Protestantism and the Rationalization of English Law: A Variation on a Theme by Weber

Assaf Likhovski

Attending to an underdeveloped lacuna in Weber's sociology of law, this essay examines the relationship between Protestant theology and the emergence of modern, rational legal systems. The essay argues that radical Protestantism inspired demands for the rationalization of English law, and while not successful in bringing about the concrete changes advocated, that central features of Weber's notion of rational legal thought were also central in the theology of the radical Protestants. Examining the legal thought of two groups that appeared during the English Revolution—the Levellers and the Diggers—the essay shows how theology provided these groups with a model for a more predictable law, offered them a source for the norms of their proposed legal system, and motivated the desire for law reform.

One of Max Weber's major contributions to the sociology of law was his claim that modern Western societies share a unique kind of legal order characterized by its "rationality." The term, as used by Weber, is notoriously vague (Kronman 1983:73). In various contexts Weber used "rational" as a synonym for learnable, methodical, systematic, general, universal, rule-governed, conscious, and that which is based on human reason and not on external systems like magic (Friedman 1969:14–21; Trubek 1972; Eisen 1978; Kalberg 1980; Kronman 1983:73–76; Schluchter 1985:87–89, 94–95, 100; Ewing 1987; Sterling & Moore 1987; Wallace 1990; Feldman 1991). In his sociology of law, the term "rational" also had a number of meanings. First, it was used to designate legal systems that relied on means which were "controlled by the intellect." Such systems—"Rational" legal systems—were divided in turn into two categories: "formal-rational" and "substantive-rational." Formal-rational systems were ones in which the legally relevant facts of each case were "disclosed

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through the logical analysis of meaning" and where "fixed legal concepts" and "highly abstract rules" were formulated and applied (Weber 1968:654–58). The epitome of such "formal-rational" systems was, of course, Weber's own legal system—turn-of-the-century German law. This legal system was based on a set of general, abstract norms, logically derived from a limited set of principles, arranged in a gapless code that was created and mechanically applied by a special class of professionally trained jurists. The calculability offered by such a system, claimed Weber, constitutes "one of the most important conditions for the existence of . . . capitalistic enterprise" (Weber 1968:883, 162; Trubek 1972; Hunt 1978:93–133; Kronman 1983:118–46; but see Ewing 1987).[1] Legal rationality thus came to be identified with a certain set of attributes such as the use of reason and logic, the desire for a general, universal and systematic law, concern for predictability, and most of all (Shamir 1993:49) the concept of codification.

In his sociology, Weber linked both Protestantism and law to the rise of modern capitalism—the rational economic order that he believed was typical to Western societies,[2] but Weber did not ask whether Protestantism could also have influenced the process of rationalization—the appearance of demands for the creation of a rational legal system. Instead Weber decided to look for the religious roots of Western notions of legal rationalization in the medieval separation of Roman and Canon law, or in the unique bureaucratic structure of the Catholic Church (Weber 1968:828; Trubek 1972:738; Turner 1981:325). In Weber's sociology of law, the Protestant impact on notions of legal rationalization is not analyzed, although Weber did mention in passing the desire of what he called "English Puritans" for "systematically codified law" (1968:767, 814).

One reason, perhaps, why the relationship between theology and legal rationalization was not fully analyzed by Weber is that Weber's sociology of law is not meant to provide a detailed history of the causes of legal rationalization. Another reason, perhaps, is the fact the theological background of the thought of those Protestant groups who *did* display a keen interest in law

[1] It should be noted that Weber's position on the question of causation was ambiguous. He seems to imply that a formal-rational system is a prerequisite for the creation of a capitalist economy, but also that capitalist economy leads to the appearance of a formal-rational mode of legal thought (Weber 1968:883, 1394–95; Kronman 1983:118, 124–30; Ewing 1987:501; Feldman 1991:221–26).

[2] Weber 1958. This is the "Weber thesis" that even today, almost a century after its appearance, still serves as a fertile source of academic debate (ibid.; Telos 1988/9; Roth 1993). Weber's ideas have inspired attempts to find Protestant sources for changes in such other spheres as science (Merton 1970; Shapiro 1968; Cohen 1990). However, the issue of Protestant influence on the rationalization of law has not been studied. A few works discuss the rationalization of English law in the 17th century from a Weberian perspective, but they either ignore the impact of religion (Newton 1987) or focus on the influence of Protestant theology on the *substance* of English law (Little 1969:167–213; Berman 1989:83, 108–10, 119), while ignoring the role of Protestantism in shaping demands for the reform of the *form* of English law.

reform was relatively unexplored when Weber created his sociology of law. It was only following historian Christopher Hill's *The World Turned Upside Down* (1975) that a body of scholarship on the theology of 17th-century radical English Protestant groups emerged (McGregor & Reay 1984:vi–vi). Thus, while early 20th-century works cited by Weber do briefly discuss some demands for law reform in England (Gooch 1927:308–11), it is only in recent decades, due mainly to the work of Christopher Hill and his students, that radical Protestant legal thought has been systematically studied.

Be it as it may, while Weber provides a complex description of the contribution of *both* Protestant theology and law to the rise of modern capitalism, he did not study the links *between* Protestant theology and law. Thus, one side of a triangle of factors that he used to explain the uniqueness of Western societies (capitalism/Protestant theology/rational law) is missing (Fig. 1).

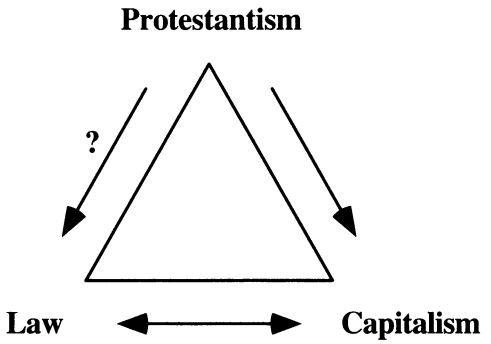

Fig. 1

In this article, I would like to examine the missing side of the triangle, the impact of Protestantism on legal thought. I do so by looking at the legal thought of two radical Protestant groups that appeared during the English Revolution. My argument is that the demands of these two groups for legal reform were, in fact, demands for a rationalization of the English legal system and that these demands were intimately connected with the unique variant of Protestant theology espoused by these groups.[3] I thus as-

[3] The legal thought of these groups, the Levellers and Diggers, has often been studied (Prall 1966; Veall 1970; Hill 1972:227–33, 1974a, 1974b, 1975:269–86; Shapiro 1975; Warden 1978; Rogers 1988), but the religious context of their legal ideas has not been thoroughly examined, even though the majority of contemporary scholars seem to agree that religious beliefs did play a major role in the shaping of their thought (Wolfe 1944:1; Schenck 1948; Frank 1955:30–40, 137, 198, 247; Robertson 1951; Simpson 1954; Elmen 1954; Zagorin 1954:3, 6, 810, 22, 30; Maclear 1956; Haller 1957:274–75, 1967:162, 176, 178, 188, 255–56, 271, 292; Gregg 1961:31–37, 113; Little 1969:130; Davis 1973, 1976, 1981:170–71, 181; Sabine 1965:3, 9–10, 21–24; Juretic 1975; Tolmie, 1977:69–72, 151, 144–82, 186–87; Mulligan, Graham, & Richards 1977; Watts 1978:118–298; Hayes 1979; Troeltsch 1981:710–12; Mulligan 1982/3; Reay 1984; Manning 1984:65, 90; Aylmer 1984; Hill 1986b; Burgess 1986/7; Bradstock 1991). Indeed, there had been just two attempts to analyze the impact of religion on the legal thought of the Levellers and the Diggers, and

sert that Protestantism did not just play a role in the process of economic rationalization of Western societies but sometimes also inspired demands for legal rationalization. It is for this reason that this article is called "a variation on a theme by Weber." It takes two themes found in Weberian sociology—the notion of legal rationalization and the argument that Protestant theology played an important role in the emergence of modern society—and combines them in a way not done by Weber. In other words, this article could also be called (again in a variation on Weber's *The Protestant Ethic and the Spirit of Capitalism*) "Protestant Theology and the Spirit of Legal Rationality."

The article is also a variation of a Weberian theme in another sense. In the addendum to this article, I will suggest that an awareness of the theological context in which demands for legal rationalization appeared in England might provide a fresh insight into the "England problem"—the fact that modern capitalism thrived in England despite the "lower" degree of rationality of English law (Weber 1968:890). However, this article is *not* about the England problem. I do not seek to show any causal link between the thought of the radicals and the rise of English capitalism. After all, as I said before, the demands made by the Radicals had little impact on concrete measures of law reform. Nor do I claim that the demands of the radicals were in any way a precondition to the success of English capitalism. This article is *not* about the relationship between economy and law. It is about the impact of theology on legal thought.

The two radical groups I will examine are the Levellers and the Diggers.[4] The Levellers, a political movement of artisans and soldiers that appeared in the early 1640s, and the Diggers, a small proto-communist group that existed for a short period during the late 1640s, shared a desire for radical law reform. Both groups wanted a knowable and predictable legal system. To create such a system, they sought to simplify and codify English law, anglicize the language of the legal system, reform the legal profession, and replace the existing norms of English law with norms derived by reason from the general principles of natural law.[5] Some of these ideas also appeared, in a milder form, in the works of moderate lawyer-reformers such as Matthew Hale and William Sheppard, but during the late 1640s they came more and more to be identified with the Radicals (Shapiro 1975:291; Matthews 1984:3; Veall 1970:75).

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both these attempts only focused on the parallel between lawyers and clergy in Radical thought (Hill 1974b; Manning 1984:66–67).

[4] Leveller and Digger legal thought influenced the demands for legal reform of other radical English groups, such as the Fifth Monarchy Men and the Quakers (Capp 1972; Rogers 1987). Because of the limited scope of this article, I do not discuss the legal thought of these latter groups.

[5] A detailed discussion of each of these demands can be found in Rogers 1987.

Of all the major demands of the Radicals, only their demand that the English language replace Law-French as the official language of the English courts was accepted, but even this small triumph was short lived. In the early 1650s Parliament decided that English should become the official language of the courts (except the court of Admiralty). In 1658, however, this decision was repealed (Nourse 1959:516; Shapiro 1975:295; Warden 1978: 684). But the importance of these groups should not be measured by their relative lack of success. Instead, it should be measured by the fact that modern notions of legal rationalization made an early appearance in their thought.

As I noted before, Weber defined legal rationalization as the attempt to create a predictable, systematic, codified legal system based on rules derived by reason from a small number of abstract principles, rules which were to be mechanically applied by a group of professionally trained jurists. The legal system envisioned by the Levellers and the Diggers was very similar to this ideal (bearing in mind that Weber is talking about an ideal type and that one should not expect *all* the characteristics of the ideal type to appear simultaneously in historical reality). These groups argued that English law was unpredictable because it was obscure and because it was governed by the "will of a judge and lawyer" instead of by the "letter of the law" (Winstanley 1651:279). Existing English law therefore had to be replaced by new norms derived by the use of reason from the principles of natural law. These norms were to be arranged in a methodical way in a code and were to be applied in a mechanical fashion by judges (or laymen).

At first glance, there seems to have been one major difference between the Weberian notion of rationalization and the legal ideas of the Radicals. Unlike Weber (1968:775), the Radicals did not think that professional jurists were necessary in order to create or maintain such a legal system. Indeed, they sought to reform or even abolish the legal profession in England. However, this apparent discrepancy may be illusory. Weber himself noted (1968:787) that when the legal profession is dominated by practitioners (as was the case in ancient Rome or in England), "no rational system of law could emerge." The reform of the English legal guild, whose interest was to maintain the existing prerational system, can thus be seen as a precondition for rationalization.

I begin with a discussion of the way concepts taken from religious thought shaped the Radical ideal of knowledge. I then show how this ideal influenced Radical demands for structural reform of the legal system. I examine the way in which religion served the Radicals as a source for the content of the norms of their proposed legal system, and discuss how religious concerns motivated the demands for Radical law reform. Finally, after

showing the various ways in which legal rationalization was associated with radical theology, I suggest that further research may prove that this association can provide a possible explanation for the relative lack of success of demands for legal rationalization in early modern England.

I. The Radical Ideal of Knowledge

One of the major sources of Radical law reform demands was found in the Radical ideal of knowledge. According to this ideal, only knowledge easily accessible to everyone is true. The Radical ideal of knowledge originated in Protestant theology. The Radicals borrowed and used it as a source of inspiration for their legal demands. I turn now to the roots of this ideal in Protestant thought. I then discuss the relation of this ideal to law reform.

The first aspect of the Radical ideal of knowledge was a belief in the duty of self-education. A characteristic of Protestantism is its emphasis on the personal aspects of religion over institutional aspects (Troeltsch 1981:471, 884; Tawney 1969:121–22; Morgan 1986:251, 268, 308). This made a widely available religious education a Protestant priority and led some Protestant groups to believe in a duty of *individual* religious study. The Protestant interest in education appeared both in Lutheranism and in English Protestantism (Bell 1967:131–32; Merton 1970:68–71; Walzer 1965:223).

The Radicals adopted the same attitude toward education and generalized it by widening the scope of the duty of self-education. John Lilburne, a Leveller Leader, mentioned the duty of *legal* self-education (Gregg 1961:124), and Gerrard Winstanley (1651:345–46, 361), the leader of the Diggers, devoted a part of his utopian essay, *The Law of Freedom,* to a discussion of secular education for children and adults, suggesting that the Sabbath be turned in his utopian community into a day of education, when the members of the community would gather, read the laws of the community, and discuss current events and recent scientific discoveries.

Another aspect of the Radical ideal of knowledge was the notion of simplicity. The Reformation, more than other periods in history, was unique in its interest in simplicity. This was apparent in the Protestant attempt to simplify religious faith, religious worship, and religious arts (Robertson 1951:11). Simplicity was a key concept in Continental Protestant works on the propagation of Reformation theology (Mullet 1980:80; Morgan 1986:72), and the English Puritans adopted this attitude. It influenced the Puritan sermon genre—the "Plain Style," a style that was flat, mechanical, uniform, and methodical. The use of this style was justified by the fact that God himself in the Scriptures used "simple, easy style" to convey his message (Haller 1957:19–23; Miller

1939). The Radicals, too, were obsessed by the notion of simplicity, and praises of simplicity can often be found in their works (Walwyn 1643: "To the reader"; 1644:59, 61; Winstanley 1650b: 252).

The last element of the Radical ideal of knowledge was the rejection of all human learning. If the positive side of this ideal of knowledge was that truth was simple, the negative side was that everything that was not simple, all knowledge requiring human learning to comprehend it, was false. Such an anti-intellectual attitude often appeared in Radical religious circles. For example, it appeared in the Anabaptist theocracy in Münster in the 16th century (where all books except the Bible were burned). Anti-intellectualism also appeared in Puritan thought. Although the Puritans believed that human learning was necessary, one could find in their thought anti-intellectual elements as well. The Puritans valued "experimental knowledge"—direct knowledge of God, unhindered by human learning. They also claimed that human learning could blur true knowledge and that scholars always had an interest in obscuring knowledge and making it inaccessible (Cohn 1970; Haller 1957:267; but cf. Morgan 1986:77).

William Walwyn, a Leveller leader, echoed Puritan thought when he claimed that God, the source of all knowledge, made knowledge simple, but that religious scholars "are much troubled that the most necessary truths are so easy to be understood" (Walwyn 1643:10). As a result, when scholars interpret the simple words of the Scripture, "they make [it] difficult, and darken the clear meaning thereof with their forced and artificial glosses." The corruption of knowledge by professionals, said Walwyn, was a phenomenon that existed throughout history—for example, in the time of Christ. Learning, concluded Walwyn (1649:44–45; 1644:33), was merely "an art to deceive and abuse the understanding of men and to mislead them to their ruin." Similar attacks on human learning were found in pamphlets written by Lilburne (1648:13) and Winstanley (1649a:201; 1650b:247). The "democratization of mysteries" (Hill 1975:93; Ginzburg 1976) thus seems to have been one of the major demands of the Levellers and Diggers. It was also a source of constant irritation to their opponents, who complained that the Radicals dared discuss the "great mysteries" of religion and politics without proper education (Gregg 1961:125; Hill 1975:366).

Radical criticism of human learning focused mainly on the three learned professions: the clergy, physicians, and lawyers. Of the three professions, the clergy were most often criticized. Walwyn accused the clergy of deceit, claiming that they obscured religious knowledge in order to monopolize it. He also accused the clergy of persecuting religious sects because the ideas held by the sects "tend to the loss of [their] craft and gain" (Walwyn

1646: 2). Similar views were held by Lilburne (1645:258) and Richard Overton (1645:17–18), another Leveller leader.

The Radicals did not criticize clergymen only for monopolizing religious knowledge in order to preserve their livelihood. The Radical Levellers, an offshoot of the Leveller movement, criticized the clergy by pointing to their political role as the servants of the King against the interests of the people (*Light Shining* 1648:609, 618). This political theme was echoed on a grander scale by Winstanley, who repeated Leveller critiques, but also attributed a more sinister role to the clergy, arguing that clergymen were "false prophets," who were preventing the coming of the Millennium (Winstanley 1648:145; 1649a:187–88, 200; 1650a:381, 392–93; 1650b:233, 238–40, 246–47; 1651:347–54).

How did the Radical ideal of knowledge influence Radical legal thought? The notion of free access to knowledge, which is the basis of the Radical ideal of knowledge, is not a necessary part of any religion. On the contrary, in most religions, religious knowledge is confined to a small group of priests. Protestantism is, in this respect, an exception. However, free access to knowledge seems to be a necessary part of any legal system. Law consists of norms. Norms are rules of conduct, rules that say how one should behave. In order to be effective, they have to be known. But making legal norms known is not just in the interest of the ruler. It is also an interest of those subject to a legal norms. It is necessary to ensure predictability. If the law is unknown, people cannot plan ahead and the rule of law is replaced by arbitrary rule. As Winstanley (1651:279) himself observed, when the law is obscure or unknown, the "will of judge and lawyer" rules instead of "the letter of the law." Free access to legal knowledge and legal predictability are thus related.

In every society, some norms are not known. Several solutions can be offered to this problem. One possible solution is to mask the difference by using legal fictions. In English law a number of legal fictions of this kind appeared. Those parts of English law created by judges were seen not as new creations but as statements of rules that were customary in England "since time immemorial." As for legislation, English law created the fiction that all citizens of England were present in Parliament during the enactment of every statute (St. German 1974:279).

A second solution is to give up the ideal of a law known to all and to expand the role of lawyers by having them serve not only as advocates but also as legal advisers. This solution assumes that there is no need for legal rules to be known by all, since when the time comes to use them, anyone can hire a lawyer and act on her advice. This solution is theoretically problematic because some people lack the means to hire a lawyer and also because sometimes one does not have the time to consult one.

A third solution is to impose a duty of constantly learning the law on every individual. This is the solution Jewish society found to the problem of knowing the *Halachah,* Jewish law (Cover 1983). This solution demands individual sacrifices, and can therefore succeed only where the duty to learn the law has an extralegal source, for example, where it becomes a religious duty, as indeed is the case in Judaism.

A fourth solution is to demand a reform of the legal system so that legal rules would be universally known. This was the one of the sources of motivation of the Continental codification movement in the 18th and 19th centuries, and it was also the solution proposed by the Radicals. They demanded a reform of the structure of the legal system by codifying legal rules, translating legal rules into the vernacular, and limiting the power of those perceived as barring the access to the law—lawyers and judges. They also wanted to change the content of legal rules, by making particular rules derive from the general principles of natural law, principles supposedly known by all.

The demands of the Radicals for laws that would be known by all appeared at a time when there was a growing concern about the gap between lay and professional knowledge of the law. Throughout the Middle Ages, the importance of English local customary law diminished and the importance of the national, common, and statutory law increased. The hundred years between the middle of the 16th to the middle of the 17th century were, it seems, the turning point when a general unified English law truly replaced local customs. This was the period when the scope of statutory activity increased dramatically, and a truly modern profession of lawyers appeared (Prest 1986). It was also a period when the interest in the problem of legal knowledge grew. Christopher St. German, John Rasteel, and Thomas More all discussed this problem (Goodrich 1990:82). The extent of lay knowledge of the rules of law in early modern England is in dispute (Shapiro 1974:450; Sharpe 1985; Prest 1987:4, 86), but at least in Radical sources, one finds time and again the complaint that "if any say [that] the old king's laws are the rule, then it may be answered that those laws are so full of confusion that few know when they obey and when not" (Winstanley 1651:283).

When the Radicals confronted the problem of unknown laws, they decided that the problem stemmed from a process of corruption of the law similar to the process of corruption that religion had undergone since the days of the early church. Accordingly, they believed that the solution to the problem of legal knowledge was to return to the times of a pure law known to all. I now examine how the Radicals sought to make law known to all by codifying it, by translating it into English, and by regulating those who, they believed, created the problem—lawyers and

judges. I also show how each of these demands echoed certain Protestant themes.

II. Religion as a Source for Structural Reforms of the Legal System

One of the major demands of the Radicals was that English law be replaced by codified law. The notion of codification is an old one. It had long since appeared in the ancient world. However, it is common to distinguish between two types of codification, ancient and modern. Ancient codes, like the laws of Hammurabi, the Twelve Tables, or the Germanic codes of the Middle Ages were based on customary law, and were usually just compilations of existing legal material. Modern codes, on the other hand, are designed to create a body of law that is "one logically ordered, coherent body" (Varga 1991:72; see also Haskins 1955; Simpson 1981) and is often based on new norms (found, for example, in natural law rather than in customary law) (Kelly 1992:260–65). The notion of modern codification is usually attributed to the spirit of the Enlightenment, but it may have already emerged in the 17th century (Haskins 1955) and, in fact, one of its early manifestations was to be found in the legal thought of the Radicals.

The Radicals did not use the term "codification" (which was invented only in the 18th century). Instead they demanded "methods" of law or wanted to "abbreviate" the law or "digest" it "in a small book." But an examination of their demands reveals that what they demanded was in fact a "modern" code. Law reform was connected in Radical thought with a general utopian desire to create an ordered, uniform, and complete society, and this was reflected in their conception of law, which also had to be ordered, uniform, and complete (Walwyn 1649:391; Shapiro 1974:433; Davis 1981:87). Existing English law, the Radicals argued, was intricate and inaccessible (Lilburne 1646:11; Winstanley 1649d:143; 1650a:361). They therefore wanted a law that would be based on the natural law and would be arranged in a simple, systematic, methodical fashion in one small book.

What inspired this desire for codification? One source was the application of the Protestant ideal of simplicity to law. The Radicals demanded "plain" laws that could be understood by simple people (*Mournfull Cryes* 1648:277; Lilburne 1645:37, 1648:13; Winstanley 1651:346). In addition, they demanded not just "plain" laws but "written" laws as well. This demand echoed the Protestant ideal of *Sola Scriptura*. The Protestant emphasis on the written word influenced the demand for codification in the 1640s in Massachusetts, and it influenced English Radicals as well (Haskins 1968:123; Lilburne 1646:12; *Mournfull Cryes* 1648:277).

Codification was also connected with the desire for a methodical arrangement of knowledge. This desire stemmed in part from Protestant thought. Calvin demanded the methodization of theology, and so did his English followers. Truth should be studied, said Richard Baxter, "till it be concocted into a clear methodical understanding and the scheme or analysis of it have left upon the soul its proper image by an orderly and deep impression" (Miller 1939:95). The New England colonists thought that "method is the parent of intelligence, the master of memory" and that "truth is methodical, error lies latent in confusion" (ibid., pp. 95, 139). The Calvinist obsession with methodization of theology was not the result of an interest in methodization for its own sake. The English Puritans believed that everyone, not just churchmen, should study theology. The methodical arrangement of theological knowledge was meant to assist laymen in the memorization of this knowledge, because order and method were considered as essential for memory. Theology was to be organized in a way that would enable it to be "understood, known and committed to memory." The Puritans therefore devoted a large proportion of their theological effort to writing "methods of divinity"—theological treatises that arranged familiar religious knowledge methodically (Miller 1939:97, 139, 140, 366; Little 1969:204; Yates 1966:17, 229, 269, 350).

During the English Revolution, both radical and moderate reformers were influenced by this obsession with method. The moderate reformer, William Sheppard, attempted to compose a digest of the common law whose goal was "[to bring] an orderly deduction of our laws from their chaos into methodical form" (Matthews 1984:125–26). Method was also a key word for Winstanley (1651:379), who called the code of laws he wrote for his utopian community "a method of laws whereby a commonwealth may be governed."

The Puritan obsession with the diffusion of religious knowledge influenced the structure of legal codification, but it also influenced its form. The Calvinist model for an instrument of knowledge diffusion was the pocket-sized Bible—a book containing all that a man should know, in a small format, easily carried around (Morgan 1986:15). This pocket-sized Bible served the Radicals as a model for the form of their proposed code. The Radicals demanded "a new little book of only useful statutes." They asked that all laws "might be reduced to a smaller number, to be comprised in one volume" and that "the great volumes of law would be reduced into the bigness of a pocket book" (*Case of the Armie* 1647:216; Winstanley 1651:377; Woolrych 1982:263, 271).

The Bible also provided the Radicals with a historical example of codification. Lilburne used the Bible as an example of a book of simple, written, and clear laws. In addition, the Biblical

code provided Lilburne with a precedent for his idea about the importance of the duty of legal self-education. God, said Lilburne (1646:12–13), gave the Israelites "a short, plain and easy to be understood law," one that could be "published and taught unto the people." This idea also appeared in Winstanley's works. "Short and pithy laws are . . . best," said Winstanley (1651:377–78) because "the laws of Israel's commonwealth were few, short and pithy." Ignorance of the law, he added, causes conflicts between Englishmen, but "if the laws were few and short and often read, it would prevent those evils . . . as Moses' laws in Israel's commonwealth."

One of the demands stemming from the Radical ideal of knowledge was that works written in Latin should be translated into English. The first attacks on the use of Latin were on its use in religious texts. Seventeenth-century Englishmen used an English Bible, and the Puritan plain style made some ministers avoid the use of "Greek and Latin phrases and quirks" in their sermons, but knowledge of Hebrew, Greek, and Latin was still deemed necessary for clergymen. The Radicals rejected this Puritan tradition. They saw the demand for proficiency in foreign languages as an attempt by educated clergymen to monopolize religious knowledge for selfish reasons. The interest of the clergy, explained Walwyn (1643:45–48; also 1644:28), was to persuade the people that they could not understand the Scriptures "without their help and interpretation."

The use of English in legal proceedings was a major demand of reformers, both radical and moderate (Lilburne 1646:11–13; *Foundations of Freedom* 1647:301, 303; *Mournfull Cryes* 1648:276–77; *Agreement of the Free People of England* 1649:406; Winstanley 1649e:123), and it was one of the few areas where reform was indeed achieved. Two statutes enacted by Parliament in November 1650 and April 1651 decreed that the language of the Courts should be English (Nourse 1959:516). The use of French in the legal system made the Radicals discuss anglicization of the law in the context of the Norman Yoke myth (Winstanley 1649e:123–24; *To the Supreme Authority* 1648:266–67). According to this myth, the laws of England were Norman laws established by William the Conqueror and his descendants. Because the Norman occupation of England was illegal, the laws enacted by the occupiers were illegal too. These laws should be abolished and replaced by the just laws enjoyed by Englishmen in Anglo-Saxon times, and the use of Law-French in legal proceedings should also be abolished (Hill 1964). The secular tone of the myth hid millenarian expectations linking the liberation of Englishmen from the Norman yoke in the secular sphere to the liberation from the "Babylonian yoke" of Catholic Rome in the religious sphere (Tucker 1984:79). This link was especially dominant in the pamphlets of the Radical Levellers, in which the use of Law-

French was attacked using explicit apocalyptic imagery (*Light Shining* 1648:617).

Like the demand for codification, the demand for anglicization of the law was fueled by the desire to make legal knowledge accessible to laymen. The Radicals stressed time and again that anglicization was needed so that every commoner might understand his own proceedings (*The Case of the Armie* 1647:216). The use of foreign languages was also seen as a tool of lawyers and clergymen to deceive the people and rule them. For example, Lilburne (1645:7–8) compared the use of "peddler's French" by the lawyers to the use the priests made of Latin "in the days of old, before the Scripture was tolerated to be in English."

As was often the case in 17th-century pamphlets, one of the sources of justification of the demands for anglicization was found in Biblical precedents. The Bible, said Lilburne (1646:11, 13), tells us that God gave the people a law in their own language. This was true of Adam and was true of the Israelites. The Radicals often quoted Deuteronomy 30:11–14, "for this commandment which I command thee . . . [is] *in thy mouth* and in thy heart that thou mayest do it" in support of their contention. This Biblical quotation also led some Radicals to see the use of foreign languages as religious sin and to see anglicization of the law as a religious duty (Walwyn 1645:2–3).

Reform of the legal profession was also a major demand of the Radicals. Almost every Radical pamphlet calling for law reform mentioned the need to reform the legal profession. Radical criticism of lawyers had strong religious roots. Lawyers were traditionally seen as un-Christian sinners (Prest 1986:218; Brooks 1986:133–34), and the Radicals repeated this criticism. Lilburne (1645:37) described lawyers as "deadly enemies to the . . . true ministry of the Gospel." Walwyn (1645:179) and Winstanley (1650a:362) followed. But the Radicals did not use just the traditional arguments. Radical criticism of lawyers was also based on their ideal of knowledge.

Both lawyers and clergymen were often criticized simultaneously (Hill 1974b). Both were seen as playing the same role—confusing, complicating, and corrupting knowledge against the interest of the people "on purpose to procure themselves work in the interpretation" (Lilburne 1645:35). Winstanley (1651:362, 364–65), for example, distinguished between two kinds of knowledge—practical knowledge, such as agricultural knowledge, and "traditional knowledge." The second kind of knowledge, said Winstanley, is typical of "both clergy and lawyers." This kind of knowledge, he said, is the cause of all the trouble in the world. One goal of Winstanley's utopian society was therefore the abolition of "traditional" knowledge and its carriers—lawyers and priests.

Another aspect of the Radical critique of both lawyers and priests was based on the Protestant idea of calling. Christian theology distinguished between practicing a profession for gain, which was considered a sin, and practicing it in order to serve the community. Christian theology defined knowledge as something that could be sold, and argued that those who possess knowledge should distribute it freely. In Protestant theology, legitimate callings were often also associated with manual labor (Weber 1958: 79–92; Le Goff 1977). The Radicals took all these criteria—benefit to the community, free knowledge, and the value of manual labor—and used them to criticize both lawyers and the clergy. Clergymen, said Lilburne (1645:13), have no rights to tithes, "considering that they never labor for it with their hands, nor earn it with the sweat of their brows." The Radical Levellers called the king, nobles, lawyers, and clergy rebels against God because "they live without a Calling," explaining that "[Lawyers and Clergy] are rebels against God's command, for saith he 'In the sweat of thy face thou shall eat bread': by 'thou' is meant all mankind, none exempted" (*More Light* 1649:633). Winstanley (1645:364–65) added that the knowledge of priests and lawyers "is an idle, lazy contemplation," as opposed to practical knowledge which is "laborious."

The two professions were criticized not only because they did not require manual labor but also because they were not callings benefiting the common good. Lawyers and clergymen were described in Leveller works as beasts who destroy the wealth of the state—the images most often invoked were "locusts," "vermin," and "caterpillars" (Lilburne 1645:35, 1648:13; *Light Shining* 1648:615). "Lawyers," said one Radical pamphlet, "are as profitable as maggots in meat, and caterpillars in cabbage, and [as] wolves amongst lambs" (*Light Shining* 1648:617).

English judges were subject to the same critique as lawyers. Judges and lawyers were both seen by the Radicals as servants of the Normans, and both were accused of selling justice for money (Lilburne 1645:13; Overton 1646:15). One unique Radical criticism of judges was connected to the Protestant emphasis on literal interpretation of the Bible, summarized in the doctrine of *Sola Scriptura.* This doctrine first appeared in Martin Luther's theology. According to Luther, the Holy Scripture, not the church, is the supreme source of religious authority, and the Scripture must be interpreted according to its clear, simple, and literal sense, without recourse to the discretion or will of human interpreters (Althaus 1966:72–78).

Just as French or German codifiers sought to limit judicial discretion by insisting on literal interpretation of the law, so did the Radicals, but in Radical thought, this insistence grew out of religious ideas. Winstanley, for example, claimed that both priests and judges refused to follow the literal meaning of their

respective texts. He argued that the legal system's basic problem was that "in many courts and cases of law, the will of a judge and lawyer rules above the letter of the law" (Winstanley 1651:279, 335–37, 1649a:188). Winstanley also used the same arsenal of images to describe the process of interpretation by judges and priests, speaking in both cases of "dark interpretations" or of "black" interpretations (Winstanley 1650b:246–47, 1651:351). Therefore, he concluded, the "bare letter of the law" should be the only measure of truth, to which he added a proposal to forbid interpretation completely. Interpretation of the law was to be forbidden not only when done by judges but also in the law-reading ceremony that Winstanley planned to establish in his utopian community. The man reading the laws to the congregation, said Winstanley, should not interpret these laws, for that would confuse his listeners for "multitude of words darken knowledge." Interpretation was also to be forbidden because "the reader will be puffed up in pride . . . [and] that will prove the father and nurse of tyranny as at this day is manifested in our ministry" (Winstanley 1651:288, 345–46, 379).

Another proposed Radical reform of the judiciary was that judges would be elected laymen. This was not an original Radical idea. Laymen traditionally served the English legal system as justices of peace and as jurymen. In early New England, all judges were laymen, and were proud of it, to the extent that in Rhode Island a man was tried for contempt of court for calling a judge a "lawyer" (Hill 1974a:152; Warden 1978:679). In Radical thought this idea had religious roots. The election of judges that Radicals proposed was similar to the way ministers were elected in Protestant sects. The demand that judges be laymen was also based on the Radical ideal of knowledge and on the central role that lay elders played in such sects as the Baptists (Weber 1946:317). The Radical Levellers, for example, demanded that the government be by "judges called Elders, men fearing God and hating covetousness: those to be chosen by the people . . . to end all controversies in every town and hamlet" (*Light Shining* 1648:615–16; *More Light Shining* 1649:638–39). Winstanley hoped that lawyers or judges would not be needed in his utopian community because "the bare letter of the law shall be both judge and lawyer." However, Winstanley did believe that there would still be a need for officials to enforce this law. These officials, said Winstanley, would be elected each year in every community, a system of election which was also to be used for the appointment of ministers (1651:288, 317, 319, 345).

A parallel demand of the Radicals was to strengthen the role of the jury in the legal system. The Levellers often demanded that a jury be used in all trials, but sometimes they also demanded that the scope of its powers be enlarged so that jurymen would be allowed to decide questions of law as well as questions

of fact (Lilburne 1646:15; *Foundations of Freedom* 1647:291, 302, 303; *Agreement of the Free People of England* 1649:397, 408; Walwyn 1650:1–2; *Declaration of the Wel-Affected in the County of Buckinghamshire* 1649:643–44). Some moderate law reformers wanted to abolish the jury altogether. This was opposed by the Levellers. The desire to abolish the jury, said Walwyn (1650:6–7), was the result of a fear of simple people dealing with law. Those opposed to the jury wanted the people to "remain as ignorant of the laws of the land as in [the] time of Popery they were of the laws of God."

III. Religion as a Source for the Norms of the Legal System

A major demand of the Levellers was that positive legal rules were to be derived from the general principles of natural law (Overton 1647; *To the Supreme Authority* 1648; Rogers 1988:56). Some Radicals even demanded that positive law be replaced completely by natural law (Hill 1975:275; Warr 1649:224). The insistence on the use of natural law was sometimes seen as proving the "secular nature" of Radical thought. This claim was based on the fact that in the 17th century a secular natural law doctrine did appear. However, one should not be misled by this fact. The natural law doctrine of the Levellers was not "secular." It was the classical Christian doctrine, which the Levellers found in the works of Christopher St. German and Puritan writers (Troeltsch 1981:714; Davis 1973). It was based on religious assumptions—the heavenly origins of the principles of natural law written by God in the heart of each human being. In some Radical works, the classical theory also became incorporated into a religiously based conception of human knowledge.

The Radicals were fervent believers in the strength of human reason. This belief also influenced their demand that positive laws be altered in accordance with natural law. The principles of natural law, they believed, could be discovered by every individual's reason (Overton 1647:159; Hill 1974c:109–10). Winstanley, for example, insisted that the strength of human reason can serve as the source of legal norms. "What need then have we of any outward, selfish, confused laws," he said, "when we have the righteous law written in our hearts teaching us to walk purely in the creation" (Winstanley 1649b:283–84, 288; 1649e:119). Although Winstanley did not say so explicitly, his words suggested that natural law was seen as providing the answer to the problem of legal knowledge. Instead of "confused [human] laws" Winstanley envisioned a legal system based on norms derived from natural law that would be known to all men, being "written in our hearts."

Religion did not just form the basis of the Radical theory of natural law. It also provided the Radicals with the specific content of the principles of this law. When the Radicals asked themselves what the principles of natural law were, they gave two answers, both based on Biblical sources. One possible answer was to claim that all the principles of natural law were summed up in the Golden Rule found in Matthew 7:12—"all things whatsoever ye would that men do to you, do ye even so to them." This claim was not original. It appeared frequently in natural law treatises (McNeill 1946; Berman 1983:65, 569). The Radicals repeatedly referred to it (Overton 1645:15; Lilburne 1649:20; Walwyn 1643: "To the reader"). Another source for the rules of natural law was found in the "moral laws" of the Bible—the Ten Commandments. The Ten Commandments were traditionally viewed in Christian thought at that time as the perfect summary of natural law, and some Radicals adopted this idea (Robertson 1951:60, 71; Troeltsch 1981:503–6).

In any event, whether the principles of natural law were to be found in human reason or in the Bible, the Radicals sought to create a new set of substantive norms, which would be logically derived from a small set of principles. Thus their turn to Reason/Natural Law/the Bible was in fact another aspect of their demand for rationalization of the law. In the legal system they envisioned, law would be known *because* it was to be logically derived from a compact set of generalized principles.

IV. Religion as a Source of Motivation for Radical Law Reform

The desire of the Levellers and the Diggers to reform English law was not caused mainly by economic or political factors. It stemmed from religious doctrines and models. The motivation of some of the leaders of the Leveller movement was based on the doctrine of "Practical Christianity." According to this doctrine, the essence of Christianity was not religious belief but Christian behavior. Part of the duty to act in a Christian manner was to act in the secular sphere against all forms of oppression, including the oppression caused by the state of English law (Walwyn 1643, 1649:388; *The Case of the Army Truly Stated* 1647:219)

Radical activity for reform of the secular world was seen not only as a religious duty but also as a religious act, an act of martyrdom. In 1649, Lilburne said that his political activity was the consequence of a religious conversion experience he had undergone 13 years earlier, when he had promised God "to glorify him with my body by righteous and just actions amongst the sons of men" (1649:20). Walwyn too argued (1649:388) that the Levellers were not intimidated by the opposition to their activity, since "[it] is nothing so much as our Blessed Master and his Followers

suffered before us." Both implied that their political actions were also acts of martyrdom, symbolic imitations of the suffering of Christ.

Some Radicals also saw themselves as prophets and made abundant use of prophetic style. Lilburne's pamphlets (1645:36) offer an example of the use of prophetical style while advancing law reform demands, but Lilburne was not the only prophet among the Radicals. The pamphlets of Winstanley (1649a:61–62) also employ prophetical rhetoric.

One of the main justifications for legal reform in Radical literature was the Norman Yoke myth mentioned earlier in this essay. Christopher Hill (1964:57) and Brian Manning (1984:85) have both claimed that the Norman Yoke myth was a "secular myth." However, structurally, the Norman Yoke myth was typical of Christian Golden Age myths—myths that refer to a purer past. The archetype of all these myths was the myth of the original sin. This myth influenced in turn the development of the "pure primitive Church" myth. In England, a local variant of the "pure primitive Church" myth evolved. According to this variant, the Anglo-Saxon Church was pure. It was corrupted by professional clergy brought from the continent by William the Conqueror with the blessing of the Pope. Since the Anglo-Saxon church was conceived as holy, it was not surprising that Radical literature demanded readopting of "holy" Anglo-Saxon Laws. Thus one sometimes finds in Leveller pamphlets the claim that Anglo-Saxon laws were more just and reasonable than any other laws (Hill 1964:57, 65).

The Norman Yoke myth also influenced Digger legal thought, but it did so in a different manner. The Diggers did not attempt to restore England to its preconquest glory (Winstanley 1649b:292). Their agenda was much more ambitious. They strove to bring about the Millennium. In Digger thought, the Norman Yoke myth was incorporated into a millenarian-oriented conception of history. The myth was linked by the Diggers to England's role in the appearance of the Millennium. England, said Winstanley (1650a:385), "is the first of nations that is upon the point of reformation, and . . . England must be the tenth part of the city Babylon that falls off from the beast first." Winstanley discussed the Norman Yoke myth as a part of the cosmic struggle between good and evil that goes on through the ages. The Norman Conquest, he claimed, was only the last of a series of "yokes" laid on the poor masses by the ruling classes (Winstanley 1649c). Reforming the law was seen in this context as part of the process of the coming of the Millennium.

V. An Addendum: The Radical Roots of Demands for Legal Rationalization and the "England Problem"

One of the debates spawned by Weber's sociology of law has been devoted to an analysis of "the England problem"—the question how could capitalism have emerged in England, if England did not possess a formal-rational system.[6] Because the theme of this article is the relationship between Protestantism and law, *not* between capitalism and law, and because of the limited scope of this article, I do not wish to take sides in this debate. I do, however, want to emphasize two points which may follow from my discussion of the legal thought of the Radicals and to suggest that these points may be relevant to future discussions of the England problem.

Most of the works dealing with the England problem have focused on the question of contradiction. Is the England problem an indication that Weber's theory was fatally flawed when applied to historical facts? Or can sociological theory and empirical reality be reconciled? Basically, there have been two opposing ways to deal with this issue. One way was to see the England problem as an indication of the unbridgeable chasm between theory and fact. This, for example, is Trubek's approach. Trubek identified three, contradictory, ways in which Weber sought to overcome the problem. First, Weber attempted to show how the English legal system promoted capitalism despite a low degree of predictability. Second, Weber claimed that the English case was unique, and in other places his theory was still valid. Third, Weber argued that there was a sufficient degree of predictability in the English system to encourage capitalism (Trubek 1972:747–48; see also Trubek 1985). Each of these propositions contradicts the other, and none of them can satisfactorily resolve the problem. In a similar vein, Kronman's (1983:123) description of Weber's treatment of the England problem, like Trubek's, is bent on exposing the contradiction in Weber's thought. According to Kronman, Weber wavered between the assertion that capitalism thrived in England because in certain senses the English legal system guaranteed a degree of legal predictability *despite* its lack of rationality, and the assertion that capitalism thrived in England *because* English law was never rationalized.

Trubek, Kronman, and others (Hunt 1978:127; Cain 1980: 71–76) have seen the England problem as an example of the weakness of Weber's theoretical scheme. Another approach has been to reconcile theory and historical fact. Ewing, for example, attempted to defend Weber from critics like Trubek by arguing that the England problem never existed, because Weber did not

[6] See generally Weber 1968:814, 891–92. See also Trubek 1972, 1985; Hunt 1978; Cain 1980; Turner 1981:329–41; Kronman 1983:118–46; Ewing 1987; Newton 1987; Sterling & Moore 1987; Feldman 1991; Coutu 1993.

claim that there was a direct correspondence between the economic process of rationalization and the creation of a system of formal-rational mode of *legal thought.* Instead, she argued that Weber linked capitalism not with a formal-rational legal *structure* but with a formal-rational system of *administration of justice* (Ewing 1987:489). A similar approach has been suggested by Coutu, who argued that Weber recognized that economic and legal rationalization were not necessarily compatible and that legal rationalization could indeed lead to economically "irrational" results (Coutu 1992:73; Turner 1981:331–32).

Many of the participants in the England problem debate seem to share certain assumptions. First, they seem (at least implicitly) to presume that demands for a rational legal system never appeared in England. Second, the discussion of the England problem has tended to accept Weber's supposition that rationalization reflects either the economic interests of bourgeoisie or (to a greater extent) was the result of the "intrinsic intellectual needs of . . . an aristocracy of legal literati" (Weber 1968:855).

The story of Radical demands for law reform told in the preceding sections offers a different perspective of the England problem (assuming one accepts that there is indeed a problem and that the whole debate does not rest upon fundamental misunderstandings of Weber's sociology). First, the story shows that demands for legal rationalization *did* appear in England. These demands were rejected. Thus the questions one asks should *not* be how did the English legal system facilitate capitalism despite its lack of formal rationality, or why isn't a formal-rational legal system necessary for economic development, but rather, why were the demands for legal rationalization *rejected* when they appeared in England in the middle of the 17th century.

Second, the story of Radical law reform shows that demands for legal rationalization were often associated not with the interests of the "legal literati" or of the bourgeoisie, but with those of the lower or lower-middle classes. That was the case with the Diggers and the Levellers in 17th-century England. It was also the case in other historical contexts, for example, in 19th-century America, where a movement for legal codification, colored by a strong Jacksonian ideology, appeared in the 1820s and 1830s (Cook 1981).

Weber described the process of legal rationalization as being mainly motivated by internal legal factors—the desire of the legal scholars (i.e., the Pandectists) for a more systematic, scientific legal system (Weber 1968:657). This is certainly true in the late-19th-century German case. However, there are some cases, such as the case of 17th-century England or 19th-century America, where demands for legal rationalization generally, and codification specifically, were associated with the revolutionary beliefs or

ideologies of the lower classes, not with the needs of legal scholars.

The link that was suggested in this article between the demands for legal rationalization and radical Protestantism therefore offers a possible answer to why legal rationalization failed in England. The English bourgeoisie may have been interested in rationalization, but it also feared it, *because* rationalization was identified with the radical democratic agenda of the Levellers and the even more radical, proto-communist, agenda of Diggers. When this fear was combined with the traditional opposition of English lawyers to any legal change (Weber 1968:853), it is not hard to understand why the process of rationalization was doomed to fail.

The political ideas and the rhetorical devices used by the Radicals reappeared sporadically during the 18th and 19th centuries (Lutaud 1962; Hill 1984:30, 1986a:107; Donnelly 1988). Demands for radical law reform similar to those made by the Radicals appeared in the legal thought of reformers like Jeremy Bentham.[7] These demands, at the center of which was the idea of codification, never took hold in England. Perhaps one reason was that the notion of radical law reform, having been tainted by its early association with discredited radical theology, had no chance of success—the English middle classes wanted to keep any revolutionary doctrine (whether theological or legal) at bay. The balance between desire for rationalization and yearning for theological and political stability resulted, in the specific English context, in legal stagnation.

The remarks just made are not conclusive arguments but suggestions for further research. The impact of 17th-century radical thought on 18th-century English legal or political thought is difficult to prove. Causal links between radical thought and the thought of later reformers may, in any event, be weak or nonexistent. Only further research can tell us if the suggestions offered in this section have any merit.

VI. Conclusion

The Radicals demanded a simple, certain, and predictable legal system. They wanted to replace the chaos of 17th-century English law with codified method and order. They wanted substantive rules which would be derived from the general principles of natural law and which would be easily discoverable by the power of human reason. In short, they wanted to rationalize English law. This desire for rationalization was firmly rooted in their Protestant beliefs. Protestant theology provided the Radicals with

[7] Of course, they may have been unconnected, and in any event, it may be impossible to "prove" the influence of the 17th-century Radicals on the late 18th-century Philosophic Radicals.

an answer to the question of what is wrong with the current legal system and what the shape of the new system should be. The Radicals based their criticism of the existing legal system on an ideal of knowledge whose roots were religious, and whose influence could be seen in every specific demand for legal reform they made. The Radical demands for codification and anglicization of the law were based on the Radical ideal of knowledge: on the desire for simplification of the law and on the belief that all people should know the law. Other sources of the demand for codification of the law can be found in the Puritan obsession with methodization of knowledge and in the use of the Biblical code as an example of a code written in simple language and accessible to all. The Radicals compared lawyers and priests, a comparison derived from their ideal of knowledge. They argued that both lawyers and priests blocked access to knowledge that should have been available to all. The Radicals used the Protestant doctrine of calling to criticize both professions. The belief in the power of simple and uneducated people to know the truth influenced the suggested reforms of the judiciary. Some Radicals stressed the role of laymen both as judges and as jurymen. Their ideal of knowledge led them to demand that professional judges be confined to literal interpretation of written laws, a demand that first appeared in the context of biblical exegesis.

The Radical ideal of knowledge and the Bible also provided the Radicals with an answer to the question what should be the content of the norms of the reformed legal system. In answering this question, the Radicals turned to natural law. Their conception of natural law was the traditional religious conception that assumed that the principles of natural law were easily discoverable by human reason, being written by God in the heart of each individual.

Finally, religion was the source of the Radical motivation for law reform. The Radicals believed that a reform of secular law and society was a Christian duty. Some Radicals used conceptions and terms taken from the Christian martyrological and prophetic literature to describe their activity in the legal sphere. Even "secular" sources of radical motivation, such as the Norman Yoke myth, hid millenarian assumptions.

The fact that Protestant notions and models permeated Radical law reform demands is another example of the intimate relationship between Protestantism and the process of rationalization in the early modern era.

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