FORMAL JUSTICE AND THE SPIRIT OF CAPITALISM: MAX WEBER'S SOCIOLOGY OF LAW

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A number of contemporary scholars have argued that Max Weber sought to establish a positive relationship between the highest form of rationality in legal thought—logically formal rationality, and the most advanced type of economic rationality, that embodied in capitalism. Since capitalism actually developed first in England, where no such logically formal legal system existed, these scholars conclude that Weber's sociology of law suffers from various contradictions that are frequently referred to as the "England problem." This paper rejects the idea of the "England problem" and argues that Weber actually identified formal justice and guaranteed rights, rather than logically formal legal thought, as the features of modern law that directly facilitated the rise of capitalism. It also challenges Habermas's claim that Weber ignored the normative dimension of modern law and argues that he considered the "rightness" of law to be an important factor in the rise of capitalism but found that with the disenchantment of law this normative dimension has weakened.

I. INTRODUCTION

Max Weber's sociology of law has recently begun to receive the attention it deserves.[1] At the same time, the various assessments of Weber's text are surprisingly consistent. Again and again one reads that his sociology of law, however impressive as an example of Weber's encyclopedic scholarship, is confused and conceptually contradictory.[2] Something of a consensus seems to have formed on this issue, and there is the danger that it will become the unexamined starting point for our understanding of Weber's text. Since it is far too early for such una-

[1] Kronman's (1983) impressive monograph is the most substantial new contribution.

[2] Thus Trubek (1986: 575) writes approvingly that

> Kronman [1983] does not merely try to demonstrate the unity of Weber's thought; he also brings to light the deep contradictions within Weber's ideas. Kronman's ultimate conclusion is that Weber's theory of law and his ideas about the nature of society and social science were contradictory and reveal his apparent "intellectual or moral schizophrenia."

This is a conclusion that clearly supports his own assessment of Weber's sociology of law (see Trubek, 1972; 1985; 1986). Cain (1980) criticizes this widespread tendency to fault the methodology in Weber's sociology of law.

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nimity about this complex work, I would like to suggest a competing interpretation, namely that Weber's analysis is far less contradictory than has been suggested.[3]

The most frequently noted contradiction focuses on Weber's alleged attempt to link the highest form of legal rationality positively and directly to the most advanced type of economic rationality—that embodied in capitalism. The highest form of rationality in legal thought is found, according to Weber, in certain European legal systems, most notably in German Pandectist law. This is a "logically formal" law, characterized by abstract legal propositions constituting a "gapless" system that results in the "legal ordering of all social conduct" (Weber, 1978: vol. 2, p. 658). The contradictions and tensions arise because this type of logically formal law existed in Germany but not in England, where capitalism first developed and thrived. In sharp contrast to the logically formal rationality of European codified legal systems, the English case law system is, according to Weber, highly irrational. Thus, his attempt to establish a connection between legal rationality and economic rationality is thwarted by what his critics have referred to as the "England problem." Weber is depicted as struggling to hold on to a model of legal rationality that simply cannot address in any useful way the question of the relationship between law and capitalism.[4]

I will first try to show that Weber was not committed to

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[3] The aim of this paper is to challenge a particular set of interpretations of Weber's sociology of law, but this in no way implies that Weber's analysis is either perfectly coherent or immune to more fundamental critiques. As a reviewer of this article correctly noted, there is always the danger that, in defending a theorist against seemingly unjust criticisms, one ends up with a revised interpretation that appears to defend all aspects of the original theory by fitting everything into a framework that is far neater, and by implication more sterile, than the complex and often contradictory original. Surely with a work as vast and complex as Weber's *Economy and Society* (1978), the interpretative possibilities are immense. If I seem to fit his sociology of law into a suspiciously coherent framework, it is only in order to show that the interpretative possibilities, if immense, are not endless: some readings are misreadings.

[4] See Trubek (1972: 746) for a discussion of the "deviant case" of England. See also Hunt (1978: 122–128). Trubek's most recent article on Weber's sociology of law (1986: 587) continues to stress its contradictions, but he seeks to locate those contradictions in the tension between Weber's commitment to positive social science and his profound pessimism about the cultural implications of such a science. He also embraces Kronman's (1983) argument that many of the contradictions in Weber's theory stem from his attempt to characterize legal thought in terms of the categories of a value-free social science (Trubek, 1986: 588). I will challenge Kronman's interpretation on the ground that he fails to distinguish Weber's analysis of legal science from his sociology of law. In the latter, Weber did not attempt to link the methodological precepts of a value-free social science to the analysis of a legal system based on formal justice. It follows from this that Trubek's (ibid., p. 580) claim that Weber, with "convoluted and tortured" arguments, anticipated a recent analysis by Heller of positivism in social science and law may be ill-founded. This

the proposition that forms of legal rationality correspond directly to forms of economic rationality. Indeed, his theory about the autonomy of various spheres of modern life would not lead one to expect such a correspondence, because during the process of increasing rationalization in religion, law, politics, and economics, each domain becomes more rational in distinctive ways.[5] Once one sets aside the assumption that Weber tried to link legal and economic rationality, his treatment of the relationship between law and capitalism becomes clearer and far more compelling. One is no longer concerned with the fact that the highest form of legal rationality—logically formal rationality—should have existed in Germany but not in England. The "England problem" thus disappears, and one finds that Weber presented a detailed and convincing historical explanation of how English common law was well suited to the rise of capitalism and how the modern legal form contributes to the calculability of economic action.

Having challenged the claim that Weber's excessive concern with the logically formal rationality of modern legal thought led him into various conceptual confusions, I will then argue that he did in fact identify a particular legal form that facilitated the rise of capitalism. When Weber turned to the study of the relationship between law and economics, he focused not on the logically formal rationality of legal thought but on what he called the "formal rational administration of justice" in a legal order (Weber, 1978: vol. 2, p. 813). I suggest that, for Weber, a legal order is formally rational in the sociological rather than the juridical sense when it is based on formal justice. Such a system is abstract and bound by strict procedure, and guarantees the legal certainty essential for calculability in economic transactions, all of which applies to both civil and common law systems.[6] If one keeps this part of

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would imply that Weber's text is, in this respect at least, less contradictory than Trubek continues to argue.

[5] In his introduction to *The Protestant Ethic and the Spirit of Capitalism* (1958: 26), Weber wrote that rationalization in such areas as economic life, technique, scientific research, military training, law, and administration means different things and that

> furthermore, each one of these fields may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another. Hence rationalizations of the most varied character have existed in various departments of life and in all areas of culture.

[6] The difference between logically formal rationality in legal thought and the formal rationality of formal justice will become clearer below. Kennedy's (1973: 358 n. 13) analysis of legal formality is relevant here. The formal rationality of formal justice refers to how rules are mechanically applied, not to how they ought to be developed.

Weber's sociology of law separate from his analysis of the increasing rationalization of legal thought, as he himself insisted on doing, it is apparent that he did in fact make an important and perfectly coherent argument about the relationship between law and economic action.

Finally, I shall turn to another controversy about Weber's sociology of law, this time with Habermas as the principal figure. Habermas (1984) argues that Weber did not acknowledge the normative side of modern bourgeois law and that he ignored its legitimizing function, treating it as a purely instrumental mechanism that facilitates capitalist economic transactions. But if one begins, as I do here, with the assumption that Weber identified the principle of formal justice as the basis of the legal order that contributed to the rise of capitalism, the normative dimension to such a legal order is evident. And, I would argue, this dimension played an important part in Weber's analysis of the rise of capitalism. Habermas has overlooked the fact that Weber's argument about modern law is historical. In his analysis of law, as in his analysis of Protestantism, Weber identified a process of increasing secularization, in which normative dimension becomes less important only when the instrumental relations of capitalism have become firmly entrenched.

II. LEGAL RATIONALITY AND ECONOMIC RATIONALITY

There is one aspect to Weber's analysis of the relationship between law and capitalism about which there is little confusion or disagreement: his identification of calculability as an essential prerequisite for those who would enter the market as rational economic actors.[7] According to Weber, the capitalist free market provides the best possible environment within which individuals can pursue their self-interest according to the criterion of purely instrumental rationality—the rational calculation of means and ends. Weber (1978: vol. 1, 636–637) argued that since every capitalist depends on the predictability of others, a "market ethic" operates to insure that economic actors uphold their contractual agreements. He stressed that the interest of the individual actors themselves in the predictability of all others acting in the impersonal market is the greatest guarantee that capitalists will honor their contracts.

Thus law itself has a secondary role in sustaining market relations, and in fact Weber (ibid., p. 335) argued that its role is

[7] See Trubek, 1972, for an account of the relationship between law and the calculability of economic action.

in some respects declining in advanced capitalist societies. In any case, legal regulations that attempt to interfere with the rational pursuit of self-interest are likely to be unenforceable (ibid., pp. 335–37). Nevertheless, Weber attempted to identify those factors that are, to use his phrase, "sociologically relevant" (1978: vol. 2, p. 866), meaning that they contribute to the predictability of social actions; in the realm of economic actions, law is clearly one such factor. Weber's (1978: vol. 1, p. 313) famous definition of law as the existence of a coercive apparatus ready to "apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement" introduces this sociological dimension. To the extent that the existence of such a "coercive apparatus" increases the likelihood that actors will behave in predictable ways, the law has had an empirical effect on social action.

With this as the relevant sociological relationship between modern law and capitalism, two questions arise. The first, and the one that has caused so much confusion, is whether Weber believed that a particular type of legal rationality, specifically logically formal rationality, would be best able to contribute to the calculability of the economic order. The second question is whether one can usefully distinguish, in Weber's analysis of the relationship between law and capitalism, between the period in which modern capitalism was coming into existence and the period in which Weber wrote his sociology of law. It may be, as I will argue, that he attributed to law a greater, or at least a different, role in the rise of capitalism than in its perpetuation.

Turning to what would seem to be the dominant interpretation of Weber's sociology of law, the claim is made that he was determined to find a relationship between the extreme rationalization in legal thought, which found its clearest expression in the logically formal rationality of German Pandectist law, and the purposively rational action of capitalist economic relations.[8] It was Max Rheinstein, I suspect, who originally

[8] Weber (1978: vol. 2, 658) offered five postulates to describe logically formal legal thought:

> 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" rationally in legal 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, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.

suggested this reading of Weber when he wrote, in his introduction to the first English translation of Weber's sociology of law, that "the categories of legal thought are *obviously* conceived along lines parallel to the categories of economic conduct. The logically formal rationality of legal thought is the counterpart to the purposive rationality of economic conduct" (quoted in Weber, 1954: l [emphasis added]). Far from being obvious, it may be quite incorrect to assume that Weber had any such parallel conceptions in mind. And if one assumes instead that he did not, a great many alleged contradictions and inconsistencies fall away, an indication, perhaps, that one is getting closer to Weber's actual argument.

Rheinstein further suggests that Weber's main concern in his sociology of law was to determine "the relationship between this peculiar type of legal thought and that type of economy which is peculiar to the West, modern capitalism" (ibid., p. xlii). Although Rheinstein himself notes that Weber nowhere "expressly stated" that this was in fact his concern, he and many others have attributed to Weber a peculiar fascination with logically formal legal thought and a determination, at the risk of considerable inconsistency and contradiction, to link such legal thinking to the rise of capitalism.[9]

Trubek has offered an interpretation that is consistent with Rheinstein's. He argues that Weber, under the influence of his methodology of ideal types, expected to find that greater rationality in legal thought would contribute to the greater calculability of economic action. According to Trubek (1972: 746), Weber "stressed that *only logically formal rationality*, the autonomous legal system with universal and general rules, could guarantee the needed legal certainty" [emphasis added]. Having posited that this was Weber's basic thesis, Trubek then suggests that Weber turned to the historical record only to discover, much to his dismay, that in fact no such correlation seemed to exist: "When he tried to verify this historically, the record did not completely support his analysis. This led him to qualify but never really abandon his basic thesis" (ibid., p. 746). What Weber supposedly discovered was that although England was the birthplace of modern capitalism, a logically formal legal system had never existed there, nor did it seem likely that one would develop (Weber, 1978: vol. 2, p. 892). Thus, the "England problem." Trubek, (1972: 746–747) concludes from all this that

[9] Albrow (1975: 29) even refers to Weber's "extraordinary and irrational fascination with formal logic."

Weber was a sociologist guided by methodology and troubled by a recalcitrant historical record:

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

Trubek suggests a lack of methodological and historical sophistication on Weber's part that simply fails to correspond to the Weber we know from other works.[10] If Weber did suffer from various shortcomings, such a lack of methodological sophistication was certainly not one of them.[11] Even before turning to Weber's own account, surely his best defense, one could argue that it was more likely that he was intrigued rather than frustrated by the fact that there was no correlation between the most logically rational legal systems and capitalist development. Surely he would have turned this to his explanatory advantage, using the variation presented by the civil and common law systems to formulate a better causal argument about the relationship between modern law and capitalism.

Parsons has described the methodology I have in mind in relation to Weber's sociology of religion, but it applies as well to his sociology of law: "Weber early became acutely aware . . . that the problem of causation involved an *analytical* problem, one of the isolation of variables and the testing of their significance in situations where they could be shown to vary independently of each other" [emphasis in original] (quoted in Weber,

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[10] Just how quickly Weber would have dismissed the "England problem" is suggested by the tone of the following quotation (Weber, 1978: vol. 2, p. 1456 n.14):

> The idea that Roman law promoted capitalism is part of the nursery school lore of the amateurish literati. . . . Moreover, Roman law never got a foothold in England, where modern capitalism originated. . . . Advanced capitalism . . . arose where the judges were recruited from the ranks of the lawyers [in England].

This passage seems to indicate that Weber was not particularly troubled by the historical record and quite impatient with the "amateurish literati" who ignored it.

[11] Cain also criticizes the usual formulation of the "England problem" by Trubek, Hunt, and others, arguing that Weber was far more methodologically sophisticated than this formulation implies. But Cain (1980: 82) nevertheless concludes that England was indeed a deviant case and still very much a problem for Weber because "the indifference of rational market capitalism to fully rational law was for Weber more than a theoretical problem; it was a fundamental challenge to his approach. And yet, AND YET, he jettisoned his theory in the face of the material evidence, the deviant case." Thus, for Cain Weber's methodology remains intact, but his theory of rationality does not.

1964: xxi). What better opportunity for such a test than the case of law and capitalism? Here was a situation in which two distinctly different legal traditions, those of common law and civil law, had clearly evolved along side the rise of capitalism and, further, the less rational of the two, from the point of view of legal science, had existed where capitalism had begun. Surely Weber would have inferred from this that there is in fact no direct connection between the rationalization of law in the direction of logically formal rationality and capitalism.

Thus, it is hardly surprising that Weber repeated in various contexts that the process of increasing rationalization in law, in the direction of a logical and "gapless" legal system, was to be explained not in terms of the need for greater calculability but primarily in terms of the "prevailing type of legal education" (Weber, 1978: vol. 2, p. 776). Weber drew an important distinction between "formal law as such" and the more specific category of logically formal legal thought. He was certainly interested in documenting the development of the latter, but he saw this as an "intrajuristic" phenomenon, quite independent of economic factors. In describing how "the task of 'construing' the situation in a logically impeccable way became almost the exclusive task" in civil law jurisprudence, Weber (ibid., p. 855) noted:

> in this way that conception of law which still prevails today and which sees in law a logically consistent and gapless complex of "norms" waiting to be "applied" became the decisive conception for legal thought. Practical needs, like those of the bourgeoisie, for a "calculable" law, which were decisive in the tendency towards a *formal law as such*, did not play any considerable role in this process. As experience shows, this need may be gratified quite as well, and often better, by a formal, empirical case law. The consequences of the purely logical construction often bear very irrational or even unforeseen relations to the expectations of the commercial interests. . . . This logical systematization of the law has been the consequence of the intrinsic intellectual needs of the legal theorists and their disciples, the doctors, i.e., of a typical aristocracy of legal literati [emphasis added].[12]

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[12] At another point Weber (1978: vol. 2, p. 688) wrote of a nonlogical legal system:

> These very elements of "backwardness" in the logical and governmental aspects of legal development enabled business to produce a far greater wealth of practically useful legal devices than had been available under the more logical and technically more highly rationalized Roman law.

Such comments are scattered throughout the text.

This seems to be a fairly unambiguous and comprehensive statement of Weber's position. It seems clear that Weber in this passage separated the notion of a "calculable" law and what he here referred to as "formal law as such" from the specific phenomenon of logically formal legal thought. Within this framework of "formal law as such," Weber quite explicitly noted that both case law and code law are highly rational insofar as they increase calculability and facilitate capitalist economic relations. At one point he explained that each system created the necessary conditions for the rise of capitalism, without suggesting that one or the other was more suitable: In England, a judge was strictly bound to precedent and thus to "calculable schemes"; and in a bureaucratic state like Germany a judge was an "automaton of paragraphs," and the legal apparatus was consequently "by and large *calculable* or predictable" [emphasis in original] (ibid., p. 1395). There were, in other words, two routes to calculability, but each at times interfered with that calculability as well. Thus one finds throughout Weber's text examples of how each type of legal system has both contributed to and hindered calculability. Many commentators have concluded from this that Weber could not decide which system was better suited to capitalism and that although he wanted to find that logically formal law increased calculability, he had to admit that case law also seemed to meet the needs of capitalism. I would argue that he was not attempting to make any such determination. Rather, as the above passage suggests, questions about the relationship between law and capitalism were quite separate from his study of how the notion of a logically formal law "became the decisive conception for legal thought."[13]

Kronman's recent study of Weber's sociology of law is based on a very close reading of the text, and he is well aware of the passage cited above and others in which Weber distinguished between calculability and logically formal legal thought. He analyzes the various passages, pointing out possible interpretations and apparent contradictions, and even suggests that "one might therefore conclude that Weber saw no close connection between the calculability of a legal order and

[13] Cain (1980: 75–76) tries to demonstrate that Weber felt that English common law was more suitable to capitalism than a more logically formal system, which led him in turn into a theoretical bind that undermined his theory of rationality (1978: vol. 2, p. 891). But I do not think Weber wanted to make such a claim. As he noted: "These differences [between civil law and common law] have had some tangible consequences both economically and socially; but these consequences have all been isolated single phenomena rather than differences touching on the total structure of the economic system."

its reliance on that type of legal thinking which has its 'point of departure' in the logical analysis of meaning" (1983: 89). But Kronman rejects such a conclusion on the grounds that Weber repeatedly "asserts that these are related phenomena" (ibid.). Thus Kronman decides that Weber really did link these two phenomena even though he sometimes said they were not related.[14] Sifting through the contradictions, he (ibid., p. 90) concludes that

> there is, after all then, a connection between calculability and the logical analysis of meaning: the latter is the only type of legal thinking that leads, even potentially, to the systematic organization of law and it is only through its systematization that the legal order can achieve a maximum degree of calculability.

I do not find any support in Weber's text for the suggestion that only one type of legal thinking could lead to the legal certainty necessary for calculability. Once again I would stress that Weber spoke of legal certainty in reference to modern, formal law in general, without linking that certainty exclusively to one type of legal thought. At one point Kronman (ibid., p. 90) asks, "Why does Weber assume that legal thinking based on the logical analysis of meaning is a necessary condition for the construction of a legal system?" As if this were a peculiarity of Weber's thinking that demands special explanation, Kronman goes to some length to explain why Weber should subscribe to such a narrow view of law. But I am more inclined to ask why Kronman assumes that Weber made logical legal thought the essential prerequisite for a legal system that would contribute, in the sociological sense discussed above, to the calculability of economic actions.

The problem with Kronman's interpretation, as with the others mentioned here, is that Weber's distinction between legal thought in the purely juridical sense and law as a sociological phenomenon is largely ignored. It seems to me that Weber had two tasks in mind when he wrote his sociology of law. He was interested, first of all, in documenting the process of increasing rationalization in legal thinking, and certainly the concept of logically formal law intrigued him. He even offered a list of stages through which law can be seen as passing and con-

[14] Trubek also refers to the passages in which Weber notes that a logically formal law may hinder capitalist development, and he too concludes that Weber, blind to his own insights, continued to link calculability and logical formalism. "But," Trubek (1972: 746) argues, "these insights, which might have caused a more fundamental reappraisal of the model, did not affect his tendency to stress repeatedly the importance of legal calculability, and the identification of calculability with logical formalism."

cluded that, from a "theoretical point of view," logically formal law is clearly the final and highest stage (Weber, 1978: vol. 2, p. 882). He also suggested that a specific factor—an entrenched "national system of legal training protected by powerful interests" (ibid., p. 853)—hindered the development of such legal thinking in England, thereby implying that, all things being equal, the legal literati would tend to create a logically formal system. But the fact that this did not happen in England was not a problem for Weber. His second task, at least as important as the first, was, I would argue, to analyze the relationship between calculable law, or "formal law as such," and the rise of capitalism; the specific "intrajuristic" qualities of various types of legal thought were not directly relevant to this task. If one reads Weber with the understanding that these were two separate questions, one finds that there is a good deal of complexity to his argument but considerably less confusion than many interpretations suggest.

III. FORMAL JUSTICE AND THE RISE OF CAPITALISM

Weber set out to explain what he called "the specific and peculiar rationalism of Western culture," especially its "modern Occidental form" (1958: 26), and his detailed examination of the evolution of law, which mapped its movement in terms of the ideal types of rational and irrational adjudication, was an attempt to trace a path of increasing rationalization in this cultural sphere. Clearly the logically formal rationality of code law represented a culmination of this process in the legal domain. But it is essential to separate this analysis, which might be called Weber's sociology of jurisprudence, from his sociology of law in a more usual sense of the term. Weber, unlike many who have interpreted him, had no trouble distinguishing between the two, and indeed he repeatedly stressed the importance of drawing such a distinction.[15]

When examining the relationship between law and economic action, and more specifically capitalism, Weber turned from a consideration of the internal characteristics of the various legal systems to an analysis of how specific legal practices

[15] Albrow (1975: 19–20) argues that, although Weber insisted on making a methodological distinction between the juridical and sociological approaches to law, he ended up focusing almost exclusively on the former:

> Weber's "empirical" study of law begins to revolve around what he held to be the heart of the dogmatic jurist's concern in law, the most ideal and least empirical aspect of all, the nature of legal rationality. . . . It is to the development of these formal qualities of law that Weber addresses himself in the rest of his sociology of law.

In fact, however, this was only one aspect of Weber's sociology of law.

affect economic action. In this context he (1978: vol. 1, p. 312) stressed that the juridical concern to establish a "legal order" with a set of logically consistent legal propositions had nothing at all to do with the sociological task of identifying the way in which a legal order contributes to a type of economic conduct:

> If it is nevertheless said that the economic and the legal order are intimately related to one another, the latter is understood, not in the legal, but in the sociological sense, i.e., as being *empirically* valid. In this context "legal order" thus assumes a totally different meaning. It refers not to a set of norms of logically demonstrable correctness, but rather to a complex of actual determinants of human conduct [emphasis in original].[16]

For Weber, the "legal order" that was relevant to the rise of capitalism was not a particular type of legal thought but a social order in which law facilitated capitalist transactions by contributing to the predictability of social action. " 'Law,' as understood by us [as sociologists], is simply an 'order' endowed with certain specific guarantees of the probability of its empirical validity" (ibid., p. 313). But Weber became far more specific about the type of legal order that could best guarantee predictability. He, like others before and since, named contractual relations as the defining legal relations of capitalism, and he argued that guaranteed rights were essential to the predictability of the market.

Weber traced in some detail the historical evolution of contract law, and he identified a qualitative change in contractual relations with the expansion of the market. As the market became more important, the group with market interests, the modern bourgeoisie, gained power and was in a position to demand immunity from political interference in market relations (Weber, 1978: vol. 2, p. 669). This group, acting against the interests of political authorities, was granted increasing autonomy to regulate its own activities in the economic sphere. This freedom of contract became the defining feature of modern society, to the extent that Weber designates such a society as "contractual" (ibid.).[17]

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[16] This passage should answer Kronman's question, mentioned above, about why Weber subscribed to such a narrow view of law. Kronman (1983: 90) assumes that Weber used the concept of a "legal order" in only one way, arguing that, "according to Weber, a genuine legal system can only emerge where legal thinking is based upon the logical analysis of meaning." But here we see that for Weber a legal order has a second, "totally different meaning" when one is concerned with law in the sociological sense.

[17] For an extensive discussion of this aspect of Weber's sociology of law, see Kronman, 1983: chap. 5.

Thus, according to Weber, the legal order that was essential to the growth of capitalism was a contractual one that limited patriarchal discretion and protected its subjects' rights to establish contractual relations and to mobilize the coercive apparatus to enforce those contracts. By thus protecting and enforcing a set of social relations, law became explicitly relevant to economics. It was, in other words, "a complex of actual determinants of human conduct." It made no particular difference whether those relations were defined by a logically formal system or a more informal common law system. To the extent that each system defended the freedom of contract and protected guaranteed rights, the capitalist economic order could thrive.[18]

This brings us back to the question about the relationship between types of legal thought and the rise of capitalism. If one concentrates, as Rheinstein did, on legal thought itself, then according to Weber's ideal types common law would be considered "substantively irrational," while civil law would be classified as "logically formally rational" (Weber, 1954: xlii). But if one is concerned not with legal thought but with empirical validity, then Weber quite clearly set out the historical conditions that in England gave birth to a legal system that was particularly well suited to the demands of the bourgeoisie for guaranteed rights and formal justice, the characteristics that distinguish a bourgeois, or liberal, legal system from all those that preceded it. In this sense the common law system, with its "formal rational administration of justice" (Weber, 1978: vol. 2, p. 813) and in spite of all its juridical irrationality, was certainly a formal, rational legal system in the sociological sense of the term.

Weber attributed the development of such a formal law in part at least to the bourgeoisie, who stood to gain from the establishment of the guaranteed rights that were essential to capitalism. Rights, according to Weber, are a source of power, and the most powerful groups in society decide how such power will be distributed. Thus, with capitalism,

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[18] Cain (1980: 75) argues that Weber was not able to treat guaranteed rights as the link between civil and common law systems:

> The "obvious" link between the two systems—the virtually identical way in which each constitutes the legal subject as a bearer of rights—cannot be considered by Weber. He foreclosed this possibility for himself by his acceptance of "the individual" as trans-historical and self-evidently existing. He could not examine how an historical form of individuality, crucial for capitalist relations, could be intrinsic and unique to capitalist law.

But in fact Weber did identify guaranteed rights as just that link that Cain argues he could not, somehow, consider.

> in an increasingly expanding market, those who have market interests constitute the most important group. Their influence predominates in determining which legal transactions the law should regulate by means of power-granting norms (Weber, 1978: vol. 2, p. 669).

The bourgeoisie promoted the rationalization of law in this specific sense of establishing guaranteed rights, which Weber referred to as " 'law' in the strict sense" (ibid., p. 847).[19] These rights, which alone guarantee the predictability of the market, evolved in England in the context of a case law system in which jurists were able to use their innovative skills to shape the direction of case law and the establishment of precedent to best serve the interests of their business clients (ibid., pp. 757, 787). In this way a body of case law evolved that could guarantee the contractual rights of capitalists quite as well as a more logically grounded contractual legal system, for "once the patterns of contracts and actions, required by the practical needs of interested parties, had been established with sufficient elasticity, the official law could preserve a highly archaic character and survive the greatest economic transformations without formal change" (ibid. p. 787). And, as Weber noted, "from such practices and attitudes no rational system of law could emerge nor even a rationalization of the law as such . . ." (ibid.).

Thus English common law, for all its substantive irrationality from the juridical point of view, was, from the sociological perspective, a system that operated according to the principles of formal justice and was therefore ideally suited to the needs of capitalism. Weber never tried to argue that the common law system was *more* suitable to capitalism than the civil law system in Europe, for such a position would give too much weight to a particular type of legal system as a factor contributing to the rise of capitalism. As we have seen, he concluded that the economic consequences of one or another type of legal system, whether civil or common law, "have all been isolated single phenomena rather than differences touching upon the total structure of the economic system" (ibid., p. 891). But he certainly did not view the "irrational" common law system as a liability for capitalism, or, for that matter, a threat to his sociology

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[19] Here Weber (1978: vol. 2, p. 847) defined quite explicitly what he means by law, not in Kronman's juridical sense of a logically formal legal order but in the second, sociological sense:

> A method of settling disputes which proceeds by means of fixed administrative regulations by no means signifies the existence of guaranteed "rights"; but the latter, i.e., the existence not only of objective and fixed norms but of "law" in the strict sense is, at least in the sphere of private law, the one sure guaranty of adherence to objective norms.

of law, as the recent concern over the "England problem" would seem to imply.

Finally, in such a discussion of Weber's assessment of the relationship between law and capitalism, the question of causality inevitably arises. In his sociology of law, Weber never tried to make the type of causal argument that he was able to construct concerning Protestantism and the spirit of capitalism because the relationship between law and capitalism was far more complex. If, as I have argued, Weber did not try to show that the existence of a logically formal legal system was causally linked to capitalism, then one might still ask whether he argued that a formal legal system, in the sociological sense, preceded and contributed causally to the rise of capitalism. Or did he argue that capitalism itself led to the establishment of such a formal system? In fact, Weber seems to have subscribed to both positions. He argued in several places that modern capitalism would not have developed without the "rational structures of law and of administration" (1958: 25) that were present "in a comparative state of legal and formalistic perfection only in the Occident" (also see Weber, 1978: vol. 1, p. 162, and vol. 2, pp. 1394–1395). Thus the existence of formal law, in the sociological sense, would seem to be causally antecedent to modern capitalism. At the same time, as this account suggests, capitalism itself—the capitalists and the lawyers promoting capitalist interests—also affected that legal system profoundly, pushing it in the direction of greater predictability. For it was the bourgeoisie, as Weber noted, who insisted on carving out the "guaranteed rights" that could protect their economic transactions. Weber described quite explicitly the manner in which economic conditions have affected modern law. Having first stressed that legal education and political factors, not economic conditions, caused certain legal systems to move toward a logically formal law, he then noted that economic conditions have made law more formally rational from the sociological (as distinct from the juridical) point of view, increasing the "purely formal certainty of the guaranty of legal enforcement." Thus he (1978: vol. 2, p. 883) wrote that

> to the extent that [economic conditions] . . . contributed to the formation of the specifically modern features of present-day occidental law, the direction in which they worked has been by and large the following: To those who had interests in the commodity market, the rationalization and systematization of the law in general and, with certain reservations to be stated later, the increasing calculability of the functioning of the legal process in particular, constituted

> one of the most important conditions for the existence of economic enterprise intended to function with stability and, especially, of capitalistic enterprise, which cannot do without legal security.[20]

When making such a statement about the causal links between law and capitalism, Weber clearly had in mind "formal law as such" rather than any particular type of legal thought. It would seem that the most one can conclude is that modern, formal law and capitalism have exerted a strong mutual influence.[21]

IV. THE "RIGHTNESS" OF FORMAL JUSTICE

Having identified formal justice and guaranteed rights as the essential elements of a legal order that would provide the necessary predictability for market activity, Weber was also concerned with the problem of the legitimacy of this law as a normative system. If the rational pursuit of self-interest was the best guarantee of predictability in the market, and if the existence of a legal apparatus for enforcing the violation of contracts also contributed to this predictability, the belief in the "rightness of law" (Weber, 1978: vol. 2, p. 866) was yet another important factor.

In both his *Legitimation Crisis* (1975) and in his more recent work on communicative action (1984), Habermas has criticized Weber's conception of the legitimacy of law. He explicitly contrasts Weber's sociology of religion with his sociology of law, noting that in the case of religion Weber identified a set of ethical foundations that contributed to the rise of capitalism. In *The Protestant Ethic and the Spirit of Capitalism* Weber (1958: 26) argued that the purely instrumental rationality of capitalist economic action, the rational calculation of means and ends in the pursuit of self-interest, was a form of action that was "obstructed by spiritual obstacles." Because the rational ethics of ascetic Protestantism were able to overcome this resistence, that religious belief actually contributed to the development of a capitalist economic spirit. According to Weber, this was a necessary precondition for the rise of modern capitalism, but once that economic system was firmly established, the need for such ethical justification evaporated since the rational pursuit of self-interest was justification enough: "In the field of its highest development, in the United States, the pursuit of

[20] Weber made the same argument at the beginning of his sociology of law (1978: vol. 2, p. 655).

[21] For a discussion of Weber's "causal agnosticism" in this context, see Kronman, 1983: 118–130.

wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which often actually give it the character of sport" (ibid., p. 182).

Habermas argues that Weber did not identify a similar process of increasing secularization in his sociology of law. Rather, according to Habermas, Weber began with a secular view of law. If the Protestant ethic provided an ethical justification for capitalism, modern law was from the outset a purely instrumental mechanism that made no appeal to values beyond the instrumental rationality that dominates in the economic realm. By this reading Weber was not concerned with demonstrating, or did not allow for the possibility, that the modern legal system, like Protestantism, served to legitimize the capitalist order by assigning to that order a moral justification. Thus, Habermas (1984: 262) writes:

> Weber stresses precisely the structural properties connected with the formalism of a law that is systematized by specialists and with the positivity of norms that are enacted. He emphasizes the structural features I have elucidated as the positivity, legalism, and formality of law. But he neglects the moment of a need for rational justification; he excludes from the concept of modern law precisely the conceptions of rational justification that arose with modern theories of natural law in the seventeenth century. . . . It is in this way that Weber assimilates the law to an organizational means applied in a purposive-rational manner, detaches the rationalization of law from the moral-practical complex of rationality, and reduces it to a rationalization of means-ends relations.

Habermas (ibid.) claims that Weber's legal positivism kept him from seeing the importance of moral justification in law: "In general, [Weber] . . . conceives modern law and legal domination so narrowly that the need for a principled mode of justification is shaded out in favor of sheer positivism." According to this interpretation, Weber treated modern law exclusively as a mechanism that facilitates economic rationality and requires no justification beyond this functional one. Habermas (ibid., p. 260) disagrees with Weber's view of law because:

> Weber should have understood the modern legal system as an order of life that was correlated with the normative sphere of value and that, like the methodical conduct of life of early capitalist entrepreneurs, could be rationalized under the abstract value standard of normative rightness. But this contradicts the competing attempt to regard the rationalization of law exclusively from the standpoint of purposive rationality.

But I would argue that in fact Weber distinguished quite clearly between the origins of the modern legal order, in which "normative rightness" was important, and the further rationalization that has since undermined the normative force of law and reduced its legitimacy to the power of enactment alone. In other words, Weber's argument was far more normative and historical than Habermas's interpretation acknowledges.[22] According to Weber, modern law has completely succumbed to the instrumental rationality of legal positivism, but this was not true of the early modern law that contributed to the rise of capitalism. Just as the Protestant ethic was no longer necessary once capitalism got under way, so the legal order no longer effectively legitimizes capitalism on any grounds other than the instrumental grounds of capitalism itself. But historically, religion and law both contributed normatively to the maintenance of such a system. This, by my reading, is central to Weber's sociology of law. It seems curious that Habermas would ignore this all-important historical element in Weber's sociology of the modern legal order.

How, then, did Weber construct his argument about the role of law as a normative system legitimizing the capitalist economic order? We have already identified formal justice and guaranteed rights as the essential elements of the legal order that he linked to the rise of capitalism. And Weber did not view this legal order solely as the reflection and reinforcement of the instrumental rationality of capitalism. Thus in his discussion of natural law Weber (1978: vol. 2, 866) noted that conceptions of the "rightness" of law "become sociologically relevant only when practical legal life is materially affected by the conviction of the particular legitimacy of certain legal maxims, and of the directly binding force of certain principles which are not to be disrupted by any concessions to positive law imposed by mere power."

Although Habermas (1984: 262) argues that Weber "excludes from the concept of modern law precisely the conceptions of rational justification that arose with modern theories of natural law in the seventeenth century," Weber in fact made several references to the natural law maxims that established the "rightness" of principles of formal justice. In elaborating on the "natural-law legitimacy of positive law" that relates to economic action, Weber wrote that "the essential elements in

[22] Even Habermas (1984: 262) admits that various formulations found throughout his sociology of law "obscure Weber's legal positivism." But he concludes, much like Trubek, that Weber was simply mired in contradictions that he never sufficiently thought through.

such a natural law are the 'freedoms,' and above all, 'freedom of contract' " (1978: vol. 2, pp. 868, 869). We have already seen that Weber identified this as the essential legal relation of capitalism. Thus it would seem that, according to him, a contractual society based on guaranteed rights and formal justice had a legitimacy that could not be reduced to "concessions to positive law imposed by mere power."

It is clear, then, that Weber did take into account this normative dimension of modern law, but Habermas's main criticism is that, in spite of these references, Weber did not recognize that capitalism *requires* this "abstract value standard of normative rightness." But one can argue that Weber did acknowledge the importance of this normative dimension of law to *early* capitalism when he referred to the political dimensions of a "contractual society." In such an order the norm

> is no longer conceived as the objectively valid rule imposed upon a group but as the establishment of reciprocal subjective claims, such as occurs, for instance, in the agreement of two business partners concerning the division of work and profits between them and their legal position within and outside the firm (ibid., p. 699).

In other words, freedom of contract between autonomous individuals replaces positive enactments "imposed by mere power" as the main legal relationship. Weber pointed out that such a transition is usually regarded as "signifying a decrease of constraint and an increase of individual freedom" (ibid., p. 729). The coercion of enactments is apparently replaced by the free choice of autonomous individuals in the market. The law then becomes a mechanism for protecting such freedom rather than for exercising power.

Weber demonstrated, at least indirectly, that the prevailing belief in the "rightness" of such a legal order is sociologically significant insofar as it legitimizes the capitalist economic order by camouflaging the actual power relations of that order. In such an order, freedom, not necessity, is the reigning value. But this of course is an ideological construct and, as Weber pointed out (ibid., p. 731), coercion may in fact be even greater under capitalism than in a system in which positive enactments regulate various spheres of life:

> A legal order which contains ever so few mandatory and prohibitory norms and ever so many "freedoms" and "empowerments" can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion.

Throughout his text on the sociology of law, Weber emphasized the crucial distinction between the *principle* of formal justice and the *reality* of economic inequality and exploitation. There is no doubt that he believed that the capitalists have benefited quite directly from a normative system that raises contractual relations to the pure abstraction of formal equality and guaranteed rights for all while facilitating the entrenchment of exploitative economic relations: "The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work . . ." (ibid., p. 728). Almost every time Weber spoke of formal justice and the formal equality of contract relations, he pointed to the difference between the principle of equality and actual unequal power relations that that principle enshrines (see, e.g., ibid., p. 699).

Clearly, then, Weber's analysis of the form of modern law and the rise of capitalism is at least in part a study of a particular normative system that legitimized capitalist economic relations by appealing to the "rightness" of those relations on the grounds of freedom and individual autonomy, moral values that are quite different than the purely instrumental value of economic self-interest. Such a legal system had, in this respect, a tremendous political significance and was not confined to facilitating capitalism by increasing the predictability of contractual relations. Those relations themselves, as Weber repeatedly stressed, were seen as legitimate because they seemed to free people from the coercion of enacted law.

V. THE DISENCHANTMENT OF MODERN LAW

According to Weber, then, normative values such as a belief in formal justice were "sociologically relevant." In other words, they increased the likelihood of certain actions by legitimizing a social order that might otherwise have met with more resistance. Just as capitalism has outlived Protestantism, so too has the logic of economic rationality triumphed to such an extent that the legitimacy provided by the natural law doctrine and the belief in the ideology of formal justice is no longer required. Law has become ever more rational, discarding the last link between law and rightness. In the process even the formalism that was central to the modern legal order has been undermined.

This is a transition that occupied Weber in the last sections of his sociology of law, and it is a transition that Habermas does

not seem to take into account. Ignoring the historical dimension to Weber's sociology of law, Habermas assumes that his analysis of the legal positivism of late nineteenth- and early twentieth-century law is indistinguishable from his analysis of modern law and capitalism in general. But in fact, Weber called attention to a profound change that was taking place in the legal system: The law was no more immune to the inevitable process of disenchantment than was religion or any other cultural sphere in modern society.

Although Weber was well aware of the exploitative dimension of a system based on formal justice, he virtually ridiculed the "literati" for naively complaining about the excessive individualism and the resulting inequities of the existing legal and economic order. Weber maintained that the freedom and individual autonomy protected by such a system were worth preserving at any cost. He was convinced that the system that was likely to replace capitalism and its liberal legal order would be a bureaucratic nightmare, imprisoning men and women in a "shell of bondage" more unbreakable, because it would be more rational, than anything experienced in ancient Egypt (ibid. p. 1402). He posed the following challenge for future forms of political organization:

> How can one possibly save *any remnants* of "individualist" freedom in any sense? After all, it is a gross self-deception to believe that without the achievements of the age of the Rights of Man any one of us, including the most conservative, can go on living his life [emphasis in original] (ibid., p. 1403).

Having labeled the liberal legal order as a bastion against bureaucratization, Weber identified three factors that were contributing to the erosion of formal justice: the expansion of the modern bureaucratic state with its welfare ideology; the working class, social democratic movement; and, finally, the virtual revolution in conceptions of legality among legal professionals (ibid., p. 886). Weber argued that these groups, in contrast to the capitalists, who had the most to gain from a system of formal justice, were likely to insist, often for different reasons, on the need for substantive criteria in law. As some groups demanded that law should go beyond formal principles to redress market inequities and others advocated greater planning and control in the economic sphere, the very notion of formal legal criteria that could be mechanically and objectively applied without regard to social consequences came under attack.

Weber suggested that the modern state and the working class became unlikely partners in their choice of substantive

over formal legal principles. If the institution of formal justice grew out of an alliance between monarchical and bourgeois interests, the government itself did not benefit from the establishment of guaranteed rights, rights that defined a whole realm of economic life as immune from state interference (ibid., p. 847). A government oriented toward what Weber called the "welfare needs of the state" would find that those rights hindered policy implementation and thus opt for a substantive legal system that could promote specific political goals.

At the same time, the formal justice of the laissez-faire economy did not serve the interests of the working class, and the powerful social democratic movement sought to break the hold of formal contract law by introducing principles of equity and social justice into the bargaining of the marketplace. The labor legislation and the various social welfare measures that appeared reflected the demands of this movement. Weber (ibid., p. 886) described the legal demands of the working class in the following terms:

> Now demands for a "social law" to be based upon such emotionally colored ethical postulates as "justice" or "human dignity," and directed against the very dominance of a mere business morality have arisen in modern times with the emergence of the modern class problem. They are advocated not only by labor and other interested groups but also by legal ideologists. By these demands legal formalism itself has been challenged.

As Weber pointed out, the legal professionals also contributed significantly to the disenchantment with formal justice by providing the conceptualizations for new legal criteria. As lawyers and judges began to view law not as a closed, formal system standing above society but as an instrument operating within it, the entire focus of legal decisions began to shift. Many legal scholars in Europe and America rejected altogether the notion that abstract laws exist and are simply applied by judges who act as "slot machines" to turn out correct decisions. They argued that judges actually rely on their own evaluations and do not mechanically apply abstract norms to come to decisions, thus introducing what Weber called "irrational lawfinding" (ibid., p. 887) into a supposedly formally rational system. This was just one part of a general tendency to introduce new arguments into the legal decision. According to Weber, the inevitable result was that "the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts" (ibid., p. 894).

But it was not only the bureaucrats, skeptical intellectuals, and socialists who were undermining formal legality, for even business interests were demanding a more informal law for the sake of "business good-will" (ibid.). Weber noted an increase in special laws and special procedures for various occupations to better meet the demands of pressure groups and thus facilitate industrial relations. Finally, because a formal legal system inevitably implies a degree of rigidity, particularistic laws offered the possibility for more expedient decisions:

> The second cause [of the emergence of particularistic laws], which has played an increasingly important role in most recent times, has been the desire to eliminate the formalities of normal legal procedure for the sake of a settlement that would be both expeditious and better adapted to the concrete case. In practice, this trend signifies a weakening of legal formalism out of considerations of substantive expediency and thus constitutes but one instance among a whole series of similar contemporary phenomena (ibid., p. 882).

These are just some of the forces Weber identified as the "anti-formalistic tendencies of modern legal development" (ibid.). What all this amounted to was that "the axioms of natural law have been deeply discredited [and] . . . legal positivism has, at least for the time being, advanced irresistibly" (ibid., p. 874). While each of the groups mentioned above had a different reason for attacking the formal qualities of modern law, the outcome, according to Weber, has been quite simply the disenchantment of law. This, a relatively recent and still unfolding process, is itself an indication of the increasing rationalization of law. Thus the triumph of legal positivism, which is Weber's description of this trend, is not, as Habermas claims, where Weber began his analysis of law and capitalism. It is where he ended it.

As for the sociological significance of this disenchantment, Habermas simply disagrees with Weber over the possible sources for the legitimacy of a legal order. Weber maintained, or so I have argued, that the belief in the "rightness" of law was "sociologically relevant" to the growth of capitalism, but that once the capitalist order has been firmly entrenched, it no longer requires normative legitimation of that sort. Indeed, according to Weber, with the disenchantment of law and the general acceptance of law as an instrumental mechanism that facilitates compromise between conflicting interests, the sociological power of legal enactments actually increases:[23]

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[23] Habermas (1975: 105) argues that norms are valid not just because

> But this extinction of the metajuristic implications of the law is one of those ideological developments which, while they have increased skepticism towards the dignity of the particular rules of a concrete legal order, have also effectively promoted the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment (ibid., p. 875).

Thus, if anything, the transition from the belief in the "rightness" of formal justice toward the obedience to enactments promoted by legal positivism has provided law with a more powerful legitimacy, one based on purely instrumental rationality.

Weber did not welcome this transition, but he considered it an inevitable outcome of increasing rationalization: "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" (ibid., p. 895). The power of Weber's analysis of this transition comes, in my opinion, from his realization that the various groups, from the socialists to the legal realists, who facilitated this process of disenchantment as a way to escape from the economic relations enshrined by the ideology of formal justice, may have miscalculated the effect of their attacks. Weber believed that the result of this process would not be a reform of the legal system in the direction of greater value rationality to serve such ends as social justice. He cautioned, for instance, that "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" (ibid., p. 893). He also warned that judges, stripped of their subjective belief in the "sacredness of the purely objective legal formalism," would not thereby become law prophets confidently and judiciously creating law. Instead, they would be transformed into a bureaucratized judiciary (ibid., pp. 893–894). In short, Weber suspected that the legitimacy of purely instrumental rationality would increase and that the law would become a mechanism more finely tuned to the instrumental rationality of advanced capitalism.

Weber was concerned with social action, and his sociology

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they have been enacted according to correct legal criteria but also because at any time they can be questioned and "discursively redeemed" that is, "grounded in consensus of the participants through argumentation." He criticizes Weber's "decisionistic" legal theory according to which "the validity of legal norms could be grounded on decisions and only on decisions" (ibid., p. 101).

of law was an attempt to make explicit the links between legal norms and social action. In analyzing the actions of capitalists, he began with the assumption that the rational pursuit of self-interest in the marketplace implied an unsurpassed degree of rationality in social action. Such an orientation toward self-interest guaranteed a level of predictability in social action that legal norms could never approximate (Weber, 1978: p. 30). But social action is complex, and Weber's study of law was an attempt to explore other motives besides the most compelling one of self-interest. His analysis suggests that the value rationality implied in the ideology of formal justice did contribute to the success of the bourgeoisie in carving out a realm for economic action unhindered by politics by appealing to the "rightness" of such a system.

However, and this is Weber's brutal insight, the instrumental rationality of economic action no longer rests on this type of value rationality. It is enough that individuals who might be inclined to violate contracts are aware that "physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation" [emphasis in original] (ibid., p. 34). The existence of enacted norms that will be enforced is all that capitalism requires of its modern legal system (ibid., p. 36). Even then "the power of law over economic conduct has in many respects grown weaker rather than stronger as compared with earlier conditions," and a stand-off between private economic interests and legal regulation is likely to be resolved in favor of the former (ibid., p. 335).

To conclude, I have argued for an historical interpretation of Weber's sociology of law to identify the ways in which law has facilitated the growth of capitalism. As Weber stressed, "from the point of view of economics and sociology it remains a fact that, on general principle, at least, the interference of legal guaranties merely increases the degree of certainty with which an economically relevant action can be calculated in advance" (ibid., p. 329). This was true when modern capitalism came into existence, and it continues to be true. But the difference is that the belief in the "rightness" of law once contributed to the motivations of social actors, whereas today enactments grounded in political power are sufficient and, according to Weber, even more effective motivation. This is a sobering view of law, one that challenges the belief of many legal reformers that modern law, which has always served as an extremely effective instrument for promoting the instrumental rationality of capitalist social relations, could be an effective mechanism for transforming those relations.

REFERENCES

ALBROW, Martin (1975) "Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law," 2 *British Journal of Law and Society* 14.

CAIN, Maurine (1980) "The Limits of Idealism: Max Weber and the Sociology of Law," in S. Spitzer (ed.), *Research in Law and Sociology*, Vol. 3. Greenwich, CT: JAI Press.

HABERMAS, Jurgen (1984) *The Theory of Communicative Action*, Vol. 1. Boston: Beacon Press.

——— (1975) *Legitimation Crisis*. Boston: Beacon Press.

HUNT, Alan (1978) *The Sociological Movement in Law*. New York: Macmillan.

KENNEDY, Duncan (1973) "Legal Formality," 2 *Journal of Legal Studies* 351.

KRONMAN, Anthony (1983) *Max Weber*. London: Edward Arnold.

TRUBEK, David (1986) "Max Weber's Tragic Modernism and the Study of Law in Society," 20 *Law & Society Review* 573.

——— (1985) "Reconstructing Max Weber's Sociology of Law," 37 *Stanford Law Review* 919.

——— (1972) "Max Weber on Law and the Rise of Capitalism," 3 *Wisconsin Law Review* 720.

WEBER, Max (1978) *Economy and Society*, 2 Vol. Berkeley: University of California Press.

——— (1964) *The Sociology of Religion*. Introduction by Talcott Parsons. Boston: Beacon Press.

——— (1958) *The Protestant Ethic and the Spirit of Capitalism*. New York: Charles Scribner's Sons.

——— (1954) *Max Weber On Law in Economy and Society*, ed. M. Rheinstein. New York: Simon and Schuster.