

## IV. POSITIVISM AND THE VALUE CRISIS

*In the Silver Anniversary issue of "Society" magazine, Irving Louis Horowitz identifies three stages in the development of the social sciences in America. The first, he says, extended from 1890 to roughly World War II. This was an era of "scientism, in which the quest for objectivity was coupled with a strong faith in the positivist model of research and theory construction." Max Weber's sociology belongs to this period.*

*During this era, social scientists sought to apply the method of the physical sciences to the social events. To achieve the desired predictability, social scientists denied or discounted the possibility that human actions are guided by cognition and will. All meanings and causes had to be observable, and therefore within the external material world. Observable events were considered to be objective "facts;" non-observable events of meaning, value, purpose, good faith, conscience, and obligation were subjective "values."*

*Because Weber ignored the consciousness of historical development inherent in the institution itself and common to all citizens, Professor Berman suggests that Weber's sociology of the development of the city contains serious errors. The consciousness of historical development is something more than a series of values originating independently within each citizen and projected by each citizen onto the observable events. Weber also erred in failing to recognize the freedom of individuals as a legal condition consisting of shared meanings, values, and purposes.*

### SOME FALSE PREMISES OF MAX WEBER'S SOCIOLOGY OF LAW

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Max Weber's sociology of law has received an enormous amount of acclaim among American legal scholars during recent decades,<sup>1</sup> and

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1. In a perceptive review of one of the earliest English translations of Weber's writings, Samuel E. Thorne, then Associate Professor Law and Librarian at Yale Law School, noted that

many of his ideas have become very widely accepted even by people who have never studied his writings. His sharp distinctions between "charismatic," "traditional," "formal-rational" and "substantively rational" types of law, his characterization of modern Western law as formal-rational, capitalist, and bureaucratic, and more generally his identification of various types of law with various types of political domination — reflect theories of law which, when baldly stated, are controversial. Nevertheless, being embedded in the immense historical and legal scholarship which Weber commanded and in the complex and intricate analytical network which he elaborated, these theories have seemed to his numerous admirers to be validated almost beyond a doubt.

One reason for the acceptance of Weber's legal sociology is that few people have carefully reviewed his historical and legal scholarship, but instead have merely assumed that since it is so immense it must be sound. Another reason is that the subtle interconnections which Weber draws between his theoretical models ("ideal types") and historical reality give an aura of plausibility to the former. When the ideal type fails to account for important elements of historical reality, Weberians fall back on its "analytical" or "heuristic" value. The fact that a given legal system falls within two or more ideal types is not disturbing to them: the ideal type is, for them, as real as the historical reality.<sup>2</sup> This confusion is aggra-

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Weber's sociological works "have received little direct attention from English readers." Thorne, Book Review 56 *YALE L.J.* 188, 189 (1946) (reviewing *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (H.H. Gerth and C. Wright Mills eds. 1946). It was the appearance eight years later of *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., 1954) that first stimulated a rash of writings about Weber by American legal scholars. In 1986 David Trubek, John Esser, and Laurel Munger produced a bibliography entitled *PRELIMINARY, ECLECTIC, UNANNOTATED WORKING BIBLIOGRAPHY FOR THE STUDY OF MAX WEBER'S SOCIOLOGY OF LAW* (University of Wisconsin Institute for Legal Studies). Today Weber is referred to as a "patron saint" of American legal thought concerning the relationship of law to society. Cf. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 *LAW AND SOCIETY REV.* 573 (1986). In 1984 one writer called him "the premier social scientist of this century." Schwartz, *Max Weber's Philosophy*, 93 *YALE L.J.* 1386 (1984).

Weber's enormous influence extends, of course, to other countries as well. John Finniss wrote in 1985 that "[a]mong the hidden streams nourishing jurisprudence at Oxford during the past thirty years, the work of Max Weber is among the most significant." Finniss, *On "Positivism" and "Legal Rational Authority"*, 5 *OXFORD JOURNAL OF LEGAL STUDIES* 74 (1985).

2. Alexander von Schelting, in his authoritative work on Weber's sociology of knowledge, states that it is impossible to remove from Weber's concept of ideal types "all its inherent obscurities, contradictions, and ambiguities." A. VON SCHELTING, *MAX WEBER'S WISSENSCHAFTSLEHRE: DAS LOGISCHE PROBLEM DER HISTORISCHEN KULTURERKENNTNIS, DIE GRENZEN DER SOZIOLOGIE DES WISSENS* 329 (1934 & reprint ed. 1975). Schelting stresses that ideal types are by definition theoretical models which can exist only in the mind of the observer. Nevertheless, it would

vated by the fact that Weber does not always distinguish between an "ideal" type (like bureaucracy) and a "real" type (like the Protestant ethic).

A third, more important reason for the widespread acceptance of Weberian legal theory among contemporary legal scholars is the fact that underlying its central concepts, as Anthony Kronman has shown, are certain unstated philosophical assumptions which give it intellectual coherence;<sup>3</sup> and these assumptions are widely shared. First, Weber starts from a sharp distinction between fact and value: facts, in Weber's view do not have any inherent meaning or purpose, and the meanings and purposes (values) attached to them by those who observe them are chosen by an exercise of will of those observers. Kronman rightly calls this a "positivistic theory of value," which rests on a "will-centered conception of personhood."<sup>4</sup> Second, Weber treats law as a fact, not a value, and

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seem that if they are to serve as useful models, they must correspond to some degree to that which is observed. In fact Weber illustrates his ideal types with a wealth of data which he purports to draw from the real history of diverse societies. He also admits, however, historical "deviations" from the ideal type. As my colleague Frank Lechner has put it, Weber's ideal types are intended in part to describe and in part to distort historical reality. This would bear out the statement in the text.

3. A. KRONMAN, MAX WEBER (1983). Kronman writes on page 3:

In this book, I offer an interpretation of the *Rechtssoziologie* which is intended to show that it does have an overarching conceptual unity . . . . My interpretation . . . elaborates and emphasizes the common philosophical assumptions underlying Weber's treatment of many different topics in the *Rechtssoziologie* . . . . All reveal an implicit commitment, on Weber's part, to a few simple philosophical ideas; it is these that provide the unifying link between what is otherwise likely to seem a jumble of sometimes brilliant but essentially unconnected insights.

Cf. *Id.* at 4:

This book . . . attempts to demonstrate that the unstated philosophical assumptions that underlie [the] central concepts [of Weber's *Rechtssoziologie*] give the work as a whole a significant degree of intellectual coherence.

I have quoted these passages to counteract the statement made by David Trubek that although Kronman

does . . . try to demonstrate the unity of Weber's thought . . . [his] 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' . . . .

Trubek, *supra* note 2, at 575.

The consistency of Weber's "methodology" has been defended by CAIN, *THE LIMITS OF IDEALISM: MAX WEBER AND THE SOCIOLOGY OF LAW* (S. Spitzer, ed.), 3 *RESEARCH IN LAW AND SOCIOLOGY* 53 (1980) and by Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 *LAW AND SOCIETY REV.* 487 (1987).

Consistency in philosophical assumptions and in methodology does not necessarily lead, however, to consistency in factual and theoretical conclusions. As the present essay attempts to show, Weber's philosophical and methodological errors, consistently pursued, led him in some instances to contradictory results.

4. KRONMAN, *supra* note 4, at 36. Arnold Brecht has traced the emergence of the sharp

states further that the social scientist should study law without himself evaluating the normative commitments of those who attach value to it.<sup>5</sup> In other words, the values which a given legal institution or set of legal institutions expressly or implicitly reflects or pursues are not values that inhere in the institutions but are values attributed to them by those who make or apply or respond to them; the scholar should study them empirically but should attempt to exclude his or her own values from such study. Third, what Weber calls formal-rational legal authority, namely, a system of politics in which domination is exercised by means of a logically consistent system of consciously made legal rules, corresponds to Weber's theory of value, which asserts the positivity of all norms. As Kronman has shown, formal-rational authority is the one form of political domination whose fundamental principle of legitimation expresses what Weber considered to be the truth about values; therefore, he was inclined (Kronman says "bound") to make this form of authority the model against which he contrasted other types.<sup>6</sup>

Thus Weber's sociology of law is appealing to many contemporary legal scholars partly because it denies that the world, including the world of law, has an inherent meaning or purpose, that is, any value "that antedates the choices and commitments of individual human beings."<sup>7</sup> At

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distinction between fact and value to the writings of Simmel, Rickert, Jellinek, and Max Weber in the late nineteenth century. Its first expression was the doctrine of the logical "gulf" (Brecht calls it "the Gulf Doctrine") between the Is and the Ought. See A. BRECHT, *POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT* 207-231 (1959). He states that this doctrine was reflected in the belief that values are essentially subjective and not capable of scientific proof or disproof. "Its inability morally to condemn Bolshevism, Fascism, or National Socialism in unconditional terms was to become the tragedy of twentieth-century political science, a tragedy as deep as any that had ever occurred before in the history of science." *Id.* at 8. Yet Brecht himself defends "Scientific Value Relativism" as itself logically unassailable. *Id.* at 488-90.

5. Weber wrote that scholarship and science should be "value-free" (*Wertfrei*). There has been some debate about what he meant by that. For a recent discussion, see CAIN, *supra* note 4. Cain's defense against critics of Weber goes so far as to raise the question whether he meant anything at all by "value-free" other than that the scholar should make his own values "explicit and public."

6. KRONMAN, *supra* note 5, at 55. Finnis, *supra* note 2, at 76-80, attacks Kronman's view that Weber "was bound" by a positivist theory of values to give a privileged position to legal rational authority. He agrees with Kronman, however, that Weber did in fact move from a positivist theory of values to a positivist theory of law. Finnis argues that a formal-rational model is also consistent with a theory of natural law. He points out (pp. 80-83) that Weber himself stressed the influence of "natural law dogmas" on lawmaking in the past and called attention to the dangers involved in the contemporary "unmasking" of law as a mere instrument of power. Yet Finnis confirms that Weber denied the objectivity of values and asserted that both values and law are essentially creatures of will.

7. KRONMAN, *supra* note 4, at 20-21. Kronman points out at 25 that "[a]ccording to Weber, there is and can be no such thing as a group idea, an idea grounded in something other than the consciousness of a single individual." This, of course, is consistent with, and perhaps essential to,

the same time, Weber interprets social action, including law, in terms of dramatic contrasts among different civilizations and different eras of Western civilization, leaving the impression that history, including legal history, does indeed have a pattern and possibly even a direction, and that law in the West did indeed at one time have a historical mission. Weber's belief in the "disenchantment" of contemporary law and his own tragic view of modern man<sup>8</sup> reflect a nostalgia that is appealing to those legal scholars who, although they may have little hope and even less faith, nevertheless find some comfort in the myths of an earlier age.

Finally, Weber's appeal is based in part on widespread acceptance of certain of his historiographical (as distinguished from philosophical) assumptions. Weber postulated that in the West, starting in the sixteenth century, an earlier "medieval" "feudal" "traditional" type of law was gradually superseded by a "modern" "capitalist" "formal-rational" type of law. To be sure, this conception was contradicted by some of his own historical insights (for example, the insight that the canon law of the "medieval" Roman Catholic Church was in fact "modern" and "rational" in his sense of those terms, and that the modern city — as we shall see below — also originated in the heyday of "feudalism"). Nevertheless, Weber associated the rise of capitalism and the rational bureaucratic state with Protestantism<sup>9</sup> and insisted on the "traditional" and "patrimonial" character of both feudalism and Roman Catholicism. This corresponded not only to the conventional historiography of the late

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the positivist theory that values do not inhere in factual reality but are willfully imposed upon it. Schwartz, *supra* note 2, at 1387, incorrectly concludes that Kronman is arguing that Weber believes that each individual is entirely free to choose among existing values or entirely free to choose new values. She combats this view by pointing out that Weber also believed very strongly in the "givenness of things," and that "our choices are situated in interpretive contexts which are historically given." Schwartz misses the point that the givenness of *things*, for Weber, does not imply the givenness of the individual's own *values*, and that "interpretive contexts," for Weber, are only the values which numbers of individuals have attributed to things in the past. *Id.* at 1392.

8. At the end of World War I, Weber said, "[T]he fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.'" "The ultimate and most sublime values," he declared, have "retreated" either into mystical experience or into intimate personal relations. Although he deplored this "disenchantment of the world" (including the world of law), Weber nevertheless rejected any role for scholarship other than that of maintaining "plain intellectual integrity" and of meeting "the demands of the day." See Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155-56 (Gerth and Mills eds. 1958) [hereinafter FROM MAX WEBER]. This divorce between the vocation of science and the vocation of prophecy corresponds to the divorce between facts and values. It contributed to the defection of the German universities in the spiritual crisis of the 1920s and 1930s. *Cf. supra* note 5.

9. WEBER, *GESAMMELTE AUFSATZE SUR RELIGIONSGESCHICHTE*, Vol. 1, Part 1, translated by T. Parsons as *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1930).

nineteenth and early twentieth centuries but also to the left-wing socialist historiography of that era which postulated a historical evolution from feudalism to capitalism to socialism.

Respect for Weber is so great, and criticism of him has been on the whole, so subdued, that to state bluntly that his sociology of law is generally wrong and that his influence has been generally harmful will strike many readers as perverse. At the same time, his scholarship is so massive and so complex that it would take far more than a single essay to expose the fallacies in it. What I propose to do here is to analyze one portion of Weber's work, namely, his sociology of the city,<sup>10</sup> to criticize its historiography, and to show some of the connections between its weaknesses and the weaknesses of his legal sociology as a whole.<sup>11</sup>

Weber's urban sociology starts with an analysis of the structural unity of the Western city as a community at the time of its historical origin in the eleventh to thirteenth centuries. He wrote that although the rudiments of the Western type of city may be found occasionally in other cultures, "an urban 'community' in the full meaning of the word appears only in the Occident." "To constitute a full urban community," he stated, "a settlement had to represent a relative predominance of trade-commercial relations, with the settlement as a whole displaying the following features: (1) a fortification, (2) a market, (3) a court of its own and at least a partially autonomous law, (4) a related form of association, and (5) at least partial autonomy and autocephaly, thus also an administration by authorities in the election of whom the burghers participated."<sup>12</sup> Such a peculiar system of forces, according to Weber, could only appear under special conditions and at a particular time, namely, late medieval Europe.<sup>13</sup>

Although cast in historical terms, Weber's theory of the city fails even to mention, much less to explain, the most striking and distinctive characteristic of the Western city, namely, its historical consciousness — that is, its consciousness of its own historical movement from past to future, its sense of its own ongoing, developing character. Partly as a result of that omission, the constituent elements attributed by Weber to the "full

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10. This analysis is drawn from BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 399-403 (1983). The references to Weber are drawn chiefly from his book *THE CITY* (D. Martindale and G. Neuwirth eds. and trans. 1958).

11. See also Berman, *supra* note 11, at 546-554.

12. WEBER, *supra* note 11, at 54-55.

13. *Id.*

urban community" of the Occident reflect its structural integration but they do not account for its dynamic character, its development in time. They do not explain why or how the twelfth-century city developed into the city of the sixteenth and the twentieth centuries, many of whose characteristics are identical to, or at least continuous with, those of the twelfth-century city, but others of which are substantially different in degree if not in kind.

A typical twentieth-century city has the following characteristics: (1) it is a corporation, endowed with legal personality, with capacity to sue and be sued, hold property, make contracts, purchase goods and services, employ labor, borrow money; (2) it is a political entity, usually governed by a mayor or city manager together with an elected council, which may employ officials, levy taxes, exercise the right of eminent domain, and perform other governmental acts and functions; (3) it is an economic unit, which usually purveys or controls the purveyance of water, gas, electricity, and transportation, and regulates the construction and use of housing and the location of economic enterprises; and (4) it is an agency for the promotion of social welfare, including education, health protection, poor relief, and public recreation.<sup>14</sup> Like their twentieth-century progeny, the cities of twelfth-century Europe were also corporate, political, economic, and social entities; however, the range of their activities in each of these roles was much more limited than that of a present-day city. Much of what a city does today was done then within the city by guilds and by the church as well as by the extended family. Also the city today is much more integrated in, and much more representative of, the modern national state, an entity which was only beginning to come into existence in the twelfth century. Yet despite these differences, the present-day city developed, by a process of organic growth, out of the cities and towns that were created, or recreated, in the period of the Papal Revolution;<sup>15</sup> and that process of growth was part of its character as an urban community.

The process of growth of the Western city cannot be explained without reference to its historical self-awareness, its sense of its own historical continuity and development, its consciousness of its own ongoing charac-

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14. Cf. WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* (1926).

15. The rise of the modern European city in the late eleventh and twelfth centuries, and its connection with other revolutionary social, economic, and political changes that accompanied the struggle of the Church under the papacy to free itself from imperial, royal, and feudal control, is described in Chapter 12 ("Urban Law") of BERMAN, *supra* note 10, at 356-403.

ter as a community, its own movement from the past into the future. Historically, this was connected, first, with the religious dimension of the Papal Revolution, and especially with the mission of the church gradually to reform and redeem the secular order. It was connected, second, with the political dimension of the Papal Revolution and especially with the belief in the coexistence of plural autonomous secular polities; it was this belief that made it both possible and urgent for citizens to form urban communes independent of royal, feudal, and even ecclesiastical authority — something that would have been unthinkable before the papacy desacralized kingship. It was connected, third, with the legal dimension of the Papal Revolution, and especially with the belief that the reformation and redemption of the secular order had to take place by the continual progressive development of legal institutions and periodic revision of laws in order to overcome the forces of disorder and injustice.

Strangely enough, Weber in a later chapter contradicted his own earlier statement of what constitutes the uniqueness of the medieval Western city. Without noticing the discrepancy, he attributed all five characteristics of a “full urban community” — which at first he had said “appears only in the Occident” — to the Asiatic and oriental city also. The latter, too, he stated, was a fortress and a market. It, too, contained farms held in socage (that is, in nonfeudal tenure) with land alienable without restriction, or hereditary in an unencumbered way or obligated only with a fixed land rent. It, too, had its own “autonomous constitution,” which presumably meant its own form of association and at least partial autonomy and autocephaly.<sup>16</sup> In all these respects, the differences between the medieval occidental city and its Asiatic counterparts were differences — Weber stated — only in degree. What “absolutely” distinguished the Western city, he finally concluded, was the personal legal condition, that is, the *freedom*, of the citizen.<sup>17</sup> Serfs emigrating to the cities had a common interest, he stated, in avoiding the imposition of military or other services by their erstwhile lords. “The urbanites therefore usurped the right to violate lordly law. This was the major revolutionary innovation of medieval occidental cities in contrast to all others.”<sup>18</sup> Weber went on to say that the “cutting of status connections with the rural nobility” had been connected with the formation of municipal corporations — legally autonomous communes. “Similar preliminary stages of the constitution

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16. WEBER, *supra* note 11, at 91.

17. *Id.* at 92, 93.

18. *Id.* at 94.



of a polis or commune may have appeared repeatedly in Asia and Africa," he added. (Note the cautionary words "preliminary" and "may".) "However, nothing is known [in Asia or Africa] of a legal status of citizenship."<sup>19</sup>

Thus Weber eventually recognized, albeit obliquely, that there was something about Western law that was of critical importance in the rise of the Western city. Also, it appears, there was something critically important about Western religion as well — which Weber also dealt with only obliquely. He pointed out that in the Asiatic cultures, including China and India, it was impossible to bring all the inhabitants of a city together into a homogeneous status group. "Foremost among the reasons for the peculiar freedom of urbanites in the Mediterranean city, in contrast to the Asiatic," he wrote, "is the absence of magical and animistic caste and sib constraints. The social formations preventing fusion of urban dwellers into a homogeneous group vary. In China it was the exogamous and endophratic sib; in India . . . it has been the endogamous caste."<sup>20</sup> Here Weber turned to Fustel de Coulanges' work to show that the ancient Greek and Roman cities did create a religious foundation of citizenship by substituting the city cult meal for the cult meal of the family. Yet Weber offered no explanation of the relationship of the religious factor to the legal and political factor; more particularly, he did not confront the fact that ancient Greek and Roman cities rested on slavery and lacked that "peculiar freedom of urbanites" which was, in fact, characteristic not of "the Mediterranean city" as such but of the Western European city of the late eleventh century and thereafter. Thus Weber stopped short of saying that the emergence of urban liberties in the West was part of a revolutionary *religious* change, in which, on the one hand, the ecclesiastical polity declared its independence from all secular polities, and, on the other, the very concept of secular polities was for the first time created and secular polities were said to be reformable and redeemable by law.

Why did Weber misjudge the role played by law and religion in the origin and development of the Western city? And why did he miss entirely the role of Western historical consciousness, including the Western belief in the organic growth of legal institutions over generations and centuries?

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19. *Id.* at 96.

20. *Id.* at 97.

Karl Marx had attributed changes in social consciousness, including religious and legal consciousness, to changes in technologies for meeting economic needs (the mode of production), and in the class struggle to control those technologies (relations of production). Weber, on the other hand, believed that in addition to the economic forces that determine social consciousness there are also political forces — in other words, that the drive for political power is an independent objective force and not (as Marx had thought) merely a reflection of economic conditions (“relations of production”). For Weber, therefore, the rise of the Western city in the late eleventh and early twelfth centuries was due not merely to the development of a new mode of production (artisan and craft industry), which drew the serfs from the manor in opposition to their feudal lords, but also to the development of new political relationships. Weber could see that the nobility, too, had political reasons to favor the creation and development of cities. He also introduced other factors into the causal chain, including legal factors. But Weber, like Marx, believed that the idea of creating cities, the growth of communal consciousness within cities, and the development of urban legal and religious concepts which manifested such consciousness — that all these constituted “values” attributed to “factual” (economic and political) developments.

Western legal institutions cannot, however, be explained satisfactorily in instrumental terms as an ideology or a superstructure based on economic and/or political foundations; nor can they be explained as essentially factual phenomena to which people attribute values. They can only be satisfactorily explained in terms that encompass and go beyond both values and facts. Indeed, all given (“factual”) legal institutions contain within themselves values, in the sense of meanings or purposes. They have, in other words, what Lon Fuller called their own internal morality.<sup>21</sup> This means that in interpreting a prevailing legal rule one cannot properly avoid treating the rule as both an “is” (it prevails, it has force) and an “ought” (it has a moral purpose, a *telos*). To take an obvious example, the legal requirement of a fair hearing cannot properly be understood as having either a “factual” content separate from the “values” it embodies or a “value” content separate from its “factual” existence.

Weber refuted Marxian historical materialism by showing that causal relations in history are more complex and more indeterminate than Marx and Engels had supposed. He wrote: “If we look at the causal lines we

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21. See FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

see them run, at one time, from technical to economic and political matters, at another from political to religious and economic ones, etc. There is no resting point. In my opinion, the view of historical materialism, frequently espoused, that the economic is in some sense the ultimate point in the chain of causes is completely finished as a scientific proposition."<sup>22</sup> Nevertheless, Weber's fact-value distinction led him repeatedly to trace the derivation of legal institutions to political domination (*Herrschaft*). Both tradition and rationality were, for him, primarily sources of legitimation of political authority, whereby coercion could be more effectively exerted. His definitions of the state and of law were in terms of coercion. He defined the state as a "human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory,"<sup>23</sup> and he defined law as "an order . . . [which] is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation."<sup>24</sup> Thus, his belief in the objectivity of facts and the subjectivity of values led him, in his sociology of law, to a political (as contrasted with an economic) materialism.

Weber's emphasis on the political foundations of law is associated with his neglect of the creative role of historical consciousness in the development of new legal institutions. He defined a "traditional society" as one in which legitimacy is based on "the sanctity of age-old rules and pow-

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22. Proceedings of the First Conference of German Sociologists (1910), *quoted in* MAX WEBER, *I ECONOMY AND SOCIETY* lxiv (G. Roth and C. Wittich eds. 1968). Weber's *PROTESTANT ETHIC AND THE RISE OF CAPITALISM* is sometimes cited as evidence of an idealist, as contrasted with materialist, interpretation of history. In it, however, Weber does not trace the effect of Protestant ideas and values on material economic and political developments as such. Instead, he traces their effect on capitalist ideas and values, arguing that Protestant "asceticism" contributed substantially to the development of a capitalist vocational ethic (*Berufskultur*). As Wolfgang Schluchter has said, "It is true that Weber's analysis can illustrate the general manner 'in which ideas become effective in history.' For this purpose he deals not only with the doctrines but also with their practical consequences. But this does not turn his analysis into a plea for a spiritualist or idealist interpretation of history." W. SCHLUCHTER, *THE RISE OF WESTERN RATIONALISM: MAX WEBER'S DEVELOPMENTAL HISTORY* 142 (G. Roth trans. 1981). Schluchter cites statements of Weber in which he repudiated both an idealist and a materialist interpretation of history as "foolish and doctrinaire" and argued that all culturally significant phenomena are subject to "both [ideal and material] causal relationships." *Id.* It should be noted, however, that Weber seems to identify materialism with economic materialism. His view of law as an instrument of political coercion, and of political coercion as part of an objective factual reality distinct from subjective values, may properly be called a form of political materialism.

23. Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER*, *supra* note 9, at 78 (emphasis in original).

24. MAX WEBER, *supra* note 22, at 34 (emphasis in original).

ers," and "traditional law" as law "determined by ingrained habituation." He stated that innovations in traditional law can be legitimized only by disguising them as reaffirmations of the past. Thus tradition, for Weber, refers to some point or points in the past, not to an ongoing continuity from past to future. It is (in Jaroslav Pelikan's phrase) not tradition but traditionalism, not the living faith of the dead but the dead faith of the living.<sup>25</sup> It is historicism, not historicity.<sup>26</sup> It is partly because he neglected the dynamics of traditional law that Weber overlooked the role of law (and of religion) in the revolutionary formation and gradual evolution of the European city.

Not only traditional authority (based on historicism) but also the other three types of authority postulated by Weber — the charismatic (based on inspiration), the formally rational (based on logical consistency of rules), and the substantively rational (based on fairness and equity) — are defined narrowly, so that they appear to be mutually exclusive.<sup>27</sup> In fact, however, the Western legal tradition, as it existed from the late eleventh to the twentieth century, combined — and thereby transformed — all four of these "ideal types."<sup>28</sup> The Western city owes both its origins

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25. See PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984).

26. See BERMAN, *TOWARD AN INTEGRATIVE JURISPRUDENCE*, 76 U. OF CAL. L. REV. (July 1988).

27. Weber's definitions of his "ideal types" of law are summarized in *MAX WEBER ON LAW AND ECONOMY IN SOCIETY* (Rheinstein ed. 1966) at xxxviii - xliii. It should be noted that substantive rationality in law and economics, which emphasizes ethical considerations, utility, expediency, and public policy, does not, in Weber's concept, correspond to any historical type of society, although Weber saw it emerging in "the anti-formalist tendencies of modern legal development" and possibly in a future socialist society. *MAX WEBER ON LAW AND ECONOMY IN SOCIETY*, *supra* at 63-4, 303.

28. Weber's own formalism went so far that he denied the possibility of reconciling conceptualism ("formal rationality") and equity ("substantive rationality"). Thus he wrote 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." *WEBER*, 2 *ECONOMY AND SOCIETY* 894 (1978). He is right, of course, if his proposition is read literally, with emphasis on the words "take the place of." What is missing is the recognition that ethical argument, certainly, and only to a slightly lesser extent economic and sociological argument, are not only implicit but often explicit in the body of formal rules developed in all Western legal systems and especially in the body of case law that developed in the English and American systems. Ewing, *supra* note 4, defends Weber against the charge that he underestimated the adaptability of the English common law to the need for a legal system which would protect contracts and property and thus achieve justice in the capitalist sense. She neglects to say, however, as Weber neglected to say, that the doctrine of precedent which was developed in England and the United States in the seventeenth through nineteenth centuries probably produced *more* calculability than the system of codes and commentaries — the *Pandektenrecht* — of the Continental jurists. At the same time, the linking of formal rules with concrete fact situations, and thus the theoretical possibility of combining what Weber called formal and substantive

and its subsequent development to a considerable extent to this combination.

Weber's sociology of law has been generally harmful, in my opinion, because it has contributed substantially to the widespread belief that the basic reason for the existence of legal systems is to enable those who have "a monopoly of the legitimate use of physical force within a given territory" to effectuate their control over the people of that territory, and also because it has contributed substantially to the widespread tendency to label given legal systems in terms of specific ideological types, each associated with a specific type of political authority. Today, for example, it is common to characterize the American legal system as capitalist, individualist, and democratic, and to contrast it with the Soviet legal system, which is characterized as socialist, collectivist, and authoritarian — without recognizing that each of these legal systems combines all these characteristics and others as well. Weber's disenchantment, and his determination to distance his scholarship from the crisis of law which he saw coming, was reflected in his separation of legal systems into distinct and mutually exclusive "ideal" categories of the sacred, the historical, the logical, and the equitable. Both he and his followers were thus distracted from the constructive task of showing the ways in which, in any healthy legal order, these elements are made to interact.

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rationality, and of combining both with tradition, is probably greater in the Anglo-American than in the nineteenth-century Continental system of legal thought.

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