*Review Essay**

MAX WEBER'S TRAGIC MODERNISM AND THE STUDY OF LAW IN SOCIETY

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While Max Weber is revered as one of the patron saints of the law and society movement, his views on the nature and limits of sociological studies in law are not fully understood. Using recent analyses of Weber's legal thought (Kronman, 1983) and overall social theory (Alexander, 1983a), the author argues that while Weber set forth the standard, positivist understanding of the sociology of law that influences research to this day, at the same time he critiqued this understanding and in the end despaired that social science could contribute significantly to human emancipation. Arguing that Weber's tragic modernism is an inappropriate guide for law and society studies today, the author suggests an alternative vision in which the sociology of law is seen as part of a pragmatic enterprise of social transformation.

> *For all of Weber's rationalist proclivities, he despaired about the possibility of rationally grounding the ultimate norms that guide our lives; we must* choose *the "gods or demons" we* decide *to pursue. With the disenchantment of the world that results from the ineluctable processes of modernization which destroys the foundations of traditional worldviews, we are left with a void. Weber bequeathed to us unresolved tensions and* aporias. (Bernstein, 1985: 5).

I. READING THE CLASSICS

Those of us who belong to the community of scholars that in the United States calls itself the law and society movement have treated Max Weber as one of our patron saints and regarded his work on law as among our classics. Weber, who was

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* A review essay of Kronman, Anthony T. (1983) *Max Weber*. Stanford: Stanford University Press; and Alexander, Jeffrey C. (1983) *Theoretical Logic in Sociology, Volume III. The Classical Attempt at Theoretical Synthesis: Max Weber*. Berkeley: University of California Press.

This paper was originally presented in 1984 at the Seminar on Legal Ideology, in Amherst, Massachusetts, where the author had the opportunity to discuss these matters in a particularly stimulating environment. Rick Lempert suggested I undertake this project, and provided support and insightful criticism throughout. John Esser gave me invaluable assistance and advice at all stages of the project. Stewart Macaulay, Fernando Rojas, and Jack Schlegel provided helpful comments on an earlier draft.

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originally trained as a lawyer and legal historian, wrote about law and legal institutions at various points in his career. But the text that has been seen as the key to his ideas about the law is the section of his *Economy and Society* that Weber's original editors posthumously dubbed "The Sociology of Law" (Weber, 1968: lxxxi). Like so many classics, this text is more often cited than studied. But in recent years we have witnessed renewed interest in Weber's ideas about law in general and in "The Sociology of Law" in particular. This new interpretative literature allows us to reconstruct Weber's complex ideas more accurately and to reappraise their significance for the movement in which we participate.

John Esser, Laurel Munger, and I have compiled a bibliography of all the major recent articles and books that contribute to the reconstruction and reappraisal of Weber's "Sociology of Law" (Trubek, Esser, and Munger, 1986). It would be useful to have a summary of this rich literature, but that is not my intent here. Rather, I want to use the literature, and particularly the books on Weber recently published by Anthony T. Kronman (1983) and Jeffrey Alexander (1983a), as background for an inquiry into a particular issue that interested Weber: the nature of our practices as legal sociologists and the status of the knowledge these practices produce. I shall call this the question of sociological knowledge about the law. Weber was one of the first scholars to identify a distinctly sociological form of knowledge about law and to distinguish it from the knowledge of the jurist (or legal scholar) as well as from that of the practicing lawyer. Weber's formulation of a unique domain of sociological knowledge about law derived from his more general ideas about social science. I believe that Weber's approach to this issue is flawed, but I think we must understand it more fully before we can criticize it. The two books under review, and particularly Kronman's meticulous reconstruction of Weber's ideas about law, allow us to conduct such a reappraisal.

It is first important to know how each of these books relates to the theme I shall pursue. Kronman's *Max Weber* is one of a series entitled "Jurists: Profiles in Legal Theory." Books in this series introduce the work of major legal theorists to a general audience. The editors are to be congratulated for having had the vision to include Max Weber among a list that focuses primarily on recognized philosophers of law like H.L.A. Hart, John Austin, and Lon Fuller. And they are further to be praised for selecting Kronman to write the volume on Weber. Trained as both a lawyer and a philosopher, Kronman chose to approach Weber's ideas about law from a philosophical rather

than a sociological perspective. His central argument is that Weber's writings on law, and particularly "The Sociology of Law," can be best understood if Weber's legal theory is seen in light of his philosophical commitments. Using Weber's epistemology and ethics as the key to interpretation of a difficult and at times contradictory text, Kronman reconstructs Weber's thought about law and legal sociology. Although it seems paradoxical, Kronman's philosophical approach has proved more fruitful than prior interpretive efforts grounded in the sociological tradition. The result is a lucid and accurate reconstruction of "The Sociology of Law" that should form the starting point for future scholarship on Weber's legal ideas.

Elsewhere I have offered a detailed analysis and appraisal of Kronman's overall thesis (Trubek, 1985). Kronman shows that Weber's ideas about the nature of social science and the nature of law are themselves part of a deeper level of philosophical commitment that Weber developed primarily in his methodological writings. This deeper level of Weberian thought provides a structure around which many apparently disparate passages in "The Sociology of Law" can be harmonized, and thus shows that Weber's complex and incomplete text has more unity than was originally thought. Kronman does not merely try to demonstrate the unity of Weber's thought; he also brings to light the deep contradictions within Weber's ideas. Kronman's ultimate conclusion is that Weber's theory of law and his ideas about the nature of society and social science were contradictory and reveal his apparent "intellectual or moral schizophrenia" (1983: 185). By highlighting the contradictions, or *aporias*, in Weberian social theory, Kronman helps us see more clearly the issues we must confront if we are to transcend the Weberian legacy. He does not, however, offer any guidance as to how to approach this task.

Alexander's project in *The Classical Attempt at Theoretical Synthesis: Max Weber* is very different from Kronman's *Max Weber*. But its relevance to the question of sociological knowledge about law is no less direct. Alexander is not primarily interested in explaining or reconstructing Max Weber's sociology, nor is "The Sociology of Law" a focus of his attention, although his book does include a section on Weber's legal ideas. For Alexander, the Weber volume represents a part of a larger intellectual project in which he tries to redefine the nature of sociological theory. The overall work, entitled *Theoretical Logic in Sociology*, contains an introductory volume entitled *Positivism, Presuppositions, and Current Controversies* (Alexander, 1982a) and, in addition to the book on Weber, volumes on Karl Marx

and Emile Durkheim (Alexander, 1982b) and Talcott Parsons (Alexander, 1983b). The volume on Weber evaluates his thought in general, including his views on law, in light of Alexander's larger project. However, Alexander adds little to our understanding of Max Weber's *legal* thought. Indeed, it is unfortunate that he did not have a chance to study Kronman before writing the short and rather disappointing section that covers "The Sociology of Law;" for Kronman's reconstruction would have helped Alexander situate "The Sociology of Law" within his overall account. Nevertheless, Alexander's study is useful. Like Kronman, he is concerned with the philosophical and methodological foundations of Weberian sociology, and he reveals some of the contradictions at the core of the Weberian system. Moreover, unlike Kronman, who seeks only to explain Weberian thought with all its contradictions, Alexander wishes to reconstruct sociology itself. So while his account confirms Kronman's analysis of the flaws in Weber's thought, Alexander also offers an alternative approach to sociology that he believes will overcome these flaws.

The central questions that Alexander addresses are: (1) Can sociology be an objective science?, and (2) If so, is positivism, with its separation of fact and value and its emphatic commitment to empirical inquiry, the sole mode of objective study? For the positivist, social science is objective to the extent that it deals only with questions of fact and not issues of value. By drawing a bright line between the realms of fact and value, and then restricting social science to the realm of fact, the positivist approach appears to solve the objectivity problem. For Alexander, however, this answer is unacceptable. In fact, the first volume of his treatise (and in a sense the whole work) could be read as a polemic against the positivist answer to the puzzle of an objective science of society. Alexander rejects this view of social science because, he says, it truncates the nature of sociological theory, reducing theory to generalizations about empirical statements. Alexander thinks this kind of reductionist thought leads to bad theory *and* bad empirical work. In place of the positivist notion, Alexander offers his own conceptualization of social science, a vision he labels "post-positivist." The post-positivist, he asserts, recognizes that social science is a multidimensional activity in which considerations of a general and metaphysical nature are as important as empirical findings, and in which all levels, from the most basic presuppositions about social life to the most minute empirical findings, have their independent yet related places.

Alexander's rejection of positivism rests largely on his

reading of contemporary thought in the history and philosophy of science. He claims to have been influenced by thinkers like Thomas Kuhn, who have challenged traditional notions of the relationship between theory and data in natural science. Writers in this tradition have noted that what we call "facts" are actually constructed by our theories, so that the positivist notion of fact as the test of good theory is naïve at best. Historians of science have demonstrated that theoretical change does not necessarily follow the appearance of factual evidence that contradicts existing theoretical paradigms. Indeed, as Alexander stresses, theoretical change can occur only after a process of autonomous debate over theory allows the scientific community to match empirical anomalies with new theoretical models.

Those whom Alexander calls post-positivists recognize that theory does not derive directly from data and that what we call "data" is often constituted by our theories. They also know that new empirical findings can influence scientific perception only after *theories* have changed so we can recognize the anomaly. For those with such a view of science, it becomes clear that all sciences, including sociology, must have an independent sphere for theoretical debate, one that operates on a plane distinct from the empirical. Alexander's books are rather long briefs arguing for a distinct form of theoretical logic in sociology.

For any ultimate assessment of the Alexander project, it is important to understand his belief that theoretical logic in sociology is general and objective. While stressing that theory is autonomous from data and that theoretical logic includes the most basic notions about how societies are held together and deals with what he terms "metaphysical" issues, Alexander has no doubt that there is a sphere for objective theory. Since he has rejected the positivist's answer to the question of what makes social science knowledge objective—namely that it rests on the mere observation of an external world—one would expect Alexander to put forth a new justification for objectivity. Alexander finds the key to objectivity in a firm commitment to what he calls "multidimensionality." The bulk of his massive study is an analysis of the sociological classics, an extensive review of the literature designed to show the origins of the multidimensional, post-positivist vision he puts forward, to illustrate how this vision was at times employed by the founders of the discipline, and to demonstrate how even great thinkers like Weber often lapsed into "one-dimensional" thought.

As we shall see in more detail, Weber's sociology of law rests on some of the presuppositions that Alexander calls the

"positivist persuasion." Moreover, I contend that some aspects of this approach to social knowledge underlies much of the work being done in the law and society field today. Both Alexander and Kronman help us understand the roots of these ideas in Weberian thought. But they also both demonstrate the contradictions, unresolved questions, and *aporias* in Weber's thought. They show us that Weber articulated a positivist understanding of social knowledge *and then critiqued it as a cultural dead end*. Because these books help us understand the complex—and contradictory—stance that Weber took toward positivism, they will help us understand the continuing relevance of the Weberian project in our own struggles with a positivist account of social knowledge. It is my contention that those of us in the law and society community have tended to appropriate Weber's affirmative views about the positivist solution to the problem of objectivity while denying his critical side.

II. POSITIVISM IN SOCIAL SCIENCE

What then is positivism? Strangely enough, given his purposes, Alexander has very little to say about positivism. He gives only a very summary definition of the term and then illustrates the positivist persuasion in the thinking of several leading sociologists, of whom Robert Merton is the best known. But he provides no analysis of the philosophical roots of the positivist idea nor any speculation about the historical or sociological reasons why this view of sociology has become so pervasive that Alexander feels it necessary to write *four volumes* setting forth an alternative vision of the sociological enterprise.

In his first volume, Alexander (1982a) does offer a brief definition of positivism as the view that there is *necessarily* a radical distinction between factual and nonfactual statements. To this is coupled the notion that only factual statements can be scientific. Accordingly, Alexander states, positivists believe that if sociology is to become a true science it must eliminate all nonempirical statements. In such a situation, sociological theory can be nothing other than generalizations about empirical propositions.

A similar definition of positivism in social science has been given by Thomas Heller in his essay on law and economics (1979). Heller not only sets forth a more detailed description than Alexander; he also relates positivism in social sciences to trends in legal theory and in other aspects of our culture. Heller likewise allows us to see the relations between the sociological positivism Alexander attacks and legal ideas we deal with

every day, and his views permit us to understand Weber's ideas more fully. For Heller, positivism reflects a structure of thought that bifurcates understanding into the following categories:

- subjective versus objective
- normative versus factual
- expressive versus verifiable
- random versus determinate

Further, he argues that positivist thought privileges the right-hand set of characteristics; positivism in social science is the belief that knowledge is only scientific if it is based on verifiable statements about factual regularities that express determinate states of the world. Thus Heller asserts that positivism limits valid knowledge to that which involves either purely logical or exclusively empirical propositions. In addition, positivism rests on the assumption that there are regular and invariant relationships among empirical entities, which means that each statement of theory can "yield predictions of determinate states of events when specified sets of empirical conditions are present." The essence of positivist thought, Heller states, "has been a quest for the certainty of a knowledge free from presuppositions." This quest, if carried out, would "result in a body of knowledge expunged of all the arbitrariness or indeterminancy associated with all varieties of subjective understanding" (ibid., p. 187).

Heller's summary of "the structure of positive science" is especially instructive:

> A positivist epistemology is constructed upon a radical distinction between scientific and normative knowledge. The essence of the method is a stipulation that all that is to count as knowledge is either confessedly logical or genuinely empirical. That is, the truth of any proposition is either a function of tautology or is demonstrable because its terms refer in an immediate way to some reality or aspects of reality that can be apprehended through the senses. In its ideal form positivism relies on a method of inductive empiricism and asserts that the data of experience force upon us definite modes of description and classification of real phenomena. Science stands in a subject-object relationship to its study: a world which is external to the actor in that its constitution is not a function of the scientist's attribution of meaning . . . (ibid., p. 195).

III. POSITIVISM AND LEGAL THOUGHT

Heller's description of what Alexander has called the positivist persuasion in the social sciences helps us see more clearly the

epistemological roots of that brand of social science that Alexander attacks. But my reason for referring to Heller is not just to add one more definition of positivism to an already overlong list. Rather, the special importance of his argument lies in the way he relates positivism in the social sciences to a particular view of the law and then asserts that both are part of the same cultural structure that he calls "liberalism." As we shall see, Weber followed a similar route, but in a more convoluted and tortured way. Thus understanding Heller's argument will help us to understand Weber's particularly complex (and ofttimes contradictory) telling of the same story. Heller's simplified and schematic analysis of positivism in social science and law creates a grid we can use to analyze Weber's more complex ideas and tortured arguments.

Heller asserts that there is a view of the nature and purpose of law that corresponds to or, in the jargon of structuralists, is structurally homologous with, the positivist vision of social science. This philosophy of law, which Heller calls "liberal jurisprudence," seeks to eliminate normative choice from legal decision making, just as positivist social science seeks to expunge normative questions from its domain.

At first blush the idea of a legal system that eschews normative choice seems to be inherently implausible. But as Heller explains the concept, the nature of the move to expunge normativity from what seems to be a necessarily normative discipline is not as unfamiliar as it may seem. Heller actually identifies two modes or moments of this form of liberal jurisprudence—the classical moment, which is usually called formalism, and a modern moment, which Heller sees at work today in the law and economics movement. While the formalism of classical legal thought and the contemporary jurisprudential movement of law and economics may seem worlds apart, Heller shows that they in fact have one feature in common: They both aspire to produce a mode of legal decision making that avoids the necessity for value choice in law.

Nineteenth-century classical legal theory, or formalism, was based on the idea that a set of legal principles could be established that would limit the exercise of state force primarily to those situations in which the law was merely enforcing the choices reached by free individuals. In such a circumstance, the law was only normative in a secondary sense, reinforcing choices that reflected individual will and free choice. The classical theory of freedom of contract was the clearest manifestation of this idea. Law and economics, which employs market and market-failure theory to reconstruct the idea of a legal or-

der whose only normative commitment is the second-order one of reinforcing voluntary choice, can be seen as a restatement, at a higher level of sophistication and complexity, of nineteenth-century formalism.

Heller suggests that positivism in social science and formalist and neoformalist accounts of law are parts of the larger cultural whole that he terms liberalism. As used by Heller, "liberalism" describes an epistemological position and a political theory, and has nothing to do with contemporary political options (cf. Unger, 1975). Liberalism in this broad sense is a cultural system that presumes individualism and intentionality and clearly separates reason and desire, as well as knowledge of facts and judgments of value. Thus according to Heller, liberalism

> uses a discourse, or way of speaking, about events which is one of existential phenomenology. By this I mean that the discourse speaks as if concepts of intentional action and voluntary choice-making were sufficiently real to deserve moral consideration. Finally, the basic unit of social analysis in liberal thought is the human individual (1979: 248).

IV. THE PARADOXES OF LIBERAL CULTURE

An examination of Heller's schematic account of positivism in law and social science and liberal political thought and culture suggests a series of paradoxes. Weber was obsessed by these paradoxes. Some of his most creative work came from his recognition of the contradictions they rest upon and his struggle to overcome these contradictions. While the paradoxes of liberal culture are best understood through careful scrutiny of Weber's work, a preliminary look will facilitate that task.

The first paradox concerns knowledge and reason. Let us start with the observation that the term "values" refers to those propositions about human life that render existence meaningful. Further, we think of reason as a beacon that guides our struggles to realize values. Yet positivism tells us that reason cannot help us choose among competing values and that the only "rational" knowledge of values we can have is the empirical knowledge of choices we and others have made.

The second paradox centers on intentionality. Liberal culture manifests a strong commitment to both individualism and intentionality. It articulates a world view in which we are represented as free individuals who can and do create meaningful worlds for ourselves. Yet positivism seems to assert that we

can discover objective truths only by identifying determinate causes behind the empirical facts whose relationships we investigate. If generalizations about empirical regularities are the only valid form of knowledge, then we must assume that the behavior we observe is caused by some determinate force, for otherwise there could be no *regularity*. Yet is not the positing of such forces in itself a denial of intentionality?

The paradoxes of knowledge and intentionality suggest there is something inherently unstable about the cultural structure that Heller has described. If we were to carry the logic of the paradoxes to an extreme, we might conclude that we are forced to choose between meaningless but objective information about the behavior of fully programmed robots and the assertion of subjective whim about a world of random encounters. That is, while positivism emerges from a culture that enshrines individualism and intentionality, it seems to embrace an epistemology that denies both. It is no wonder that we are simultaneously attracted and repelled by the products of liberalism.

Of course we all live in the culture that Heller calls liberalism. In its triumphant phase this culture seemed to offer a promise of liberation or emancipation. To the thinkers of the Enlightenment the idea of adopting natural science as the model for knowledge of society meant we could escape from the blindness of tradition and the prejudice of religion. Similarly, by developing a legal system that entailed a minimum of coercion we could liberate humanity from arbitrary domination. But as we work our way through the commitments that liberalism in this general sense entails, its paradoxes and contradictions become more apparent. As this fact becomes better understood, we may begin to understand Weber more fully. As I shall seek to demonstrate, he was one of the first social thinkers in the Western tradition to grasp both the overall structure of liberalism in this broad sense and to understand the paradoxes on which it rests. Moreover, Weber developed this analysis in detail, applying it to legal thought and other manifestations of modern culture. Read closely and properly, his "Sociology of Law" both expresses the unity of liberal culture and articulates a critique of it. Heller's essay, clearly inspired by his careful reading of Weber, outlines a structure that Weber had already shown to be inherently contradictory.

V. MAX WEBER'S "SOCIOLOGY OF LAW"

Kronman's reconstruction of Weber's ideas about law, which places them in the context of Weber's social theory,

helps us see the two sides of Weber's thought. I want to focus on three major themes that Kronman elucidates. First, I will set out Weber's view of the nature of the sociology of law, showing its relationship to the positivist persuasion in social science. Second, I will show how Weber articulates a theory of law similar to the one Heller calls liberal jurisprudence and then, in the same breath, develops a critique of modern law that demonstrates that many of its claims are dubious and its positions contradictory. Third, I will show how this same deconstructive mode is at work in Weber's epistemology, which means that Weber can also be properly read as a critic of positivism. In the final section I will speculate on how this analysis of Weber affects our attitudes toward the study of law and society. Kronman provides an essential guide for this complex journey; Alexander helps us put Kronman's account in perspective.

A. The Nature of the Sociology of Law

The key to this analysis of Weber's thought on law lies in the second chapter of Kronman's study, which sets forth Weber's ideas on what the sociology of law as an academic practice should consist of. To do this Kronman relates Weber's specific statements about the social-scientific study of law to his metatheoretical writings on the nature of social science and to the philosophical tradition they reflect. In these metatheoretical writings Weber (1949) established a sharp line between the realms of fact and value. Knowledge of empirical reality on the one hand and ethical or purposive knowledge on the other exist in separate, unbridgeable spheres. In this schema, science is the realm of the empirical, and anything outside that realm is not science. This does not mean that scientists do not have values or that empirical science cannot contribute to debates over values. It simply means that no statement that addresses a question concerning value choice can be a scientific statement. For Weber, values cannot be determined by science: They are chosen, or created, by individual acts of will. In his essay on "'Objectivity' in Social Science and Social Policy," Weber wrote:

> The fate of an epoch which has eaten of the tree of knowledge is that it must know that we cannot learn the *meaning* of the world from the results of its analysis, be it ever so perfect; it must be in a position to create this meaning itself. It must recognize that general views of life and the universe can never be the products of increasing empirical knowledge, and that the

> highest ideals, which move us most forcefully, are always formed only in the struggle with other ideals which are just as sacred to others as ours are to us. (ibid., p. 57).

Kronman describes Weber's philosophical position as "the positivity of values" (1983: 16–22). In this view, something is considered to be a value only if it is thought of as an act of individual choice. Values are created through an act of will, about which science can say or do nothing except to record the choices that have been made and examine their implications.

Since all questions of value must be banned from science, what should be the concern of science? When the living person with her hopes and fears, likes and dislikes, attachments and aversions, puts on the white coat of the social scientist, what can she study? Although this question is important for all the social sciences, it may have particular salience for those special sociologies like the sociology of law and the sociology of religion, which seek to study phenomena that are, in themselves, explicitly normative. Thus the way Weber defines the proper domain of the sociology of law is an especially important test of this general philosophical approach.

Kronman employs a number of techniques to present Weber's complex ideas with clarity. One is to define the sociology of law negatively and differentiate it from other forms of legal knowledge (ibid., pp. 28–36). Thus, Kronman asserts, Weber held that the sociology of law is neither evaluative, practical, nor specific. Whereas for Weber legal science and ethical critiques of law can express normative ideas, legal sociology can have no evaluative content. Further, the sociology of law does not create knowledge for any practical purpose. Practicing lawyers, like the sociologists, Kronman says, may want to know something about the conduct of people in regard to the law, but the former seeks this knowledge for a specific end while the latter desires it for its own sake. Finally, although the practicing attorney might want to know how Judge X will behave in case Y, the sociologist of law is not interested in such concrete or specific data; the social scientist instead seeks knowledge of a general nature.

We know, then, what Weber thought the sociology of law should *not* be. But what did he think it *should* be? Once again we have to consider the subject, method, and aims of the discipline as Weber understood them. First, the sociology of law is the study of human behavior or conduct. But what aspect of the infinite world of human actions should the legal sociologist study? Kronman tells us that Weber defined the proper sphere

as that aspect of human conduct that is significantly affected by the actor's orientation to legal norms. Since Weber classified the sociology of law as an empirical science, which means that it is not evaluative and aims at and produces "judgments of fact" or "causal propositions," it follows that the sociologist of law should seek only to make causal statements, that is, statements about the relationships between facts. However, these "facts" include the actor's subjective orientations, which are his or her beliefs about the law and its commands, since it is in the sphere of conduct toward the law that this science operates (ibid., pp. 31–34).

It would seem that, at least in Kronman's account, Weber's views on social science, as reflected in his definition of the appropriate domain for the sociology of law, are similar to the kind of positivism described by Alexander and Heller. But this is not the case. Weber's view, although in some ways similar to the positivist position, is actually much more complex. Weber did accept the positivist's distinction between statements of fact and statements of value. Because he believed in the positivity of values, he thought there was no rational science of value. This meant that science had to be limited to statements of fact. But beyond this point Weber's thinking deviates sharply from the other tenets of social-science positivism as identified by Heller.

Weber did not accept the idea that, as Heller puts it, science stands in a subject-object relationship to its study in a world that is external to the actor and whose constitution is not a function of the scientist's attribution of meaning. Quite the contrary: As Kronman makes clear, Weber was careful to point out that the social scientist's values are what determine the world that is to be studied (ibid., pp. 33–34). Weber saw the empirical world as a meaningless infinity; it is only our values that allow us to carve out a particular aspect of this infinity to study.

Further, Weber did not believe that the goal of social-scientific knowledge was to formulate universal or general laws concerning relationships among empirical entities. This is not, however, because Weber necessarily rejected the objective possibility of invariant relationships but because he did not think that laws that expressed any such relationships would constitute valid cultural knowledge. Such knowledge cannot be knowledge of social reality because social reality can only be defined in terms of the significance that concrete events have for us in the light of our values (Weber, 1949: 80–81). Universal laws of the type familar to the natural sciences might be formulated by the social sciences, but they are not themselves social

knowledge; they are only tools we may use to create knowledge about the concrete events that have meaning to us.

If this is the case, one may well ask, in what sense is Kronman correct to say that Weber thought that the proper sphere of the sociology of law was to create general knowledge, which is made up of statements of fact or causal propositions? The answer, I believe, is that Kronman is accurate when he cites Weber to this effect. But when he seeks to reconstruct Weber's ideas of the methodological foundations of the sociology of law, Kronman is insufficiently sensitive to the inherently contradictory nature of Weber's theory of social science (see Kronman, 1983: 28–34). It seems to me that Weber wanted to hold on to one aspect of positivism—the sharp line between fact and value—while abandoning most of the rest of its structure. His complex reasoning about the interrelationship between value considerations and empirical observations whittled down the positivist edifice until little of it was left standing. As Heller suggests, the positivist *sans peur et sans reproche* believes that a valid body of general knowledge about society can be constructed because social relations have the determinate quality that we attribute to nature and empirical events force upon us definite modes of description and classification; we accordingly truly stand in a subject-object relationship to our study. Weber, on the other hand, saw that we construct the empirical world out of the infinitude of existence and that our values, and not the world, determine what we study and what meaning it has for us. Weber held on to the idea of a value-free domain of empirical science only by draining it of most of its meaning and by narrowing its scope to an extreme degree.

Further, having carefully delimited the restricted sphere in which a science of society could validly operate, Weber then reached the conclusion that the very science he had sought to defend had very little value after all. In the end, his attitude toward social science, as toward modern law and other aspects of modernity, is one of pessimism if not despair. If positivism in social science and liberalism in legal theory are triumphant modes of the culture of liberalism or modernity, Weberian sociology is its tragic voice.

It would not be far-fetched to read Weber as a critic of modern culture and to see "The Sociology of Law" as one of several parallel inquiries into modern culture through which he revealed unities behind the process of cultural differentiation that was, for him, one of the hallmarks of modernity. Weber's view of modern law paralleled his account of science: Both aspects of modernity express yet ultimately destroy the ideals of

the Enlightenment that inspired them. Kronman helps us understand the parallels between Weber's separate sociologies and to see what ties Weber's accounts of modern economies, states, bureaucracies, and legal systems together. Speaking of "The Sociology of Law" in particular, Kronman writes:

> Weber's aim is to make manifest the common thread of meaning that links certain centrally important features of the modern legal order—including all those substantive and procedural aspects of modern law that he characterizes as "formally rational" and the distinctive type of contractual association which predominates in modern legal systems (the "purposive contract"), and the conception of authority that underlies the modern state and its bureaucratic apparatus ("legal-rational authority"). One of Weber's principal objectives is to show how these techniques, doctrines and institutions fit together into a meaningful whole, forming a world with a characteristic and historically unique meaning of its own. (ibid., p. 36).

B. Weber and Liberal Jurisprudence

The "common thread of meaning" that Kronman identifies is the same set of ideas that underlie Weber's methodological writings. These ideas provide the clue to the unity of modern legal thought and connect the separate sphere of law to other differentiated spheres of modern life. Thus Kronman asserts:

> What links the various aspects of modern law and ties them together into a meaningful whole is their common rootedness in a positivistic theory of value. It is this idea, and the will-centered conception of personhood associated with it, which gives the modern legal order its unity as a world of meanings. More generally, it is the same theory of value that implicitly shapes all of the institutions that Weber believed to be characteristic of modern society (ibid.).

This notion, which animates Kronman's entire study, works admirably to bring to light both the unity of Weber's thought and the contradictions that are built into it. For just as Weber critiqued the idea of science, so he set forth a devastating critique of the ideals of modern law. These critiques, taken together, constitute the stance of tragic modernism that makes Weber's view of our culture so bleak and despairing. Both Kronman and Alexander pick up this note of tragic modernism that echoes through Weber's work.

While Weber's views, as Kronman ably reconstructs them, show distinct parallels to the structuralist account of liberalism presented by Heller, there is a profound difference between the

Weberian analysis and the robust and triumphant mode of liberalism that Heller describes. While Weber sees parallel forces and processes in the separate spheres of culture he analyzes, each of them is shot through with fundamental contradictions. We have already seen this mode of thought in Weber's discussion of the nature and limits of social science, as contrasted with the more hopeful position of positivism *sans peur et sans reproche*. But the theme of contradiction emerges with stunning clarity in Kronman's reconstruction of Weber's substantive ideas about law.

The most significant aspect of this reconstruction lies in Kronman's exegesis of Weber's concept of legal formality. In Weber's well known scheme, legal thought can be seen as formal or substantive, rational or irrational. What Weber called "modern law," that is, the legal theory and institutions of the Europe of his day, was both formal and rational. It employed a mode of thought that he referred to as "logical formal rationality." Kronman demonstrates that, for Weber, logical formal rationality represented the aspiration for a value-free form of legal science. In this theory, legal science could be value-free because legal decisions would enforce the will of individuals as that will was made manifest through action; the law could therefore rely on individual choice to provide the value component necessary for any legal decision making. This form of legal thought reaches its high point in the classical theory of contract, in which the law is thought of as simply enforcing the will of the parties. In this theory, law is only a second-order normative structure; the real source of values comes not from the "science" of law but from the unrestrained choices of individuals.

Kronman shows how Weber's understanding of legal formalism and classical contract theory relates to Weber's epistemology and ethical ideals. Since Weber thought that it was impossible to reason about values, he believed modern legal science could be rational if and only if it eliminated value questions. Further, since Weber was an ethical individualist, he found modern law to be ethically attractive because it alone could foster the value of individual freedom. Formal law would do so, Kronman suggests, by enforcing individual decisions and providing a framework—like the law of contract—within which individual choice would be maximized.

Thus, armed with Kronman's reconstruction, we are able to see that Weber was strongly attracted to and fully understood that set of ideals that Heller calls liberal jurisprudence. We can also see the structural relationships between this juris-

prudential commitment and Weber's philosophical ideas. We further become conscious of how this jurisprudence is related to Weber's ideas about social science. However, if this were all there is to the issue, one might think that Kronman's Weber and Heller's liberals were theoretical twins. But as Kronman and Alexander show, there is another side to the Weberian account.

One of Kronman's basic conclusions about Weber's "The Sociology of Law" is that it is a contradictory text. A main line of internal contradiction is the way Weber deconstructed liberal jurisprudence as he was restating it. Thus Weber questioned the practical feasibility of legal formalism. He showed how the desire to rest legal decisions on the will or intent of the parties leads, ineluctably, to a kind of particularism in legal decision making that undermines the certainty or predictability that is one of formalism's hallmarks. Further, Weber conducted a scathing critique of the ethical implications of legal formalism. While in principle formalism promotes liberty, Weber asserted that under the actual social conditions of modern capitalism such products of formalist thought as the classical theory of contract may actually operate to benefit those with wealth and power by strengthening their ability to coerce the have-nots. Weber noted that

> a legal order which contains ever so few mandatory and prohibitory norms and ever so many "freedoms" and "empowerments" can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion (1978: 731).

In passages that bring to mind Marx's critique of capitalism, Weber suggested that a regime of free contract will lead to the replacement of fraternal ethics by an exclusively instrumental view of all social relationships (ibid., p. 636).

The paradoxical nature of Weber's assessment of modern law can be grasped by looking at the account of legal history that is a key aspect of "The Sociology of Law." One of the several themes Weber deals with in this text is the history of the emergence of the modern legal order. This history was presented as the story of the gradual "rationalization" of the law. There is a strong historical dimension to all of Weber's analyses of modern culture; one of the threads that runs through his discussion of separate spheres such as law, economy, religion, art, and government is the process he called "rationalization."

For Weber, a fully "rationalized" legal system is one in which law consists of consciously created rules that are organ-

ized into a comprehensive system and applied by technically trained specialists who employ a distinct form of legal logic. Weberian formal law is autonomous, a differentiated cultural sphere that obeys its own fully internal criteria. Weber believed that a legal system could not be rationalized unless it was formal: As Weber saw it, this meant that law had to be separated from politics and ethics and applied by logical—and thus value-free—techniques. Weber recognized that legal systems could be aimed at satisfying "substantive demands of a political, ethical or affective character" (Kronman, 1983: 93) and that this would lead to a form of rationalization. But in his view this kind of "substantive rationality" differs from a formally rational legal system in that it inevitably must lead to what Kronman calls "*ad hoc* decision of cases in a purely individual fashion" (ibid., p. 93). For Weber, injecting political, ethical, or affective demands into law reduces its generality, destroys its systemic character, opens it to manipulation by various interests, and reduces its predictability.

Weber can and has been read as asserting the superiority of a formal legal order. Various modernization theorists like Parsons (1967) have found support in Weber for the proposition that a formal legal order is an evolutionary universal, the sign of a move to a higher level of social organization. For scholars of this persuasion, Weber's discussion of the rationalization of the law demonstrates the superiority of legal formalism and casts doubt on both the viability and the desirability, under "modern" conditions, of a legal system that seeks to accomplish substantive ends, emphasizes the decision of concrete cases rather than the formation of general rules, and seeks to take account of political, ethical, and affective dimensions of conflict in its processes of dispute resolution and adjudication.

What Kronman has shown is that the modernization or evolutionary reading of Weber is, at best, misleading. The key to this interpretation is in a fuller understanding of Weber's paradoxical and pessimistic use of the concepts of rationalization and reason. For while Weber is ambivalent and even contradictory, the best reading of "The Sociology of Law," which Kronman has provided for the first time in full detail, is that for Weber rationalization in law (as in other aspects of modern life) may be an ineluctable but not a desirable or hopeful development. Thus Weber spoke of rationalization as a "fate," by which he meant an unavoidable development. But this is a tragic fate, for in the end the process of legal rationalization leads to the denial, not the realization, of the ideals of Western

law. For Weber formal law, like bureaucracy, creates an iron cage, "a shell of bondage which man will perhaps be forced to inhabit some day, as powerless as the fellahs of ancient Egypt" (Weber, 1978: 1402).

Weber's depiction of the negative face of rationalized law is graphic. As I have noted, he incorporated aspects of the Marxist critique of bourgeois law when he observed that although formal law favors freedom of contract, the practical effect of such freedom is to make it all the easier for property owners to subject workers to their arbitrary power and to lock them all the more tightly into the numbing discipline of the factory. Weber suggested that while formal law in general and contract law in particular appear to be distributionally neutral, they actually operate to favor those who have greater wealth and power. Moreover, Weber said, as the process of legal rationalization proceeds, the law will become ever more technical and specialized and thus inaccessible to the average person.

Weber depicted the process of rationalization in law as the gradual negation of the ideals of formal law and a process that leads ultimately to its own destruction. The Weberian notion that legal rationalization threatens to destroy rather than protect individual freedom is part of his pessimistic view of modernity, a view that the Frankfurt School picked up and referred to as the "negative dialectics" of enlightenment (Wellmer, 1985: 45). Weber's ideas are complex and his text is incomplete; even with the aid of Kronman's reconstruction, it is not easy to decipher his meaning.

In "The Sociology of Law," Weber traced the origins of modern formal law, relating it in part to the rise of belief in natural law and the rights of man. Thus he saw modern law as grounded in the Enlightenment tradition. But the very process of rationalization in law, he argued, ultimately destroys our belief in what he called the "metajuristic" ideas that lie behind legal formalism and serve as the grounding for a theory of rights. The result, Weber suggested, is that instead of being the shield of liberty, legal rationalization is part of a general process of societal change in which Western society has created rigid structures that enslave us as they seem to promise liberation. The modern legal order, like other characteristic products of modernity such as the factory and the bureaucratic state, becomes an alien machine that we cannot control. Individuals can struggle against this alien structure that man has himself created, but Max Weber saw this struggle as a lonely and heroic one, probably doomed to failure. For the general process of societal rationalization unleashes what Weber called the "poly-

theism of values" in which the individual can find no guidance from reason, now diminished to an instrument, nor from religion, now reduced to an "irrational" force, nor from community, now destroyed by industrialization.

C. *Tragic Modernism and the Rejection of Positivism*

This reconstruction of the central message of Weber's "The Sociology of Law" shows how Weber's text is a part of his overall analysis of modern society and helps us understand how it echos the tragic themes he put forth elsewhere in his work. Describing Weber as a "liberal in despair," Alexander says that Weber saw modernity as a process in which all the institutional aspects of culture have been drained of normative meaning and people are caught between structured but meaningless realms of instrumental action and meaningful but private and transitory experiences, like erotic love, that preserve some sense of the meaning of existence or the experience of freedom. According to Alexander, Weber viewed modern social life as

> a period in which the synthesis of idealism and materialism has been torn asunder. Weber sees himself, and modern man, as surrounded by institutions which are purely material in their substance, "iron cages" from which all value has been drained. At the same time, the people who inhabit these dwellings are enveloped from within by spontaneous impulses like the very ones Idealist philosophers eulogized as freedom (1983: 126).

Where does social science fit into this picture? Is it, for Weber, an iron cage empty of meaning, or does it offer hope for the reuniting of the impulses of idealism and materialism? I believe that Weber would say that social science is, in the end, another of the iron cages of modern life. Since until the end of his life Weber held on to the positivist's radical split between fact and value as well as to the notion that social science must eschew any questions of value, he felt that social science could offer no answers to the questions of value or meaning, which he knew remain the most fundamental questions for social thought.

In a particularly paradoxical passage in his last statement on these matters, the profound essay on "Science as a Vocation," Weber (1958) reaffirmed his commitment to the fact-value dichotomy while at the same time making clear his belief that the commitment to a purely rational and thus exclusively causal-empirical understanding of social science was one of the forces of rationalization that was leading to the destruction of freedom and the collapse of the hopes of the Enlightenment.

But seeing no way out of this iron cage, he could do no more than warn aspiring social scientists not to hope for too much from their scientific work.

There is, it seems to me, a strong parallel between Weber's thoughts about law and his ideas on the nature and purpose of social science. He understood more clearly than most the structure of liberalism, in which an intentionalist discourse, a positivist understanding of social science, and a liberal theory of law are all parts of a larger whole. In the area of legal theory, he cut through the triumphant mode of this discourse to uncover its darker side and critiqued its social and moral pretensions. In the realm of epistemology, he demonstrated the inherent limits of positivism, thus undermining the claims of those who thought this form of thought could lead to human emancipation. But in both cases, he saw no alternative, no way to move beyond the dualisms of liberal thought. As a result, his thought exhibits contradictory impulses, and his ultimately tragic stance is, as Alexander suggests, one of despair.

VI. TOWARD A NEW CONCEPT OF SOCIAL THEORY

The newer, more critical reading of Weber's legal thought suggests that, having dreamt that we could have an objective science of society and an autonomous and neutral form of legal decision making, Weber awoke to find that his dreams had come true but as nightmares. He recognized that the theoretical ideal of freedom under law could be employed to preserve domination. He also saw that the search for objectivity in social science meant that science had to eschew the truly important questions of the times. Faced with these contradictions in Western culture, Weber saw no way to escape. He scorned those who sought an easy escape from these dilemmas and counseled stoic resignation in the face of the apparent collapse of the ideas of the Enlightenment.

The Weber who emerges from the recent interpretative literature is a darker and more complex figure than we may have thought. Once we have confronted the dark side of Weber's sensibility, seen the deeply critical and pessimistic message that lies at the heart of "The Sociology of Law," and recognized that his view of social science was in some ways as dark as is his view of law, then we must reappraise some of the Weberian ideas that have influenced our community of scholars.

The first of these ideas is the independence of theory and facts. Looking into the dark night of value conflict, Weber

could see no toehold for objectivity except in empirical reality. Despite his recognition that it is our values that determine the questions we ask and the meaning we give to our "findings," he held on to the notion that the only truly objective knowledge is that of an external, empirical reality. Since he banished values from science, it must follow that his notion of sociological theory was, in the end, a positivist one. To cope with his recognition of the complex relationship between facts that give objectivity and values that give meaning, Weber erected the intermediate notion of "cultural knowledge," which refers to what counts here and now for us in our community. But he did not push this notion as far as it should have been pushed. Perhaps Weber had not grasped the Kuhnian, post-positivist conception of the way science works, and still thought that the empirical and theoretical worlds could be held apart, even provisionally. But once we reject that notion (as Alexander counsels we must) so that facts cannot be said to exist independently of theory, then even the inner, or Weberian, redoubt of positivist thought must fall.

By developing the inner logic of Weber's own thought and reinterpreting his ideas in the light of Kuhnian histories of science, we can see the need to abandon the sharp line between theory and fact that Weber held on to. This will force us to realize, as Alexander insists we should, that theoretical logic is something very different than mere generalizations about self-evident empirical findings.

We can accept Alexander's notion that post-positivist theory must be something other than making generalizations about facts without at the same time accepting his approach to sociological theory. Remember that because Alexander wants to reconstruct the idea of objectivity in social science, his image of theoretical logic is of an objective process. The problem with his approach is that he has bootlegged his own optimistically liberal views about society into what he calls the "objective" structure of theory, and then asserts that he can show that theorists who do not agree with him have made scientific errors.

This aspect of Alexander's work emerges from his critical assessment of Weber. Alexander admires Weber as the first person who tried to create a truly multidimensional sociology. But, according to Alexander's argument, Weber retreated from multidimensionality and his work became reductionist. Since Weber's view of modernity fails to meet the test of multidimensionality, Alexander can reject it as wrong (1983a: 127).

It is worth looking with care at the process by which Alexander reached his conclusion. Setting forth Weber's existential

ethic, Alexander says that Weber believed that "in the completely rationalized world, the individual has freedom to carve out a meaningful course, but he can do so only *as* an individual without any connection to institutional life" (ibid.). In the next sentence, Alexander cites this as proof that Weber's theory had become mechanistic and instrumental and thus theoretically wrong. His argument seems to be that it is objectively correct to say that the individual is free to "carve out a meaningful course" but that it is scientifically wrong to conclude that this struggle will be met with resistance from existing institutions.

How can this be? The key lies in the criteria Alexander sets up in the first volume of his treatise for multidimensionality and thus for objective theory. There he argues that sociology must move beyond the false dichotomy of idealism and materialism and that it must be based on a general framework that keeps free will and determinism and individual and community in balance. He believes that multidimensionality will achieve this balance:

> A multidimensional perspective encompasses the voluntary striving for ideals without which human society would be bankrupt indeed, and does this without emphasizing individuation to the point of forgoing the communality and mutual identification without which such striving becomes an empty shell (1982: 124).

Alexander seems to be saying that you cannot, as an objective sociologist, conclude that modern social institutions are what Weber called iron cages, bereft of meaning and hostile to freedom. If you reach such a conclusion, as Weber did, you have become mechanistic, one-dimensional, and thus unscientific.

Now it may be morally attractive and politically desirable to posit a world in which individuals are free to strive for ideals *and* these strivings may be supported by the community and accepted by institutions like law, the market, the state, and so on. Alexander admits that this is why he adopts this view; at one point he even confesses that his multidimensional approach is based on an effort to "effectuate certain moral values" (ibid.). But one cannot bootstrap these choices into objective criteria for social science as Alexander has tried to do.

I think it is perfectly legitimate to set up a moral and social vision as the keystone of a sociology and to see the sociological project as one of working to realize that vision within the constraints of existing social life. Indeed, in the post-positivist age I see no other way to imagine what sociology is all about. While this is what Alexander has actually done, he has not done it openly or honestly. Rather, he has constructed a mas-

sive structure of pseudo-objectivity and obscured the inherently political nature of sociological thought in a treatise that searches in vain for a neutral standpoint and an objective discourse. Instead of saying, "Look, I think Max Weber was too pessimistic and failed to see radical potential in existing institutions and new social movements," Alexander wants to indict him for being unscientific. The indictment should be dismissed.

VII. THE STUDY OF LAW IN SOCIETY

To probe the final point in my examination—the impact of Weberian thought on the field of law and society—I want to question a key aspect of Weber's legacy to legal sociology, namely the concept of the discipline as an autonomous endeavor. One reason that Weber has been revered in our movement is that he sought to differentiate the sociological study of law from legal science as properly defined. Those of us who have struggled to create a safe place for a more sociological approach to law have gained sustenance from his effort. Indeed, some among us today argue that we should establish ourselves as a separate discipline independent of law.

There are many cogent, pragmatic reasons for the separate institutionalization of law and society studies in the American university, and this is no place to argue all the complex elements of this issue. For the moment I only want to examine the epistemological questions involved in such a separation in light of Weber's reflections on the idea of differentiated spheres of law and legal sociology.

If we look back to the sources of the distinctions Weber wanted to draw between law and the sociology of law, we see that underlying them are the same fact-value and fact-theory distinctions analyzed above. Thus, in Weber's mind, law was a normative discipline in which questions of value were pursued, whereas sociology was a science of fact. Because the fact-value divide was fundamental and unbridgeable and because people's attitudes toward norms could be treated as facts, it was not merely desirable but also absolutely necessary to separate the sociology of law from the study of law as traditionally defined. The sociology of law would study factual regularities in attitudes about and conduct toward law, while staying clear of any normative questions.

What would happen if we were to discard this whole way of looking at the world? What if we were to say that social science exists not to uncover some objective, external, determined reality but simply to help us cope with what confronts us to-

day? What if we decided that our theories should be as much concerned about how the world ought to be and how we can work to transform it in the directions indicated by our utopian visions? What, that is, if we were to imagine the study of law and society not as the objective yet empty enterprise Weber envisioned but rather as a process of social transformation? Would such a vision require us to rethink the way we define our individual work and collective interaction? I certainly think so. Clearly it would take us not only beyond positivism but also beyond Alexander's effort to reconstruct the idea of a neutral and objective science of society along post-positivist lines. It would also force us to articulate our social vision and moral values, not as neutral frameworks but as possible goals. Finally, it could reunite the sociology of law with law and law with politics.

Not all of you may like the vision of our work as transformative politics. You may rebel from the idea that the purpose of the law and society movement is to help us envision a better future and work to realize our visions. You may feel that a scholarly community should limit its aspirations to the production of objective knowledge as defined by positivism. If you choose in this way to stand with Max Weber, be sure you understand his message in all its fullness: Weber tells you that you can and should choose detachment, but also that you must abandon hope.

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