique.²⁵

Judgments of validity in modern “legal science” are (i) not judgments about a matter of fact, but correct or incorrect interpretations of the logical requirements of the meanings of the system of norms. (ii) They are not ethical judgments, because the logical coherence and gaplessness of the system of norms provides no warrant whatever of the moral desirability or moral (as opposed to legal) validity of the norm system as a whole or of any particular norm. (iii) They are “scientific” judgments because validity is established according to interpretive procedures strictly bound by logic.²⁶

(b) Sociological validity: a factual inquiry

(i) what are the norms that actually exist in a society? A factual question, requiring first an elaborate differentiation of types of normative system—all seen as subsets of “regularity.” For example, habit, custom, convention, law, state law. It includes both the question of the substance of the norms (e.g., are usurious contracts binding?) and the question of the mode of legal thought.²⁷

(ii) what causes a particular norm system to come into existence? Like the first sociological question, we can ask it about both the substance of the norm system and about the mode of legal thought. This is the main topic of Weber’s historical sociology of law, discussed in the next subsection.

(iii) how does a normative order of the legal type (administered by a specialized

staff—for example, of lawfinders) achieve “legitimacy,” meaning a probability of obedience higher than what can explained by the material threat of legal sanctions? This is the question of where legal norms get intrinsic “oughtness,” *in the minds of addressees*. It has nothing to do with our own view of the goodness or badness, rightness or wrongness of the norm in question. As we have seen above, legal norms can be legitimated by tradition, by charisma (e.g., by revelation), or “legally,” that is, by the mere fact of proper enactment.

(iv) what is the impact on the behavior of social actors of factually existing systems of law, in the sense of norms backed by sanctions of various kinds administered by specialized staffs and possessing legitimacy? This is a factual question that requires us to look at what actually influences the practical, particularly the economic behavior of whatever actors we are concerned with. For example, we can ask what norms governed usury in different systems, how effectively they were enforced or evaded, and what the impact of the actual or attempted prohibition of usury was on economic development. We can ask the same kind of question about modes of legal thought, for example we can ask about the influence of the rationalization of law on the emergence of bureaucracy, or about its influence, through its supposedly superior calculability, on economic development.²⁸

(c) Ethical/political judgment: the ethical irrationality of the world

On what should “we” base legal rules when we are choosing consciously among them? For Weber, this is an ethical/political value judgment, and one that we confront in our particular historical circumstance of disenchantment, a process that has affected all the different systems to which we might appeal to ground ethical/political choice by deducing answers from normative postulates or factual regularities, including particularly religion, rationalist natural law, and social

science. Weber has a lot to say about this, not as a sociologist but as an ethicist in a particular tradition, and we'll take it up later because it is highly relevant to the contemporary mode of legal thought.

C. Weber's historical sociology of Western legal thought ca. 1900

Using the above complex categorical scheme, Weber's sociology of law is an historical account of how the Western European great powers came to have, first, the set of legal concepts that they presently have, second, the set of substantive legal rules through which they regulate economic life, and, third, the mode of legal thought through which these rules are administered. His methodology, like that of this Chapter with respect to our contemporary mode of legal thought, is "genealogical."²⁹

1. The origins of present legal categories and legal norms, i.e., of CLT

He starts with the present, in which his contemporaries understand law to be divided into public and private, rights-granting and administrative, criminal and private, tort and crime, and so forth. Moreover, his contemporaries understand LFR to be "the" modern mode of legal thought. Next he takes up the substantive content of a modern system of private law, which consists of what we call property and contract, commercial law, and corporate law. The system is based on the idea that there is freedom of contract unless the state limits it, which it often does, for a wide variety of reasons, along with a family law system that rejects contractualization and commodification of sexual relations through a status conception of marriage, and corporate law regimes that permit economic entities to function legally as self-contained units.

In each case, he shows that the familiar concepts and specific rules of our modern system have a complex legal history, in which the specific economic interests of powerful groups, the agendas of political rulers, and, over and over again, the specifically technical or academic interests of legal specialists drive legal change on the way to the current set-up. Just before beginning this summary history, he sums up his conclusion in a famous paragraph:

As we have already pointed out, the mode in which the current basic conceptions of the various fields of law have been differentiated from each other has depended largely upon factors of legal technique and of political organization. Economic factors can therefore be said to have played their part but only to this extent: that certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of the underlying and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law or have intensified the institutionalization of political society. ... On the other hand, we shall frequently see that those aspects of law which are conditioned by political factors and by the internal structure of legal thought have exercised a strong influence on economic organization.³⁰

The odd phrase “certain rationalizations of economic behavior” seems to me to mean the development of modern capitalist enterprise with great economic power; the “resulting awareness” is that law has a large effect on such matters as the distribution of income; and this leads to the development of state institutions designed to control or channel market forces according to the political aims of governments. However, in his actual historical account, Weber

often attributes particular legal changes to the needs either of particular interest groups or to the needs of a developing economy. The above paragraph exaggerates his opposition to the Marxist approach.

2. The development of lawmaking

Having accounted for the emergence of the specific categories and characteristic rules of a modern legal system (in a manner that is not particularly original or interesting to today's readers, I dare allege), Weber undertakes a fascinating and difficult history of legality. It combines throughout the development of his "universal sociology" (ideal typical categories, with hypothetical connections among them, for understanding all law in all places throughout history), and his "philosophy of history" (his grand narrative of rationalization and disenchantment).³¹

The universal sociology roams freely around the world, from system to system, showing that such phenomena as oracles, divine revelation, law prophecy, folk assemblies, *cadi* justice, priestly rationalization of divine law, substantively rational patrimonial administration, and so on, are common to many systems and work in quite similar ways from system to system.³²

The philosophy of history dimension is about how the West of the European Continent, and only the West of the European Continent, arrived (a) at the sharp separation of law making and lawfinding, (b) at the view that lawmaking is a secular process through which a state claiming the monopoly of the legitimate exercise of force enacts valid legal norms as compromises of conflicting interests (legal positivism) and (c) at the practice of elaboration and application of the norms (lawfinding) through LFR, that is through the logical elaboration of the meaning of the norm system taken as a whole, excluding all elements of substantive rationality

(not to speak of irrational elements of various kinds). In other words, it turns out that the categorical schemes we presented above simply as a typology, were all designed to set up a particular historical narrative progression ending in the Continental present of 1900.

The parts of this Euro-exceptionalist narrative that are most important for our purposes are the latest in time. The peculiar conditions that facilitate the emergence of the notion that law is made by the sovereign and can be elaborated according to LFR include, in merely chronological order, the peculiarities of Roman law; the peculiarities of canon law administered by the Papal bureaucracy; the development of academic law specialists in universities rather than in a powerful guild of legal practitioners; the peculiarities of the revival of Roman law in the late Middle Ages; the need of the 17th and 18th century enlightened despots to consolidate power against feudalism by alliance with the bourgeoisie combined with the development of state bureaucracies; the emergence of what Weber calls “revolutionary natural law” (the Rights of Man, particularly to property and freedom of contract, as the only legitimate source of positive law) in the 18th century (not to be confused with Catholic natural law); and the creation of the first modern code by the French in 1803.

3. Revolutionary Natural Law (the Rights of Man)

We need to pause at Weber's interpretation of the Rights of Man. In the chapter of Economy and Society on the Sociology of Law, Weber introduces revolutionary natural law as a key element in the emergence of the modern conception of law making (we hold positive law to the test of natural rights) and of LFR. “[T]he natural law axioms of legal rationalism .. alone were able to create norms of a formal type ... ”³³ Specifically, what happened was the elaboration

of the abstract principles of revolutionary natural law, and the fragmentary, not yet “sublimated” provisions of the French Civil Code, into the pyramidally structured, deductive, complete system that I called above “the will theory.”

“The purest type of [formal natural law] is that ... which arose in the seventeenth and eighteenth centuries as a result of the already mentioned influences. especially in the form of the ‘contract theory’ and more particularly the individualistic aspects of that theory.” He goes on to elaborate, and mock, the derivation of the rules of a laissez faire economy from the individualistic conception. Here Weber simply appropriates the work of the social oriented critics of Classical Legal Thought (Jhering, Gierke and Ehrlich). The construct of an individualistic will theory used to deductively elaborate a complete system was their work and not his.

Revolutionary natural law clearly produces “value rational” orientations to action in the form of rules that are to be observed regardless of the consequences (though it adds elements of substantive rationality in the form of reasonableness tests the minute jurists begin to elaborate it into a normative system³⁴). But how does this type of law fit into Weber’s typology of legitimacy? His most basic model of legal development is that tradition is disrupted by charismatic revelation of new norms that are then rationalized (this is one aspect of the famous “routinization of charisma”) by the specialized staffs that administer them. Charismatic revelation is at first strictly associated with the divine (oracles; revelation—as in Moses and Mohammed).

Religion plays a role here, too, since Weber follows his friend Jellinek in locating the sources of the Rights of Man in “the religious motivation provided by the rationalistic

[Protestant] sects ...”³⁵ But natural law is not itself religious. In fact, “[i]t is the specific and only consistent type of legitimacy of a legal order which can remain once religious revelation and the authoritarian sacredness of a tradition and its bearers have lost their force.”³⁶

We have to go elsewhere in *Economy and Society*, to the discussion of “Sect, Church and Democracy,” for an explanation. The belief in the Rights of Man is the:

charismatic glorification of ‘Reason,’ which found a characteristic expression in its apotheosis in Robespierre, [and] is the last form that charisma has adopted in its fateful historical course. It is clear that these postulates of formal equality and economic mobility paved the way for the destruction of all patrimonial and feudal law in favor of abstract norms and hence indirectly of bureaucratization. It is also clear that they facilitated the expansion of capitalism. The basic Rights of Man made it possible for the capitalist to use things and men freely, just as this-worldly asceticism—adopted with the same dogmatic variations—and the specific discipline of the sects bred the capitalist spirit and the rational “professional” who was needed by capitalism.³⁷

4. Natural law disintegrates into legal positivism

Natural law, and the individualistic will theory developed from it, disintegrated, according to Weber, during the second half of the nineteenth century. The reasons are the following: First, the rise of socialist substantive natural law theories proclaiming “the right to work,” “the right to a minimum standard of living,” “the right to the full product of one’s labor,” and more. Second, “natural law doctrine was destroyed by the evolutionary dogmatism of

Marxism, while from the side of 'official' learning it was annihilated partly by the Comtean evolutionary scheme and partly by the historicist theories of organic growth."³⁸ In other words, Classical Legal Thought, as the will theory, was destroyed by its two enemies, namely Marxist theory and the socially oriented reform theory (the latter was "official" only in Bismarck's Germany). Weber sums up his diagnosis in a famous passage:

Compared with firm beliefs in the positive religiously revealed character of a legal norm or in the inviolable sacredness of an age old tradition, even the most convincing norms arrived at by abstraction [from natural law axioms] seem to be too subtle to serve as the bases of a legal system. Consequently, legal positivism has, at least for the time being, advanced irresistibly. The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed, as the technical means of a compromise between conflicting interests.³⁹

5. Weber's sociology of law incompatible with the socially oriented view of CLT

There are two further striking traits of Weber's historical sociology law that we need to note, just because they distinguish his attitude from that of the social critics.

(a) Historicizing the substantive content of CLT

Whereas each of the schools mentioned above (historical school, utilitarians, Kant or Locke natural rights people, social Darwinists) had believed that we got to the will theory through the *development of an idea*, he showed that the free contract/property regime was best

understood as an historical accident, with many diverse causes, and many of the causes were “disreputable.” This idea was incompatible with the critique developed by the social people because their theory made CLT a highly adequate adaptation to past conditions favorable to individualism (the yeoman theory in the US; the early modern post-feudal situation in Europe).

(b) The Freedom/Coercion Flip

The various schools who agreed on the will theory, and that it was the working out of an idea, also agreed that the idea that got worked out was freedom, or at least autonomy. Weber argued that far from the realization of the will or of freedom, the modern order of freedom of contract and property was a regime of coercion.⁴⁰

Although the social people had themselves extensively developed the notion that unequal bargaining power rendered formal equality practically meaningless, Weber's stark approach was incompatible with the social approach for two reasons: It presented the choice as between modes of coercion, with different distributive outcomes and different consequences for economic growth, period. For the social, the idea of adaptation to the functions, purposes, or needs of “society” provided an objective basis for good law (from is to ought), law that would correctly adjust the needs of the individual to the needs of the collective, so a tragic choice between coercions was the last thing they had in mind. Their rhetoric emphasized that their opponents were social scientifically *vieu jeu*, rather than that they were invested in a mode of domination.

D. Weber's Ambivalent Attitude Toward Logically Formal Legal Rationality:

1. The social critique of LFR: the abuse of deduction

The social critique of CLT was that it failed to develop the rules needed for the new game of interdependence, for two reasons. The first was its ideological commitment to individualism, an outdated philosophy both as description and as norm. Second, according to the social people, CLT people understood themselves to operate as interpreters (judges, administrators, law professors) according to a system of induction and deduction premised on the coherence, or internal logical consistency, of the system of enacted legal norms. One mode was to locate the applicable enacted rule; a second was to develop a rule to fill a gap by a chain of deductions from a more abstract enacted rule or principle; a third, the method of “constructions,” was to determine what unenacted principle must be part of “the system,” given the various enacted elements in it, if we were to regard it as internally coherent, and then derive a gap filling rule from the construction.

It is important to recognize that, like his model of the will theory, Weber's ideal type of LFR, which he treats as the “highest” type of legal rationality, is in every way identical to the ideal type developed by the social people, here Jhering, Ehrlich and especially Geny, to describe CLT. LFR, as a descriptive category, is theirs not his. The difference between him and them was in their respective attitudes toward this mode understood as highly typical of actual late 19th century practice.

In the social analysis, because interpreters must always be logically compelled in one of these ways, they could never legitimately work consciously to adapt the law to the new conditions of the late 19th century. Nonetheless those conditions constantly presented them, as interpreters with gaps. What the CLT people had to do, to stay loyal to their role as they conceived it, was to “abuse deduction.” They had to make decisions reached on other grounds

look like the operation of deductive work premised on the coherence of the system. And the abuse of deduction permitted the smuggling in not of the general desiderata of social evolution, but of the partisan ideologies of the parties to the conflicts between labor and capital, large and small business, of the century's end.

In response, the social people had four positive proposals: (a) from the social "is" to the adaptive ought for law, (b) from the deductive to the instrumental approach to the formulation of norms, (c) not only by the legislature but also by legal scientists and judges and administrative agencies openly acknowledging gaps in the formally valid order, (d) anchored in the normative practices ("living law") that groups intermediate between the state and the individual were continuously developing in response to the needs of the new interdependent social formation. We know already that Weber had no use for the first point. We now take up his critique of the remaining three.

2. Weber's pros and cons of LFR

Weber's attitude toward LFR as characteristic of CLT was highly ambivalent. He was aware of the social critique of CLT for the abuse of deduction, and he was careful always to treat logically formal rationality as an ideal type never fully achieved in practice and maybe even theoretically unachievable. It has its origin, like the substance of modern law, in historical accidents rather than any cunning of history. But the source of his ambivalence had nothing to do with the kind of internal critique of abuse of deduction that the social people leveled against it. Quite the contrary.

(a) The cons of LFR

LFR was a factor in producing universal bureaucratization of social life, and bureaucracy was equally characteristic of the state apparatus, private capitalist business enterprises, charitable organizations and churches. Bureaucracy would have to be the characteristic mode of organization of a socialist state and society (state ownership of the means of production would require an increase rather than a decrease in bureaucracy). Moreover, it was bureaucracy rather than either the state or the capitalist market in the abstract that most substantially restrained individual freedom and agency in the modern world. The basic political/social problem of modernity was therefore not the choice between capitalism and socialism but the choice between ever increasing bureaucratization and whatever alternative might be found.

Together with the argument that the contract/property regime was one mode of coercion among others rather than the realization of human freedom, the argument for universal bureaucratization as the essence of modernity amounted to a radical rejection of the public/private distinction, as it had developed, first, in liberal and then, in dialectical opposition to the liberal formulae, in socialist thought. The choice was neither between private freedom and public servitude (the liberal version) nor between capitalist servitude and freedom through the collective (the socialist version).

Note just how different this mode of critique is from the abuse of deduction idea. Here it is the determinacy, the calculability of LFR that is the problem, rather than the reverse.

(b) The pros of LFR

But, on the other hand: LFR is “how we do it now,” it is what we mean by “dogmatic legal analysis” or “legal science,” and it would be silly to deny that it exists and is a force in the world. It has many of the good attributes that make bureaucracy, both public and private, the

most efficient form of administration, by comparison with which the alternatives are mere dilettantism. In particular, it has an important role in guaranteeing that bureaucracy is calculable and can proceed *sine ira ac studio*.

It is associated as well with accomplishments of the liberal revolutions, in the way of formal equality, democracy and due process that, we cannot deny, have transformed our world for the better. LFR, because it operates by the logical analysis of meaning and then the deductive application of norm to facts, guarantees the “impersonality” of legal administration. That is, it guarantees that only the legislator, who has “the right to make law,” makes it in fact.

Many of the same results can be and indeed have been achieved by the lower form of formal rationality represented by the common law. Weber, moreover, concedes that while calculability is crucial to capitalism, LFR is not—indeed, capitalism flourished first under the common law, and when the systems compete, the common law tends to win out. But the reasons for this are no credit to the Anglo-Saxons. It is the highly biased irrationality of their system (e.g., the Khadi justice of justices of the peace to repress the rural masses), that largely explains their success. The common law may have worked, but there is no aspect of it that Weber sees as on the same level of development as Continental LFR.⁴¹

Closer to home, both the substantive rationality of welfarism (i.e., Enlightened Despotism), and natural law, whether elaborated deductively from individualist premises or as a socially oriented substantive doctrine, have proved failures at the task of providing operative techniques for the development of a legal order adapted to the needs of the administration of justice in a centralized bureaucratic state. That was the whole point of his narrative of the displacement of natural law by positivism.⁴² LFR was, in this view, a big advance, but, more

important, it was all that was left of the ambitions of legal rationalism as a general phenomenon.

3. Weber's dismissal of "the antiformal tendencies of modern law"

The "antiformal tendencies of modern law" are, according to Weber, multiple. They include the tendency of formal law to adopt subjective rather than objective tests of intention, and subjective ethical notions like "good faith," in response to the need of the business community for legal standards that will correspond to the needs of business practice. Other pressures in the same direction included:

the demand for substantive justice by certain social class interests and ideologies; ... the tendencies inherent in certain forms of political authority of either authoritarian or democratic character concerning the ends of law which are respectively appropriate to them [i.e., democracy appeases the masses anti-formally, and authoritarianism keeps power anti-formally]; and also the demand of the 'laity' for a system of justice which would be intelligible to them; finally, ... anti-formal tendencies are being promoted by the ideologically rooted power aspirations of the legal profession itself.⁴³

This set of demands, Weber concedes, responds to the fact that "the development of the formal qualities of the law certainly shows some peculiarly antinomian traits,"⁴⁴ and has produced a body of "modern sociological and philosophical analyses, many of which are of a high scholarly value." But all of them fly in the face of modern reality.⁴⁵ Weber understood himself to be addressing a complex of positions and attitudes, including "demands for a 'social law' to be based upon such emotionally colored ethical postulates as justice or human dignity,"⁴⁶

and the “school of ‘free law,’” which tried to show that there would be gaps in every statutory scheme, “in view of the irrationality of the facts of life; that, in countless instances the application of the statute ‘as interpreted’ is a delusion, and that the decision is and ought to be made in the light of concrete evaluations rather than in accordance with formal norms.”⁴⁷

In the same direction were theories, here presumably speaking of Ehrlich, according to which the “true foundation of the law is entirely ‘sociological,’” meaning that judges should respond to “norms which are factually valid in the course of everyday life and independently of their reaffirmation or declaration in legal procedure.”⁴⁸ Even further in the same vein, some scholars (Ehrlich again?), first, “degrade” statutory enactment to a “mere ‘symptom’” of sociological validity, and then argue that “no precedent should be regarded as binding beyond its concrete facts,” to reach the conclusion that the judge should engage in “free balancing of values in every case.”⁴⁹

In response to these theories, neo-Kantians (Stammler?), Comteans (Duguit?) and Catholic natural lawyers propose rational reconstructions that will “reestablish an objective standard of values.” [id.] Putting them together, the set of anti-formal tendencies “are agreed only in their rejection of the once universally accepted and until recently prevalent *petitio principii* of the consistency and ‘gaplessness’ of the legal order.”⁵⁰

Weber’s response remains puzzling. As he lays out the positions, he repeatedly points out that what is proposed is a reversion to substantive justice, is a “challenge to legal formalism”⁵¹, and, here is the key charge, that the reformers, “in view of the inevitability of value-compromises, very often [would] have to forget about abstract norms and, at least in cases of conflict, would have to admit concrete evaluations, i.e., not only nonformal but irrational

lawfinding.”⁵² Weber here uses the word “irrational,” according to his categorical scheme, to refer to decision that is oriented to the facts of the particular case rather than to rule application. In context, this means that because of ideological conflict on the one hand, and the vagueness of notions like social justice, on the other, the judge will have to decide each case on its facts. The general program that he attributes to the anti-formal thinkers fits well with this conclusion, since Weber sees them, as noted above, as committed to freeing the judge up for the “balancing of values in every case.” At the least, “the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts.”⁵³

Although he did not present it in this section, Weber had a sharp critique of the notion that the “living law” developed by intermediary groups, in the mode of Gierke and Ehrlich, should be regarded as having ethical warrant or a claim to being responsive to social needs, just because of its “organic” origin. Although he is happy to “categorically deny that ‘law’ exists only where legal coercion is guaranteed by the political authority,”⁵⁴ there is never the slightest suggestion that customary law is in any way more adaptive or otherwise valuable than state law. The “interests” that drive social development are always those of individuals or competing social groups, and never those of “society.”⁵⁵ He teasingly points out that, given the way Continental judges are recruited and trained, “it is by no means certain that those classes which are negatively privileged today, especially the working class, may safely expect from an informal administration of justice those results which are claimed for it by the ideology of the jurists [i.e., the social people].”⁵⁶

Instead of developing this kind of critique, Weber repeatedly notes that the socially

oriented reformers represent the desire of the legal profession to avoid the status degradation associated with the rationalization of a once learned and autonomous occupation.⁵⁷ And then, after elaborately summarizing the arguments, he ends abruptly: “At this place we cannot undertake a detailed discussion or a full criticism of these tendencies, which, as our brief sketch has shown, have produced quite contradictory answers.”⁵⁸ True to his word, he does not make a serious effort to come to grips with the socially oriented critique of LFR except to reiterate the charge of irrationalism, and add an interesting analogy to religion. (Remember that proposals for ad hoc judicial decision or the balancing of values from case to case fall under Weber’s definition of methodological irrationality.)

All variants of the developments which have led to the rejection of that purely logical systematization of the law as it had been developed by Pandectist learning, including even the irrational variants, are in their turn products of a self-defeating scientific rationalization of legal thought as well as of its relentless self-criticism. To the extent that they do not themselves have a rationalistic character, they are a flight into the irrational and as such a consequence of the increasing rationalization of legal technique. In that respect they are parallel to the irrationalization of religion.⁵⁹

In the last paragraph of his *Sociology of Law*, he has this to say to all the tendencies that want to openly acknowledge judicial discretion and infuse lawfinding with self-conscious concern for substantive justice: “Inevitably the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of expediential considerations and devoid of all sacredness of content.”^[60]

III. Logically Formal Rationality in Weber's Sociology of Domination

Weber's attitude toward the social abuse-of-deduction critique of LFR seems strange in light of the developments in legal theory over the last century. Weber's treatment of its inventors seems in retrospect dismissive at best and often tendentious or obtuse. He failed to distinguish the critique of the abuse of deduction from the various kinds of, at that point, embryonic alternatives being bruited about, and particularly insisted on associating the anti-formal critique with *qadi* justice. To put it bluntly, since he wrote, the socially oriented critique of LFR has won close to universal acceptance, even though the solution of case by case adjudication has been equally universally rejected. In modern legal theory, the single most important question is what to do after the demise of LFR, and this is a question Weber resolutely refused to face.

In this section, I offer an explanation for Weber's stance, based on the place of LFR in Weber's sociology of domination in modern society. We have seen already that, in this sociology, the modern system of property and contract law, bureaucratically administered, structuring a market economy also bureaucratically administered, constitutes a pervasively coercive social order, rather than either the realization of human freedom or an invitation to socialist reform. I will argue that in order for this position to make sense, Weber had to defend LFR against the social critique.

A. Religion, rationalization, disenchantment, mysticism: The Iron Cage Narrative

In Weber's general sociology, the domains are religion, science, politics, the economy, sexuality and art.⁶¹ There are complex analogies in the evolution of the domains, established through a basic conceptual vocabulary that includes the concepts of disenchantment, rationalization, bureaucratization, irrationalization, and sectarianism. It is striking that in his "philosophy of history" writings, Weber does not, as far as I know, ever offer an analysis of the legal domain that establishes the analogies with these other ones. This in spite of the fact that he wrote an enormous amount about law, and characterized law in ways that are full of parallels with the others, including the importance of specialists and specialized knowledge, bureaucratization, and, above all, rationalization. In fact, Weber treats the development of LFR as of prime importance both to politics and to economics.

The rise of the modern bureaucratic state is intimately intertwined with LFR, and LFR makes that state a calculable element in the economy. At the same time, the administration of large corporations comes to resemble more and more closely the administration of the state apparatus. But law is just as intimately important to the evolution of religion and science. The rationalization of religion is partly a matter of the development of the first bureaucracy by the Catholic Church, and a large part of that bureaucracy's function was the rational development and application of canon law. The modern university, which is the producer of modern science, is a state institution with an internally bureaucratic organization as well. There is the same double relevance of law: organized religions develop religious law, and do it bureaucratically; universities develop scientific laws, and do it bureaucratically.

The metanarrative: Initially, all the domains, and those of sex and art as well, are bound

together in religion. Religious thought struggles for a rational answer to the question of theodicy—or of the apparent ethical irrationality of the world (the good suffer, the evil are rewarded). The attempt to find a rational answer sets us down a path of “disenchantment” as it turns out to be possible to explain more and more of what happens in the world without positing, first, miracles, and then, the existence of God. This is the work of science. Disenchantment is an existential or phenomenological category. It means loss of belief that humans arrive at birth in a material and social world where events are part of a system of ethical meaning (one that includes supernatural powers) that we have “merely” to discover.

The knowledge of the world as a place of cause and effect goes along with the gradual development of the science of norms, that is of how to use legal technique to organize people in the state and the economy. What is disenchanted here is, first, divinely revealed laws of social organization, and, second, the divine right of kings and other authorities (all the way down the great chain of being to the level of, say, the manor) to issue legitimate commands. Together with scientific disenchantment, political disenchantment allows a vast increase of power over the material world, so long as we use the power for secular ends. This is rationalization. Its highest accomplishment is bureaucratization in state and economy.

But religion doesn't go away. It struggles against science and against legal disenchantment to affirm cosmic meaning accessible to reason, but it also retains and develops “irrational” tendencies, meaning mysticism. It is more and more forced to concede that the world works without direct divine intervention and that reason cannot find the world's ethical meaning simply by rational interpretation of what we know about it. But it insists more and more strongly that there are other truths, ways of knowing, and experiences than those that are made intelligible

through the techniques of disenchanted knowing, or mastered for secular ends through rationalization and bureaucracy.

The organizational correlate of religion's surrender of science and the state to secular forces is religious sectarianism. The process of polarization, so to speak, in which religious meanings are more and more to be found by the individual seeker "beyond" the domains of secular activity undermines, though only slowly, the aspiration to theocratic rule, or even to the religious organization of society through "establishment." The end result is the transition from "church" to "sect," which is a voluntary community of believers existing in the private sphere of civil society without public powers and functioning within the state's regime of civil law. (This strongly resembles Marx's Essay on the Jewish Question.)

When Weber describes the antiformalism of the social people as a disparate set of irrational reactions to the rationalization of legal science, it is to this version of religious development that he refers. It is not a flattering allusion. He clearly regards disenchantment not just as inevitable but as a process whose "truth for us" only "grown up babies," as he puts it, can deny. He recognizes the fact of mystical otherworldly experience, but doesn't see it as even a little challenge to disenchantment and rationalisation within actual social practices. Antiformal reactions within the actual social practice of law are destined to well deserved defeat if all we can say for them is that they are the analogue to the flight into mysticism and sectarianism in religion.

In this version of the metanarrative, all the emphasis is on the power of the autonomous "logics" of state and economy, their imperviousness to transformation through religion, and the foolishness of resisting the benefits that come along with acceptance of rationalization. Of

course, the situation has the downside that the autonomous logics are logics of domination, and that a disenchanted world has a basic grimness because of our nostalgia for lost meaning, even if we have the refuge of manly embrace of the partial ethic of our particular calling within one of the domains.

Our modernity is further redeemed, to however limited an extent, by the existence of two other domains, love/eroticism and art, which split from religion through a process closely linked to disenchantment in economy and polity. With the decline of public religious power, they are capable of holding their own and even developing their autonomy as concrete social practices against the perennial hostility of religion. Eroticism and art for art's sake are self-consciously irrational, and self-consciously resistant, as yet, to modern-style social control. Nonetheless, they are in the shadow of rationalization and bureaucratization (sexual science, Foucauldian institutions of sexual discipline; art theory, art markets, museums). We might add (Weber doesn't) that they develop their own intense sectarianism, in the form of the warring art movements and sexual ideologies.

B. The Disenchantment of Lawmaking and the Scientificity of LFR

1. The disenchantment of lawmaking (not of LFR) fits the metanarrative

The coherence of this picture of modernity is promoted by a version of the history of modes of legal thought that emphasizes the progressive disappearance of value rational sources for the legitimacy of legal/bureaucratic domination. As we have seen in Part II above, Weber offers just such a narrative. Ultimate norms are first legitimated by tradition, with change

brought about by charismatic revelation claiming a divine origin. Charismatic revelation is routinized in theocratic regimes into religious law, of a more or less formally rational character. Then, as we've seen, there is the last gasp of charisma in the form of revolutionary natural law (the Rights of Man) quickly routinized into a deductive legal science, and equally quickly discredited by positivist critique of its fanciful state of nature myths, vagueness, and internal inconsistencies. Another important factor is the rise of the variants of the social ideology, splitting the charismatic camp and reducing its plausibility as pure reason.

All the while, logically formal rationality and state bureaucracy are emerging downstream, so to speak, from the battles at the abstract level of God vs. Reason, just as rational economic practices develop in the shadow of medieval and early modern monarchical absolutist controversies about how to secure the welfare of the populace. Theories of natural law are in fact the last representatives not just of charismatic law giving but also of pre-modern enchantment as a general phenomenon. In the words of Colliot-Thelene:

The structure that determines the recent evolution of natural law doctrines (l'Enthüllung, or "unveiling"[of legal norms as merely compromises of conflicting interests]) is closely related to that of disenchantment: the veil is lifted on the reality of law, as the charm is removed that had more generally hidden from prior generations the prosaic character of the here-below. In the brief span of a century, or rather of a few decades, the concept of law repeated, on a smaller scale, the very process of desacralization and elimination of transcendence that at a general level engenders modernity. The "formalist" definition of the legal mode of domination recognizes this twice over reduction, within which the second in time

[“unveiling” of law as mere compromise] brings the first [general disenchantment] to a close at the same time that it reproduces it. If natural law was the only form of legitimacy that remained after the disappearance of belief in religious revelations or the sacredness of tradition, formal legal rationality was in turn all that remained of the legitimacy of the Rational State once the values on which that legality had originally rested had lost their persuasive power.⁶²

2. Weber's commitment to the scientificity of LFR explained as necessary in order for modernity to be an Iron Cage

It is at least plausible, it seems to me, that Weber's dismissal of the antiformal social as irrational had one of its origins in the role of LFR in his theory of modernity as I've just sketched it. Weber is committed to the tragic situation of loss of meaning within a system of domination by the autonomous logics of the spheres—this is the famous “Iron Cage” of modernity--redeemed only by the possibility of stoic pursuit of a vocation and the private pursuit of the erotic and the aesthetic.

The “scientificity” of LFR is essential here because it is the glue that holds the rational/bureaucratic structure of domination together after disenchantment has deprived it of all external traditional or charismatic legitimations. The following seems to me a key to Weber's whole sociology, and it is pretty brilliant besides, and so worthy of quotation at length:

Present-day economic life rests on opportunities acquired through contracts. It is true, the private interests in the obligations of contract, and the common interest of all property holders in the mutual protection of property are still considerable, and

individuals are still markedly influenced by convention and custom even today. Yet, the influence of these factors has declined due to the disintegration of tradition, i.e., of the tradition-determined relationships as well as of the belief in their sacredness. Furthermore, class interests have come to diverge more sharply from one another than ever before. The tempo of modern business communication requires a promptly and predictably functioning legal system, i.e., one which is guaranteed by the strongest coercive power. Finally, modern economic life by its very nature has destroyed those other associations which used to be the bearers of law and thus of legal guaranties. This has been the result of the development of the market. The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is *calculable* in accordance with rational rules. On the other hand, the constant expansion of the market, which we shall get to know as an inherent tendency of the market consociation, has favored the monopolization and regulation of all “legitimate” coercive power by *one* universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies.⁶³

Given the effacement of traditional and charismatic authority, as well as of the non-state institutions that once guaranteed order, we couldn't speak of a rationalized, bureaucratized set of domains constituting an iron cage of particular logics if we didn't believe that LFR could function, at least in a gross way, to put the dominant order into effect at the level of application. And the moral picture of tragic loss of meaning would no longer be plausible if within the key

domain of legal practice there was the possibility of redemption by the reintroduction, anti-formally, of substantive ethical elements. If that were the case, all bureaucrats would have the possibility of agency within their jobs, rather than being condemned to vocational formalism.⁶⁴

IV. The Disenchantment of Logically Formal Rationality

Here begins a second Weberian narrative, in which his sociology works strongly against his own interpretation of modernity in general, and against his defense of LFR in particular.

A. Rehabilitating the irrational moment within rationalized domains

1. The irrational moment in economy, science and politics

In the last narrative, religion retreated into mysticism, confronted by the overwhelming theoretical success and practical power of rationalization in science, state and economy. But there is another Weberian narrative running parallel to this one. In science, state and economy, under conditions of bureaucratization, there remains an irreducible irrational element to the activity within each domain. In the Iron Cage discussion, the logics of the domains are both unitary and irresistible, but in conflict with one another. In this second narrative the logics of the domains produce, over and over again, situations of undecidability.

Because this point is more familiar for state and science than for the economy (*Politics as a Vocation* and *Science as a Vocation*), we can begin with the economy. The most developed

modern bureaucratic economic systems run partly on the charismatic irrational principle represented by entrepreneurship as risk taking, by the management of monopolies, and specifically by Robber Baronage. Weber's Robber Barons are individuals who manage to operate outside the constraining logic of competitive price determination, taking advantage of opportunities that are objectively present but also capitalizing on their own charismatic qualities.

In science, it turns out that "creativity" isn't reducible to bureaucratically determinable characteristics that govern the specialized subdomains of the modern university. It involves an agonistic, irrational, intuitive moment without which no amount of learning and technique can accomplish anything of note. In politics, there is a similar split: the state is reduced more and more to a bureaucracy administering a rule system according to LFR, but the politicians are engaged in "fighting" for power, and have to make decisions with big ethical implications using an ethical apparatus that is internally contradictory and so often leaves them just having to "decide." This is the much commented on "Schmittian" element in Weber's thought,⁶⁵ shared with other post-Nietzschean modes, such as existentialism.⁶⁵

At this point in the analysis, science, economic management and politics have more in common with love/eroticism and art than at first appeared. Each is a domain split internally between a bureaucratic element operating according to LFR and an irrational but equally essential element within which LFR doesn't operate, and neither do more mundane techniques for rationally deciding what to do.

The problem is not just that each domain has a logic and the logics (or Gods, in Weber's terminology) are at war.⁶⁶ The situation is much more dramatic, because within the part of each domain where LFR doesn't operate, there are irreducibly conflicting principles at work, rather

than a single logic. Loyalty to one's vocation turns out not to be an answer to the disintegration of the world into antagonistic value-spheres, because antagonism is present within each sphere.

This is where sectarianism comes in. Just as religious irrationalism favors religious sectarianism, the irreducibly irrational in politics favors ideological sectarianism and nationalism. In the economy, it favors national economic rivalry even against the "logic of the market." Only in science, in Weber's view, does the power of the rational grid confine irrationalism to the moment of individual creativity (what would Thomas Kuhn say about that?).

Let me hasten to say that the reading I've just proposed is at least as partial as the previous one, in which science, state and economy starkly oppose religion, sex and art. It is moreover an "ideal typical" rendering of disenchantment as a general phenomenon, and I've embellished Weber's account to give it an internal consistency that will be useful, I hope, in the analysis of the fate of LFR in the contemporary mode of legal thought.

Remember that the puzzle before us is to understand Weber's theory of LFR, and to trace the fate of his theory into the contemporary mode of legal thought. As a first step, we have already distinguished the question of moral or ethical validity of norms in a system from the question of the mode of legal reasoning once a set of norms are given legislatively. LFR is, in Weber's view, the modern way to do legal interpretation to generate new legal norms scientifically from the legislative postulates. Keeping to his distinction, the ideal typical narrative of disenchantment applies without much strain to Weber's account of the enterprise of producing valid legal norms by declaration (as opposed to by interpretation, as in LFR). His sociology of law elaborates the series of steps that lead us to the modern situation he calls positivism and that we call classical legal thought:

	Law
Disenchantment	law disengaged from religion (oracles, divine revelation)
Rationalization	legislative codification + logically formal legal rationality
Bureaucratization	specialized, unitary national legal system
Irrationalization	natural rights theory (charismatization of reason)
Sectarianism	proliferation of natural rights theories (e.g. social vs. individual)

2. The disenchantment of lawmaking merges it into the political domain

In the above, what is disenchanted is lawmaking understood as such. Weber's theory of the disenchantment of lawmaking ended with its fusion into politics—specifically legislative politics. In other words, once legitimations for lawmaking had reached the point where multiple natural rights theories, Marxism, and the variants of the social ideology contended to define the necessary ethical substance of the legal order, and none of them were plausibly rationally compelled (they were merely rival charismatic claims), lawmaking was just a branch of politics. This meant that the law making process was subject to the logic of the political sphere—it was about “fighting” between interest groups and ideological sects. Politicians made their decisions about what law to create in the same situation of ethical undecidability (due to contradictory moral imperatives) that applied to all other political questions.

When Weber spoke of the “anti-formal tendencies of modern law” he was not referring to the proliferation of schools of thought about what to legislate or declare constitutionally, or about the merger of lawmaking and politics. These had been the topics of the previous sections. They had established for the legal domain the same internal structure—progressive rationalization and bureaucratization in one sector of the domain, combined with irrationalization and sectarianism in another—that existed for religion, politics, economy, sex and art.

“The Anti-Formal Tendencies of Modern Law” is rather about an irrationalist assault on the supposedly hard rational kernel of LFR that remains within the legal domain at the level of interpretation after law-declaration has been politicized. This kernel is important not just to the legal domain, but through its role in the general social form of bureaucracy, to all the other domains that have undergone the modern form of rationalization.

B. The implausibility of LFR after the politicization of lawmaking

There seems on the face of it to be a serious, indeed invalidatingly serious problem with Weber's attitude toward LFR. It is implausible that lawmaking, whether by charismatic divine revelation, natural law deductions or positivist enactment, can lose enchanting power, while LFR grows and even becomes stronger all the while. The problem can be stated simply:

1. Because there are contradictory legislative ideals, we can no longer "presuppose" the coherence of "the system"

As we've seen already, according to Weber, Western legal thought moved from natural law to positivism for two reasons. First, the vagueness, inconsistency, etc., of natural law makes it inapt as a basis for a modern legal bureaucratic order. Second, the development of new types of charismatic natural law thinking, and the variants of the social ideology. These developments undermine both the charismatic and the rational claims of the 18th century "revolutionary" natural law of the bourgeoisie, that is, the "individualist" natural law of absolute property rights and freedom of contract.

Positivism becomes the theory of lawmaking because natural law is implausible in theory, but also because *actual legislation* comes more and more to embody both the program of revolutionary natural law and that of social law. The corpus of codified rules thus no longer plausibly translates a single set of value-rational judgments (say, the rights of man) into the details of legislation. Rather, in Weber's formula already quoted, law "has been unmasked all too visibly, indeed, as the technical means of a compromise between conflicting interests."⁶⁷

This development put LFR in jeopardy. There are two components to the modern legal order, codification and the technique of interpreting the code “as though it were” an internally consistent document each of whose concrete or (in the European phrase) “material” provisions can be understood to be an implication of the meaning of a more abstract provision. In this system, as I explained above, gaps are filled by the analysis of the system, presupposed to be internally coherent, to build a chain downward from some unquestionably valid abstract provision, or upward to and then downward from some logically required though unenacted abstract provision.

So in LFR, the statement that the system is “presumed to be gapless” has a particular meaning. It does *not* mean that the code, or the body of legislatively enacted statutes, contains a provision that can be directly applied to every case that comes before the judges. Quite the contrary, LFR presupposes that the judge (or professor) will often find, in the body of legislatively enacted rules, no particular rule that applies to the particular facts of his case. But the system is indeed gapless in the sense that by the logical analysis of meaning the judge or professor can derive deductively a rule that will be the correct one to apply. This, again, involves both finding enacted abstractions from which to derive the subrule and also “constructing” new abstractions where they are logically necessary, given the premise of the coherence of the whole code.

The jeopardy created by the recognition of the vagueness of revolutionary natural law combined with the rise of rival forms of natural law was that the method of LFR might no longer be plausible. Why not? If there are rival abstract principles of natural law, representing say the bourgeois property/contract version and the socialist, labor-based version, and each approach has

been embodied in legislation, the presumption of internal coherence is false in fact.

This is jeopardy but not yet actual disaster (that is, disenchantment), for the following reason. Weber's modern mode combined LFR with the elaborate "materialization" of law by the legislative adoption of ever more detailed statutory and administrative norms covering more and more particular cases. This meant that there was a kind of race going on, in which the plausible determinacy of the legal order was shored up (by the multiplication of specific enacted norms) at the same time that the plausibility of rational interpretation of the norms was undermined (by the multiplication of flatly incompatible abstract principles each with a claim to explain a large part of the concrete multitude of enactments).

Already at the time Weber wrote, it seemed obvious to many legal theorists that this race would end in the utter discrediting of LFR. These are the very theorists he criticizes in the "The Anti-Formal Tendencies of Modern Law." His dismissive characterization of their position I've already mentioned. But they had good reasons for arguing that LFR was an implausible description of the way legal reasoning worked. Moreover, their experience of the disenchantment of LFR, that is, of its loss of all persuasive power, seems in retrospect a highly plausible consequence, in Weber's own terms, of the dynamic of rationalization. Weber was wrong to see them as irrational in the mode of the religious flight into mysticism. He should have recognized that what was happening was exactly the same movement toward decisionism, this time within the process of legal interpretation, that he had brilliantly traced for the process of formal law declaration, on the model of economy, science and politics.

2. Gaps were inevitable, the stakes were high, many valid norms were the product of

the abuse of deduction

The implausibility of LFR derived, in large part, from two “discoveries” (by which word I mean to endorse them): First, the dynamism of the capitalist economy generated, constantly, increasingly, legal gaps or conflicts involving large economic and political stakes. Second, a large part of the body of norms that applied to economic and political life was judge made according to LFR, but had involved in its formulation the “abuse of deduction.”

While these norms were supposedly derived by the “logical interpretation of meaning” from other norms legitimated by enactment, the derivations were flawed. Because the derivations were flawed, they were open to the charge that they were illegitimate in their resolution of the high stakes issues involved. Worse, they might well represent not random errors in deduction, but “motivated errors” of an ideological kind. The judges were open to the charge that they had settled these high stakes questions according, as Holmes put it in 1897, to their “economic sympathies.”⁶⁸

To the extent this diagnosis was accurate, the modern judge (or the modern law professor in systems where professors were understood to have the main task of legal interpretation) confronted a dilemma that Weber never took seriously. The judge was likely to have to decide, as the economy and polity rapidly changed shape, on the choice of a valid legal rule. Even if the choice seemed to occur at a low level of the system, and therefore not to have major systemic implications, it might have very large economic or political implications (think of modern decisions about intellectual property, or *Bush v. Gore*). The massive body of enacted norms is, *ex hypothesis*, no help. It can’t just be “applied” –or there would be no “gap.”

The enacted or “constructed” principles from which the concrete norms supposedly derive

are contradictory. They embody, for example, radically different attitudes toward freedom of contract according to whether they come from the “revolutionary” or the “social” version of natural law. Moreover, many of the concrete rules that might seem most relevant were chosen through judicial or “scientific” (by professors) “logical interpretations of meaning” that now appear open to the charge that they were abuses of deduction with patent ideological motivations. What’s a boy or girl to do under these circumstances?

Contrary to what political philosophers and newspaper editorial writers are likely to think, the one option that is not open is to claim that we must stick to LFR in order to “guarantee certainty” for reasons of economic functionality, or to “guarantee respect for the separation of powers” between judge and legislator for reasons of democratic political legitimacy. The reason for this is that it is LFR itself that has presented us with the choice in question. LFR has proved internally indeterminate. We can’t just “stick to LFR” (maybe arguing “what are the alternatives?”). With respect to the particular high stakes problem that the judge is asked to decide by choosing among alternative candidate valid rules, *there is no LFR to “stick to.”* Denying this, and proceeding merrily along in full “fidelity to law,” or some other such nonsense, is exactly what we mean by the abuse of deduction.

A jurist who has reached this point can be said to have experienced the disenchantment of LFR in a quite specific Weberian sense. From Savigny’s brilliant first volume of *The System of Modern Roman Law*⁶⁹ until the 1930’s, jurists in Europe were, as has often been noted, obsessed with the idea that the ensemble of valid legal norms constituted a system in the strong sense of an entity whose internal coherence could be presupposed.⁷⁰ Given that presupposition, it is plausible to say that “the system determines” the choice of a rule among alternative candidates

when there is an apparent gap at the level of materially applicable rules.

The “system” is a “metaphysical” entity because it is the product of, but somehow transcends, a multiplicity of concrete decisions by particular adjudicators, the work of a wide range of jurists, and the enactments of legislators, including the personally clueless legislators of massive codifications. When we say that “the system determined” the choice of a particular materialized rule to resolve a high stakes dispute, we mean that an entity transcending the above mentioned individual social actors determined the choice.

The critique of LFR disenchantments it because it deprives the decision maker of the illusion (for us, it is no longer any more than an illusion) that “the system” in some sense produces the norms that decide cases, rather than either some particular earlier jurist enunciating some particular rule, or we ourselves imposing meaning in the presence of a gap (one we may ourselves have worked hard to open), in the post-Nietzschean mode. Sometimes there appears before us some earlier jurist’s valid norm, and we can’t resist the experience of being bound to apply it. Sometimes, and sometimes as a result of our conscious effort, a space appears in which we can impose meaning. To be disenchanted is to “bracket” the question of what immanences and transcendences (i.e., what conception of “the system”) might once have rendered this experience of subjective boundness and freedom intelligible.⁷¹

There are two radically different ways to proceed after acknowledging the bind. The first is the Weberian way, though he refused to take his own way with respect to the issue before us, that of the disenchantment of LFR. The Weberian way is to acknowledge disenchantment and take responsibility, in the antinomian decisionist mode, for making a choice without hoping that it will have a “warrant.” The other way, the one pursued by legal theory over the whole course of

the last century, is the way of “reconstruction,” that is, of the attempt to re-legitimate legal interpretation according to new ideal types, after the disenchantment of LFR.

Part V: The Contemporary Mode of Legal Thought: Policy Analysis

I would distinguish two historically important reconstruction projects, one for private, administrative and substantive criminal law, and the other for constitutional law, with very different content, different origins, and different fate. In constitutional law, today, the dominant model is based in a very straightforward way on United States constitutional history and practice, as reinterpreted to some extent by Jellinek and Kelsen. A legitimate order is based on plebiscitary adoption of a written constitution containing a charter or declaration of rights, which judges of a constitutional court are to interpret according to extant juristic technique, with the constitutionally granted power to overrule democratically enacted legislation and executive action, although without direct access to police or military staffs to enforce their judgments against legislature or executive.

It is an interesting question how this ideal type has gained legitimacy around the world, but it is to my mind less interesting than the one to which I have chosen to devote the remainder of this paper. That is the question of reconstruction in private law, administrative law, and substantive criminal law, a project that was initially a joint venture of German and French scholars, with the rest of the world looking on, but became, in the 1930's and 1940's, above all a United States venture, globalized after the second World War.

A. Weber accepted and rejected within the contemporary mode of legal thought

In Europe through Kelsen⁷² and in the US through Llewellyn and the legal realists,⁷³ Weber's basic critiques of the social – that it illegitimately attempted to generate a legislative ought from the is of social change, and that it often (not always) tried to bootstrap validity in the juristic sense from the facts of regularity of behavior and normative consensus– were very fully assimilated and are an important part of the modern mode of legal thought (in its theory part). Moreover, Weber's basic sociological distinctions are the basis of the methodology of modern legal sociology on both continents.

It is very different with respect to Weber's overall diagnosis of legality and its future. In Europe the traumas of the middle third of the twentieth century led to revival of natural law, in a context in which it continued its confrontation with legal positivism a la Kelsen. Legal formalism, though discredited at the level of pure theory, survived and even prospered as part of the mystique of the civil as against the common law and as part of the liberal post WWII argument that the anti-formalism of the social current was complexly complicit in the rise of fascism and even in Stalinism. (In spite of the intense Marxist critique of the social–you have to be a Hayekian libertarian to believe that the social people are crypto-communists).

What happened in the U.S. was no more Weberian, but very different from what happened in Europe. The critique of LFR had been taken seriously and far in the U.S. during the period between 1900 and 1930. The American critics of Classical Legal Thought used all the European materials, but they were co-inventors of the strategy and actually did it more thoroughly than the Europeans. (Compare, for example, Hohfeld with Josserand.) Moreover,

their version was never even slightly enamored of judicial discretion, as was the case briefly in France and Germany.

There was an initial period, that of the heyday of legal realism, when the critique of the abuse of deduction combined with insistence on a sharp is/ought distinction led to two opposite, quite extreme reactions. On one side was a scientific positivist approach aiming to identify the factual regularities of legal behavior, rigorously excluding all reference to the dogmatic materials, influenced by behaviorism in psychology and the Vienna Circle. On the other side was an intuitionist account of judicial behavior in applying law to facts, typified by a famous article called “The Function of the ‘Hunch’ in Judicial Decision.”⁷⁴ These tendencies were denounced by the American founders of sociological jurisprudence (Pound) and also by the emigres from Hitler’s Germany who had recanted their Free Law wildness (Kantorowicz, Kocourek).⁷⁵

This phase was quickly succeeded by the rise of what I have been calling the contemporary mode of legal thought. There was intense development of the “abuse of deduction” strand in the social critique of CLT, decisively discrediting LFR for the legal profession as a whole, in a way that never happened in Europe, and incorporating what Weber called “relentless self-criticism” into the professional training of elite lawyers. A second key trait was the “juridification” of “substantively rational” normative elements—i.e., legal “policies”—that for Weber were inconsistent with the highly developed form of LFR.

The best way to understand the United States development would be this: the U.S. post-social scholars accepted and even greatly intensified the abuse of deduction critique, but recognized Weber’s (and others’) critique of the social as threatening diffuse judicial usurpation and incalculability. The danger was particularly obvious in the U.S., where progressive forces had

struggled for several generations against conservative judge-made constitutional law restrictive of the very reforms advocated by the social people. Both the rise of policy and the development of human rights judicial review were post-realist responses to these challenges. This means that Weber's sociology of law was not prophetic—not LFR but a distinctively hybrid contemporary mode of legal thought legitimates contemporary legal/bureaucratic domination.

B. "Formalizing" substantive rationality: the rise of policy analysis

In the contemporary mode of legal thought, legal interpretation is based on a combination of deductive argument in the mode of LFR, precedential argument, and what is called "policy argument." Policy argument is sufficiently different from the "traditional" modern modes so that it warrants, I think, an attempt to present it in the form of a new ideal type, rather than as a combination of the modes of legal reasoning typologized by Weber. Weber's typological axes can nonetheless be helpful in this. It is worth noting that Max Rheinstein, in his Introduction and footnotes to "Max Weber on Law in Economy and Society," repeatedly recognizes that United States legal theorists (among whom he includes himself) think they have gone beyond LFR to a method they call policy analysis, and are therefore likely to disagree with Weber's characterization of the modern mode of legal thought.⁷⁶

1. Ideal typical legal policy analysis

Policy analysis presupposes that the interpreter has to decide in the presence of a gap in the system of valid norms, or that he has to apply a norm that in its own terms calls for policy analysis,

or that the circumstances for some reason permit application of a norm derived from policy analysis to displace a deductively derived norm. The analysis presupposes that there are many policies, or desiderata in rule making, that they often though not always conflict, that they are well conceptualized as forces or weights or vectors in a force field, and that they vary in force or weight according to the precise factual circumstances to which they are applied within the field. Policies come in conflicting pairs of different types, including conflicting welfare arguments, conflicting moral maxims and conflicting subjective rights. There are also as we will see an important class of “institutional” policies.

Rational decision is defined in policy analysis as choosing a norm to apply to this case and to a class of similar others in the future on the basis of a total-value-maximizing balance of the conflicting policies. It is understood, first, that the rule is no more than a compromise of the policies, rather than a thing valid in and of itself, and, second, that the rule will inevitably be more or less adequate across the range of fact situations to which it applies. The ideal type as a whole was the work of Jhering, Holmes, Heck, Demogue, Radbruch, modern United Statesian conflict of laws theorists, and the sequence of Hohfeld, W.W. Cook, Llewellyn, Felix Cohen, John Gardner, Lon Fuller, Henry Hart & Albert Sacks, and Stewart Macaulay.⁷⁷ Macaulay, interestingly, uses Weber’s sociological categories in constructing his catalogue of interests to be balanced.⁷⁸

2. Policy analysis as “formalized substantive rationality”

Weberian substantive legal rationality is rational in the sense that it appeals only to rationally calculable factors (no oracles or trial by battle). It may also be rational in the sense that it decides according to a rule (derived from one of the extra-juristic normative orders of the society), or it may proceed ad hoc. In the case of policy analysis, the decision maker has no rule already available that

he can just apply, because the attempt to do LFR turns up a gap or a conflict. But the goal of the policy analysis is to choose a new rule that will be applied first to this case, and then in the future (except as explained below). Policy analysis, is therefore not “irrational” in the sense of refusing to decide according to rule.

Like Weber’s substantive rationality, the content of policy analysis is derived from the general political, moral, religious and expediential goals that drive government in the society as a whole. Nonetheless, modern policy analysis is in several important ways closer to LFR than it is to Weberian substantive legal rationality. In contemporary policy analysis, the policies (welfarist, moral, rights based) are understood as strictly legal, fully “inside” the practice of legal interpretation, rather than as external, and in this respect policy analysis resembles LFR.⁷⁹

Policies are plausibly “internal” because there is an implicit criterion for their “juridification,” namely, universalizability. (In Habermas’s sense.⁸⁰) Only policies, or desiderata, that everyone shares can be included, in order to preserve the legitimacy claim of the procedure. So for example efficiency considerations can be included but distributive ones cannot; general moral desiderata are permissible but not moral teachings uniquely associated with a particular church or sect (or for that matter with atheism as a belief system); the only rights that can be consulted are “universal” at least in form.

The self-consciously selective incorporation of substantively rational elements from non-juristic normative practice goes along with the typification or ritualization of legal policy argument. The result is a juristic practice that is sharply distinguishable from the general social normative practice from which it derives. However, the commitment to balancing conflicting policies, with an eye to consequences, in a context in which rules represent no more than the means to implement the

resulting compromise, sharply distinguishes policy analysis from LFR. It also distinguishes policy analysis from those variants of substantive rationality that are value rational, i.e., oriented to rules absolutely valid without regard to consequences.

3. Policy analysis transforms the will theory and the social theory into policies to be balanced

One of the most striking developments of the 1940's was the transformation of the "formalist" requirements of the will theory, and the equally formal functionalist requirements of the social, into mere policies to be balanced within the larger analysis. The will theory became Lon Fuller's "principle of private autonomy," no longer the fountain of deductions, but rather *primus inter pares* of a set of principles that included, for example, a potentially conflicting principle of protecting reliance.⁸¹

In modern tort and contract law doctrinal writing, both in Europe (e.g., Ghestain, Viney, Atiyah) and in the U.S. (e.g., Prosser, Farnsworth, MacNeil), the principle of private autonomy is often opposed, from case to case or across a particular doctrinal domain, with varying results, by what is unmistakably the old social principle validating the claims of interdependence. Policy analysis appears to have transcended, in this way, the antinomy of autonomy of the will and social embeddedness.

It is striking that it does this for each type of policy: economic, moral and rights based. When rights conflict, it is likely to be an autonomy right conflicting with a right to protection against harm. The autonomy principle of no liability without fault comes up against the counter-principle of "objective responsibility" (liability based on causation). The efficiency gains from permitting the

externalization of costs confront those of internalization of costs. In this way, what seemed to be an insuperable objection to normatively compelling rational law making, namely the existence of contradictory legal philosophies each claiming to operate according to an absolute (logical or social) necessity, was transformed into something like a technical problem (though the need for value judgments—not political judgments—wasn't denied).

4. Policy analysis transforms objections to its legitimacy into additional policies to be balanced

Weber's ideal type of substantively rational legal thought succumbs, in his theory, to LFR because LFR is superior both in that it provides calculability for the addressees of the legal order and because it permits a sharp separation between norm formulation and administration, whether the formulator is an absolute monarch or a parliament. At first blush, it might appear that any legitimacy claims of policy analysis must be defeated on the ground of incalculability and failure to respect the separation of powers.

The true genius of the policy analysis initiative was that it found a way to meet these objections in the mode of confession and avoidance. Because he operates within a mode of thought for which LFR has been disenchanted, gaps and conflicts, some with high stakes are inevitable. That means that "value judgments" are also inevitable. All that can be hoped for is to make them in the most rational way possible, that is, in the way posing the least danger (not no danger at all) of incalculability and/or politicization of the adjudicative process. This is accomplished within the contemporary mode of policy analysis *by incorporating the question of the calculability of the chosen rule, and the question of the appropriate division of law making power between judge and*

legislature, into the policy calculus itself.

In policy argument, a major question is whether the rule proposed will be adequately calculable (in policy jargon, “adequately administrable”), account taken of the major problem of arbitrary over- and under-inclusion that highly calculable rules inevitably generate. In policy argument, a second major question is whether the choice of a rule is consistent with the premise of the separation of powers between judge and legislator, of course acknowledging that the inevitability of gaps makes this problem insoluble in the old fashioned terms of LFR (“institutional competence arguments,” in policy jargon).⁸²

An adjudicative system whose mode of thought corresponded to the ideal type of policy analysis would be “autopoietic” (in the very limited sense that Teubner gave to Luhmann’s ideal type⁸³) because its practice includes wholly intra-system methods (not rules) for the generation of new norms to apply to the data that arrive from “outside,” and also methods (not rules) for regulating the boundaries of the legal system vis a vis others, viz. the legislative and executive. It is for this reason that it seems right to call it a “formal” (in Weber’s sense) version of substantive rationality. It is also purpose-rational rather than value rational, because it is based on consequence-oriented trading off of values rather than rule application. But it involves constant value judgments as to what policies should be juridified and how to balance them in any particular case of rule-making.

Of course, policy analysis is never present in pure form in contemporary legal thought, and always operates in uneasy co-existence with at least the following earlier types: *cadi* justice or lay equity, LFR, the “social” methodology of deducing a rule from a single social purpose, and the mode of positivized natural rights reasoning characteristic of modern charter-based constitutionalism with judicial review. Moreover, the Weberian category of legitimacy doesn’t capture the subtle

psychological attitudes of modern ruler and ruled toward the ought-claims of law produced in this way. I would prefer to describe them in the register of degrees of “bad faith,” in the Sartrean sense.⁸⁴

**Conclusion: Irrationality in Adjudication and the Sectarianism of
Contemporary Legal Theory**

In contemporary legal theory, policy is always a potential Trojan Horse for ideology, just because of the patently weak rationality of choosing policies by universalizability and then merely “balancing” them. The Weberian legitimacy of the legal order rests partly on the claim that “we” use democratic law making procedures—rather than judicial legislation—to deal with ideological conflict. It also rests partly on the claim that constitutional law, with non-ideological judicial enforcement, guarantees human rights. As a consequence, the apparent possibility of a moment of arational, Weberian or Schmittian decision within the adjudicative process is, at least, “a problem,” for apologists for the existing legal and social order.

One way to interpret the proliferation, after about 1970, of “schools” of legal theory is as a Weberian phenomenon of sectarianism in the face of the irreducible ethical irrationality of legal judgment. Thus revived natural law, human rights, law and economics, Habermasian speech act theory, Dworkinian rights theory, libertarian legal theory, feminist legal theory, critical race theory, and, last but by no means least in this list, critical legal studies, would represent responses to the core dilemma, whether it is called “democracy deficit,” “countermajoritarian difficulty,” “judicial paternalism,” “result orientation,” “activism,” or whatever.

It is hard to imagine that Weber would have found any of the reconstruction projects of contemporary legal theoretical sects even slightly plausible, as a response to his dire decisionist view of political existence. To a degree that has continually surprised me, this inquiry into Weber's sociology of law, viewed in conjunction with his general sociology of disenchantment, seems to lead to the conclusion that much critical legal studies work, in the skeptical vein, has been reinvention, or adaptation to new non-Weberian purposes, of Weberian wheels.

1. See generally, Roscoe Pound, *The End of Law as Developed in Juristic Thought II, The Nineteenth Century*, 30 *Harv. L. Rev.* 201 (1917); **Franz Wieacker, *History of Private Law in Europe with Special Reference to Germany* (Oxford, U.K.: Clarendon, [1967] 1995); James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford Univ. Press, 1991).** For the literature on the will theory, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form*, 100 *Colum. L. Rev.* 94 (2000). The summary in the text is a slightly modified version of that in Duncan Kennedy, "Legal Formalism," in Neil J. Smelser and Paul B. Baltes, eds., *Encyclopedia of the Social and Behavioral Sciences* (New York: Elsevier, 2001) 8634.

2. See generally on the social as legal consciousness, **Franz Wieacker, *History*; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 *Va. L. Rev.* 999 (1972); Andre-Jean Arnaud, *Les juristes face a la societe du XIXieme siecle a nos jours* (Paris: Presses Universitaires de France, 1975); Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford Univ. Press, 1992); Nestor DeBuen, *La Decadencia del Contrato* (Mexico City: Porrúa, 1965); Duncan Kennedy & Marie-Claire Belleau, "Francois Geny aux Etats-Unis," in Claude Thomasset, ed., *Francois Geny: Mythes et realites* (Brussels: Dalloz, 2000); Duncan Kennedy, *From the Will Theory. The summary in the text is a slightly modified version of that in Duncan Kennedy, Two Globalizations of Law and Legal Thought: 1850-1968*, 36 *Suffolk Univ. L. Rev.* 631 (2003).**

3. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth & Claus Wittich (Berkeley: Univ. Of California Press, [1921/22] 1978).

4. See Max Weber, *The Methodology of the Social Sciences* (Glencoe: Free Press, 1949); Max Weber, *Roscher and Knies: The Logical Problems of Historical Economics* (Glencoe: Free Press, 1975).

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5. In Weber, *Methodology*.
 6. In Weber, *Methodology*.
 7. In Max Weber, *From Max Weber: Essays in Sociology*, ed. H. H. Gerth & C. Wright Mills (New York: Oxford Univ. Press, 1946).
 8. See generally, Weber, *Roscher and Kneiss*.
 9. Weber, *Economy and Society* 754
 10. E.g., Weber, *Economy and Society* 334.
 11. E.g., Weber, *Economy and Society* 654.
 12. Max Weber, *Max Weber on Law in Economy and Society*, ed. Max Rheinstein (New York: Simon & Schuster 1954) 1.
 13. *Weber on Law* at 9
 14. *Weber on Law* at 8.
 15. *Weber on Law* at 59.
 16. Weber, *Economy and Society* 217.
 17. *Weber on Law* at 336, see also Weber, *Economy and Society* 217-20.
 18. *Weber on Law* 336.
 19. *Weber on Law* at 64. Weber's point is not historical, but about Weber's present: "According to present modes of thought ["systematization"] represents an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules, under which it is implied, all conceivable fact situations must be capable of being logically subsumed, lest their order lack an effective guaranty." *Weber on Law* at 62.
 20. *Weber On Law* at 63.
 21. Weber, *Economy and Society* 787, 889-92.
 22. *Weber on Law* at 63-64.
 23. Compare legal rationality, formal and substantive, with economic rationality, at Weber,

Economy and Society 85-86 (for a better translation, see Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons (Glencoe: Free Press, 1947) 184-85). Economic substantive rationality, like its legal sibling, involves heterogeneous criteria that may be value-rational or purpose-rational in terms of an indefinite number of value systems.

24. Cf. Gunther Teubner, *Law as an Autopoietic System* (Cambridge, USA : Blackwell, 1993).

25. Weber, *Economy and Society* 311

26. It seems to me that Kelsen is indeed the direct descendant of Weber. The major difference between them is that Kelsen accepts the social critique of LFR. For Weber, the framework of powers defined by public law is filled, at the level of adjudication (or academic interpretation) by “doing” LFR on the positively enacted norms of the system. For Kelsen, the “judgment” is a “norm like any other norm,” chosen by the judge as lawmaker, albeit within the constraining “frame” (his word) established by the abstract norm to be applied. Norberto Bobbio, “Max Weber e Hans Kelsen,” in Renato Treves, ed. *Max Weber e il diritto*, *Sociologia del diritto* no. 5, Milan, 1981.

27. Weber, *Economy and Society* 319-25.

28. Weber, *Economy and Society* 312-37.

29. And eminently Nietzschean, as well as post-structuralist. See Michel Foucault, “Nietzsche, Genealogy, History,” in Michel Foucault, *Language, Countermemory, Practice: Selected Essays and Interviews*, ed. Donald Bouchard (Ithaca, N.Y. : Cornell Univ. Press, 1977).

30. Weber, *Economy and Society* 654-55.

31. Mommsen, this volume.

32. It has been denounced as anti-historical, because it is indifferent to context in its drive for concepts that will apply across contexts. Harold Berman & Charles Reid, “Max Weber as Legal Historian,” in Stephen Turner, ed., *The Cambridge Companion to Weber* (Cambridge, UK: Cambridge Univ. Press, 2000). But this is to miss its point—which is to find concepts that transcend context, and then use them to describe contexts as parts of larger developments.

33. Weber, *Economy and Society* 867.

34. Weber, *Economy and Society* 870.

35. Weber, *Economy and Society* 868.

36. Weber, *Economy and Society* 867.

37. Weber, *Economy and Society* 1209-1210.

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38. Weber, *Economy and Society* 874.
 39. Weber, *Economy and Society* 875.
 40. Weber, *Economy and Society* 729-31.
 41. Weber, *Economy and Society* 778, 889-92, cf. David Trubek, Max Weber on Law and the Rise of Capitalism, 3 *Wisc. L. Rev.* 720-753 (1972); David Trubek, Reconstructing Max Weber's Sociology of Law, *Stan. L. Rev.* 919-936 (1985); David Trubek, Max Weber's Tragic Modernism and the Study of Law in Society, 20 *Law & Soc. Rev.* 573-98 (1986); Sally Ewing, Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law, 21 *Law & Society Review* 487-512 (1987).
 42. Weber, *Economy and Society* 873-75
 43. Weber, *Economy and Society* 894.
 44. Weber, *Economy and Society* 894.
 45. Weber, *Economy and Society* 895.
 46. Weber, *Economy and Society* 308.
 47. Weber, *Economy and Society* 886.
 48. Weber, *Economy and Society* 887.
 49. Weber, *Economy and Society* 888.
 50. Weber, *Economy and Society* 889.
 51. Weber, *Economy and Society* 886.
 52. Weber, *Economy and Society* 886-87.
 53. Weber, *Economy and Society* 894.
 54. Weber, *Economy and Society* 316.
 55. Weber, *Economy and Society* 753-60.
 56. Weber, *Economy and Society* 893.
 57. Weber, *Economy and Society* 886, 889, 894.

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58. Weber, *Economy and Society* 889.
59. Weber, *Economy and Society* 889.
60. Weber, *Economy and Society* 895.
61. The discussion that follows is based on “Religious Groups (The Sociology of Religion),” in Weber, *Economy and Society*, “Science as a Vocation,” “Politics as a Vocation,” “The Social Psychology of the World Religions,” and “Religious Rejections of the World and their Direction,” all in Weber, *From Max Weber*.
62. Catherine Colliot-Thelene, *Le desenchantement de l'état de Hegel a Max Weber* (Paris: Editions de Minuit, 1992) 238 (my translation).
63. Weber, *Economy and Society* 336-37.
64. Cf. Duncan Kennedy, *A Critique of Adjudication [fin de siecle]* (Cambridge: Harvard Univ. Press, 1997) Ch. 14.
65. Wolfgang Mommsen, *Max Weber and German Politics: 1890-1920* (Chicago : University of Chicago Press, 1984); Pier Paolo Portinaro, “Max Weber e Carl Schmitt,” in ed. Renato Treves, *Max Weber e il diritto*, Sociologia del diritto no. 5, Milan, 1981; Colliot Thelene, *Le desenchantement*; Michel Coutu, *Max Weber et les rationalites du droit* (Quebec City: L.G.D.J., 1995). Anthony Kronman’s often useful study, *Max Weber* (Palo Alto: Stanford Univ. Press, 1983) seems to miss this crucial aspect of Weber’s thought.
65. Cf. Duncan Kennedy, *A Semiotics of Critique*, 22 *Cardozo L. Rev* 1147 (2001).
66. On this aspect, see Harvey Goldman, *Politics, Death and the Devil: Self and Power in Max Weber and Thomas Mann* (Berkeley: Univ. of California Press, 1992).
67. Weber, *Economy and Society* 875.
68. Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 *Harvard Law Review* 1 (1897).
69. Friedrich Carl von Savigny, *System of Modern Roman Law* (**Westport, CT: Hyperion, [1839] 1980**).
70. See, for example, Paolo Grossi, *Scienza giuridica italiana: Un profilo storico 1860-1950* (Milan: Giuffre, 2000) 8.
71. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. Leg. Educ.* 518 (1986); Pierre Schlag, *The Enchantment of Reason* (Durham, N.C.: Duke Univ. Press, 1997).

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72. Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon, [1934] 1992)
73. Karl Llewellyn, A Realistic Jurisprudence–The Next Step, 30 *Colum. L. Rev.* 431 (1930).
74. Joseph Hutcheson, The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision, 14 *Cornell L.Q.* 274 (1929).
75. See Kennedy & Belleau, “Francois Geny aux Etats Unis.”
76. Max Rheinstein, Introduction to *Weber on Law* at .
77. See generally, Kennedy, *Critique of Adjudication*, Ch. 6; Kennedy, From the Will Theory.
78. Stewart Macaulay, Private Legislation and the Duty to Read: Business Run by IBM Machine, the Law of Contracts and Credit Cards, 19 *Vanderbilt Law Rev* 1061 (1966).
79. This aspect was made explicit by Ronald Dworkin in his famous critique of positivism, “The Model of Rules,” in *Taking Rights Seriously* (Cambridge: Harvard Univ. Press, 1978).
80. Jurgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, vol. 1, trans. Thomas McCarthy (Boston: Beacon Press, 1984) 16-19
81. Kennedy, From the Will Theory.
82. Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William Eskridge and Phillip Frickey (Westbury, N.Y.: Foundation Press, 1994).
83. Teubner, *Law as an Autopoietic System*.
84. Kennedy, *Critique of Adjudication*, Ch. 8.