

## ARTICLES

# THE PROMISE AND PARADOX OF MAX WEBER'S LEGAL SOCIOLOGY: THE "CATEGORIES OF LEGAL THOUGHT" AS TYPES OF MEANINGFUL ACTION AND THE PERSISTENCE OF THE PROBLEM OF JUDICIAL LEGISLATION

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### ABSTRACT

Unsurpassed in its ambition and historical scope, Max Weber's legal sociology centers around the four "categories of legal thought" that follow from his distinction between formal and substantive modes of rationality and irrationality in the conduct of lawfinding and lawmaking activity. At the same time, Weber's general sociology is built around four ideal types of possible meaningful conduct by individual actors, ranging from the instrumentally rational to the affective. Despite its visibility, the lack of meaningful connection Weber makes between these two categorical schemes has never adequately been remedied or even explained by his inheritors. This article seeks to do both by arguing that a clearer perspective can be gained on Weber's sociology of law by reconstructing his categories of legal thought in terms of his ideal types of meaningful action. Considered, instead, as ideal types of legal action by juristic actors in the course of undertaking lawmaking and lawfinding activity, Weber's categories of legal thought not only are rendered more intelligible but also more powerful in scope. For viewed in this way, Weber's choice of conceptually segregating the categories of legal thought from his general sociology of meaningful action is revealed as a precocious, even if ultimately unsuccessful, tactic for solving the problem of judicial legislation. In this way, Weber's legal scholarship was not just sociological but driven by much of the same concern that continues to preoccupy scholars of legal theory and jurisprudence into our own day. Therefore, the limitations of his solution are not simply of historical interest but vitally relevant to understanding the ongoing difficulties that have plagued our

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own contemporary attempts at elaborating an adequate philosophy of legal reason.

## I. INTRODUCTION

Near a century after its main text was composed, Max Weber's sociology of law remains persistently rewarding in its scope and complexity. It is, perhaps, for this reason that it has remained more of an ongoing concern for legal scholars than it has a relic of nineteenth century evolutionist-tinged comparative jurisprudence's past. Yet, even as such, like Weber's work more generally, its reception has often been accompanied by an impulse to dampen effusive praise for its near unsurpassed ambition and sophistication with a tone of lament over its incompleteness and inconsistency. This tendency has manifested itself most noticeably in commentary on the conceptual centerpiece of Weber's ideal typical approach to characterizing the world's legal traditions and distinguishing what was particularly unique about those of the modern West. Laid out in a brief few pages entitled "The Categories of Legal Thought," which closes the first major subsection of Weber's text on the sociology of law,<sup>1</sup> Weber's ideal types elucidate "the rationality of the law and, quite particularly, of that branch of it which is relevant to economic life, viz., private law."<sup>2</sup> It is in these pages that Weber explicitly outlines his famed double axis for characterizing what he rather misleadingly dubs "law" in the trans-historical perspective. It is according to these axes that a distinction should be drawn between "rational" and "irrational" ways of conducting legal thought on the one hand, and on the other, between its being done, in either respective way, in a manner that is "formal" or "substantive."<sup>3</sup> All together these make for four ideal types of legal thought—the formally irrational, the substantively irrational, the substantively rational, and the formally rational.

In elaborating further what these four categories of legal thought mean for distinguishing how lawmaking and lawfinding activity<sup>4</sup> may be

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<sup>1</sup> 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 654 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1956). Like much of Weber's writing, the text was only posthumously published, appearing as one of the major chapters of Weber's three volume foundational treatise on economy and society.

<sup>2</sup> *Id.* at 655.

<sup>3</sup> *Id.* at 656–57.

<sup>4</sup> As Richard Swedberg details in his discussion of Weber's concepts of lawmaking and law-finding ("*Rechtsschöpfung*," "*Rechtsfindung*"):

In modern legal thought, Weber explains in his sociology of law, lawmaking refers to the "creation of general [legal] norms." Lawmaking is complemented by law-finding or the "application of these norms to particular cases."

Lawmaking as well as law-finding can be rational or irrational. They can also be formal or substantive. Kadi justice falls into the category of lawmaking and law-finding that is substantive as well as irrational. The work of legal oracles is formal and irrational. Certain theocratic legal systems are examples of law that is substantive and rational, while modern law is formal and rational.

Weber terms "law-finding by the folk assembly" situations in which "the folk assembly . . . can accept or reject the decision recommended by charismatic or official possessor of legal knowledge and can influence the decision in some way." One example of this is the Germanic military community.

conducted, this Article argues that they are better understood in terms of the foundational concept of meaningful action<sup>5</sup> on which Weber's sociology generally rests.<sup>6</sup> Defined as "[a]ction in the sense of subjectively understandable orientation of behavior" that "exists only as the behavior of one or more *individual* human beings,"<sup>7</sup> meaningful action was, itself, classed by Weber into four distinct sub-classes: the instrumentally rational (or "zweckrational"),<sup>8</sup> the value-rational (or "wertrational"),<sup>9</sup> the affectual,<sup>10</sup> and the traditional.<sup>11</sup> Because some relationship is necessary between Weber's general sociology and the class of phenomena more

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According to Reinhard Bendix, "Weber used the term 'lawfinding' (*Rechtsfindung*) to express the idea that the law that is declared is believed to exist—for example, as part of the divine order."

RICHARD SWEDBERG, *THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS* 143 (2005) (citations omitted).

As the entry suggests, there is a slightly different coloring to Weber's use of the term lawfinding in the modern (continental Western European) context than in others. Outside of the former context, for Weber, there tended not to be a very clear-cut distinction between legislation and adjudication. What is important for Weber in such contexts is, as the closing snippet from Bendix states, the belief that adjudicatory reasoning operates on a law that is already extant and the contents of which, thus, needs merely to be found rather than made de novo. *See id.* In the "modern" context of continental Western Europe, however, the term lawfinding refers, to the process of adjudication understood as an activity categorically distinct from legislation. Thus, the insistence that the lawfinding involves the mere application of legal norms to facts rather than any value-dependent interpretive enterprise is quite important for Weber. *See* 2 WEBER, *supra* note 1, at 653–54. One should note that in Weber's view of the matter, like many in his own day, the application of legal norms to facts would have included not simply the process of bringing to bear clearly extant rules on the facts of some given case but also situations in which the facts necessitated a process of the judicial discernment of sub-rules within some one of the more clearly extant rules so as to close what would then be considered the merely apparent gap within the overall rule system that the given facts had initially uncovered. *See id.*

<sup>5</sup> I WEBER, *supra* note 1, at 4–5. As such, and as Weber himself elaborates by way of example, it is to be distinguished from action considered from the meaning-less perspective of, say, the cells whose structure and functioning lie behind the machinations that, presumably, lead to psychological phenomenon. *Id.* at 13.

<sup>6</sup> *Id.* at 4–5. For the purposes of this article it is not essential to argue the point about whether the types of legal action to be analyzed in terms of the types of Weber's more general categories of meaningful action are also capable of being analyzed, more specifically, as types of meaningful social action in particular. This is because, as Weber clarifies when defining his four types of meaningful action, not only social action but also "all action" is to be considered as capable of being oriented in one of these four ways. *Id.* at 24–25.

As for Weber's famed definition of social action, of course, it was that "[s]ocial action, which includes both failure to act and passive acquiescence, may be oriented to the past, present, or expected future behavior of others. . . . The 'others' may be individual persons, and may be known to the actor as such, or may constitute an indefinite plurality and may be entirely unknown as individuals." *Id.* at 22. It is enough to leave the present matter by noting that Weber's further discussion of meaningful social action strongly suggests that legal action would fall under its heading and not just that of meaningful action in general. *See id.* ("Overt action is non-social if it is oriented solely to the behavior of inanimate objects. . . . The economic activity of an individual is social only if it takes account of the behavior of someone else. Thus very generally it becomes social insofar as the actor assumes that others will respect his actual control over economic goods. Concretely it is social, for instance, if in relation to the actor's own consumption the future wants of others are taken into account and this becomes one consideration affecting the actor's own saving. Or, in another connexion [sic], production may be oriented to the future wants of other people.")

<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Id.* at 24 (stating that social action that is instrumentally rational is "determined by expectations as to the behavior of objects in the environment and of other human beings; these expectations are used as 'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends").

<sup>9</sup> *Id.* at 24–25 (explaining that social action is value-rational (wertrational), when it is "determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behavior, independently of its prospects of success").

<sup>10</sup> *Id.* at 25 (defining affectual social action as "affectual (especially emotional), that is, determined by the actor's specific affects and feeling states").

<sup>11</sup> *Id.* (defining traditional as that which is "determined by ingrained habituation").

specifically at issue in his sociology of law, this Article argues that the categories of legal thought are ultimately better conceptualized as ideal types of a specifically legal type of meaningful action undertaken by judges and legislators.

It comes as a surprise, therefore, that the question of the precise relationship between these two different families of concepts is never one that Weber explicitly addresses. This contrasts sharply with how he approaches his ideal types of economic action; for where the latter are concerned, he takes specific care to explicitly elaborate how they stand in relation to the more fundamental categories of instrumental and value-rationality. Still more surprising, however, is how little attention has been paid to this question in the broader secondary literature on Weber's legal sociology.<sup>12</sup> While this commentary began flourishing amongst American legal scholars interested in law and society and law and development studies in the early 1970s, it has not been until recent years that more sustained efforts have been undertaken more widely to examine Weber's categories of legal thought in the context of the more contemporary concerns of jurisprudence and social theory.<sup>13</sup>

In this Article, therefore, the first of the three main purposes is to advance this line of scholarship on Weber's legal sociology. Points that have heretofore been touched on only tangentially concerning how the categories of legal thought appear when viewed through the lens of Weber's types of subjectively meaningful action will be discussed in detail. Of particular concern is showing why the category of formal legal rationality, somewhat counter-intuitively, involves value-rational action on the part of the juristic agent. Through broadening the perspective on

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<sup>12</sup> It is important to emphasize that meaningful action is to be understood as involving what Weber calls a "subjective meaning-complex" because it is in reference to this complex that the actor stands, as a whole individual and deliberating self, with either a lesser or greater (but necessarily some) degree of reflectivity (or some degree of such a quality that can, at least, retrospectively be reconstructed as such and attributed to him by the social scientific observer). *Id.* at 13. For the same reason, vis-à-vis this subjective meaning-complex (elsewhere identified by Weber in terms of motivation) it is, at least in theory, with a lesser or greater (but necessarily some) degree of non-automaticity and distanced reflection that the actor must stand. This occurs, for instance, when it comes time for the meaning-complex to factor itself into the actor's deliberative faculties such as those involved in his or her "rationality." For these reasons, meaningful action (whether social or merely individual), as Weber means it, is to be partly defined through its "limiting case." *Id.* at 25. This includes those types of action that are oriented not through what can be reconstructed by the social scientist as some such variety of "rational" deliberating-ness but through what Weber deems "affect" and "tradition." *Id.* It is not by accident that the chief characteristic of this limiting case is its greater (or even, at least in the case of tradition, its total) automaticity and the lesser cognitive distance, so to speak, required between the basis of motivation and the consequent action. In the case of affective orientation "that is, determined by the actor's specific affects and feeling states," one might say that there is not so much a meaning-complex to be deliberated on as an affectual coloring that the social scientist finds the actor to be directed by; and, even more starkly, in the case of traditional orientation "determined by ingrained habituation" there is much less of a process the social scientist can attribute to the actor by which he can be claimed to be doing anything—whether "deliberating" or being colored by (to adopt my own terminology here)—that is very distinct from the doing itself given that it takes place automatically, "like the reactive type of imitation." *Id.*

<sup>13</sup> See, e.g., Andréas Buss, *Les Rationalités du Droit et l'Économie Dans la Sociologie du Droit de Max Weber*, 39 REVUE JURIDIQUE THEMIS [R.J.T.] 111, 111 (2005) (Fr.); Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1031 (2004); John P. McCormack, *Max Weber and the Legal-Historical Ramifications of Social Democracy*, 17 CAN. J.L. & JURIS. 143, 143–84 (2004).

Weber's legal sociology in the above way, the second aim of this article is to find a better vantage point from which to survey its defects than that which ends up alleging too facilely that the problem is merely its conceptual confusion. For it is only in light of a truer appreciation of the full explanatory scope of the categories of legal thought that the ways in which Weber's sociology connects with ongoing problems in contemporary legal theory can be seen. Lastly, the third main aim of the Article is to show that by understanding the categories of legal thought as types of legal action, Weber's sociology of law is a precocious attempt at solving the problem of judicial legislation. By framing it in this manner, it not only becomes more apparent why formal legal rationality should have to correspond to value-rational action by the juristic agent but also why the connection was left so little commented on by Weber. Insofar as a value-rational orientation to legal norms suggests absolute deference to their content, Weber developed a novel method for reducing questions of legal interpretation to questions of norm application. This was because by isolating the categories of legal thought from the types of meaningful action, Weber was conceptually distancing judicial reason from the notion of arbitrariness implied by its characterization in terms of the discretion rather than absolute compulsion of the lawfinder in the face of the relevant norm of decision, be it one already existing within the norm system or one in need of newfound derivation in order to fill some gap therein.

In this respect, this Article argues that Weber was essentially following an argumentative technique that has been invoked time and again since the high nineteenth century understanding of legal reason was laid to waste. Like Ronald Dworkin's very contemporary notion of the judge's "personal political theory" or Henry Hart and Albert Sacks's once dominant notion of processual constraints, Weber's notion of the formal rationality of Western law interposes a third term between adjudicatory reason and the legal norm, the handling of which nineteenth century thinkers envisioned in terms of strict deduction. Unlike Dworkin or Hart and Sacks, however, Weber's notion of formal rationality does so not through reference to a body of higher or altogether extralegal constraining values that the adjudicator can then be understood to draw on in the context of the proverbial Dworkinian hard cases. Rather, it does so through a reconstruction of the judge's way of knowing that obviates altogether the need to reckon with what Weber himself would have conceded was the irrationality of interpreting and selecting amongst these more abstract constraining values themselves. In this way, the Weberian concept of formal rationality intermediates between the Scylla of adjudication as judicial discretion and the Charybdis of overly mechanistic portraits of judicial deduction by shifting focus altogether away from the meaningful action of the lawfinder and toward what the conceptual terminology of the categories of legal thought instead suggest are the characteristics of the law itself.

As mentioned above, this Article pursues these three aims in four parts. Parts I and II flesh out why Weber's categories of legal thought are better seen as types of action rather than as descriptive characterizations of an isolated object, here, the law. With this preliminary point in hand, Part II of

this Article reconstructs the four types of legal action in terms of the four types of meaningfully oriented action to which they correspond. Specifically, the goal in Part II is to integrate Weber's categories of formal and substantive legal irrationality and rationality into his broader sociology by arguing that the type of lawfinding Weber claims distinguishes the modern West can be considered formally rational only in virtue of its involving value-rationality. This linkage of formally rational lawfinding to value-rational action proves counterintuitive insofar as it uncouples Weber's highest form of legal rationality from his highest form of general rationality (that is, instrumental rationality). It does so, moreover, in a way that is at odds with the pairing given in the context of economic action. For there, Weber is explicit that formally rational economic action is, indeed, a subspecies of instrumentally rational action. Part III of this Article proceeds to clarify the relationship between these reconstructed ideal types of legal action and Weber's other major law-related ideal type. This is, namely, the legal subtype of "legitimate domination"<sup>14</sup> involving "legal-rational authority," in particular.<sup>15</sup> This is done by stepping back from the earlier discussion of Parts I and II to explore why it is that implicitly equating formal legal rationality with value-rational action is so essential to Weber's larger vision of modern social life. In so doing, the discussion is cognizant of the important warning scholars of Weber often make against too facile an assumption that the trajectory of rationalization within each domain of social life is the same and, hence, all part of a single grand narrative. At the same time, this Article argues that there certainly does exist some kind of connection worth drawing out among Weber's narratives of legal, economic, and general social rationalization. Lastly, Part IV of this Article considers the paradoxical outcome that results from attempting to appreciate more fully Weber's categories of legal thought as types of legal action. Examining Weber's legal sociology in the light of his general sociology not only leaves his concept of legal rationality more illuminated but also more exposed. Of particular concern in this regard are the contradictory implications that arise from what was referred to above as the counterintuitive nature of the connection between formal legal rationality

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<sup>14</sup> 1 WEBER, *supra* note 1, at 215. Weber describes this concept as follows:

There are three pure types of legitimate domination. The validity of the claims of legitimacy may be based on:

1. Rational grounds—resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority);
2. Traditional grounds—resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); or finally,
3. Charismatic grounds—resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority).

*Id.*

<sup>15</sup> "In the case of legal authority, obedience is owed to the legally established impersonal order. It extends to the persons exercising the authority of office under it by virtue of the formal legality of their commands and only within the scope of authority of the office. In the case of traditional authority, obedience is owed to the *person* of the chief who occupies the traditionally sanctioned position of authority and who is (within its sphere) bound by tradition. But here the obligation of obedience is a matter of personal loyalty within the area of accustomed obligations. In the case of charismatic authority, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma." *Id.* at 215–16.

and value-rationality. As this concluding part of the Article shows, these emerge, particularly, when an attempt is made to extend the descriptor to cover not only formally rational lawfinding but also its would-be counterpart of formally rational lawmaking. Ultimately, these contradictions prove quite harmful to Weber's legal sociology—not because they demonstrate its lack of conceptual coherence, but, to the contrary, because they were indicative of an attempt on his part at solving the problem of judicial legislation that was strikingly precocious, even while being vexed in much the same way as are those offered by scholars and jurists down into our own day.

## II. THE OBJECT OF LEGAL RATIONALIZATION IN WEBER'S SOCIOLOGY: LAW, LEGAL THOUGHT, OR LEGAL ACTION?

The necessary point of departure for addressing how the types of rationality or irrationality that underlie Weber's categories of legal thought relate to his ideal types of meaningful action is to consider why the connection between these sets of concepts has been so little commented on. To some degree, this is a consequence of Weber's own choice to elaborate distinct descriptors for discussing the rationalization processes within the legal domain. This itself, was the consequence of his well-known commitment to the idea that while possibly related to one another in a complex of mutual causation and while possibly sharing broad overall trajectories, the rationalization process within each of the various domains of social life—be it law, religion, the economy, aesthetics, or whatever other—abided its own autonomous logic. Thus, Weber did not see these as being simply part of a single process of rationalization, but as several distinct ones.

While this point is essential to keep in mind, it is also important to see that there is more to the matter than just this. For part of what has made it difficult to discern the relationship between the general types of meaningful action on the basis of which Weber espouses his overall sociology and the categories of legal thought on which he bases his sociology of law is the equivocal nature of the object of analytical scrutiny Weber claims the latter are invoked to characterize. This is hinted at from the very outset of his discussion on the categories of legal thought in which he describes his purpose as being to inquire into the more precise nature of the rationality (or lack thereof) of the law; yet after doing so, he goes on to elaborate a set of ideal typical categories that characterize how and on what basis legal thought proceeds as an activity of the intellect. At first glance, there may seem not to be any necessary tension between these two pronouncements, nor any that Weber, himself, shrank from addressing head on. He does, for example, make sure to remind readers at the beginning of this subsection that “[a] body of law can be ‘rational’ in several different senses, depending on which of several possible courses legal thinking takes toward rationalization.”<sup>16</sup> Much the same connection seems to come out shortly

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<sup>16</sup> 2 WEBER, *supra* note 1, at 655.

later when, in turning to the conduct of legal thought as an undertaking of juristic actors, Weber introduces the formal and substantive axis alongside of the rational and irrational one. These, he explains, are meant to each be simultaneously applicable in characterizing legal action in both of the two forms it takes, namely of lawmaking and lawfinding.<sup>17</sup>

Yet, as it is too easily missed, the formal and substantive distinction that is introduced here results in concepts the technical precision of which can be maintained only at the expense of their being equally as applicable for characterizing either the conduct of legal thought as a form of action or the overall quality of the body of law that emerges from it. Thus, after first explaining under what conditions lawmaking and lawfinding are formally versus substantively irrational, Weber goes on to discuss how the same distinction obtains in the context of lawmaking and lawfinding activity that is rational. And here appears the following perplexing sentence: “All formal law is, formally at least, relatively rational. Law, however, is ‘formal’ to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account.”<sup>18</sup> From this passage, it becomes clear that Weber is unable to characterize “law” according to the two axes of description (that is, rational and irrational and substantive and formal) he has just finished elaborating without lapsing into what is really an endeavor at characterizing the conduct of legal thought. This is why the above passage appears circular. Weber proves capable of defining how law is to be considered formal (formally rational?) only through reference to what turns out to be the juristic actor’s meaningfully oriented action—of taking into consideration “unambiguous general characteristics of the facts”—by which the law is brought into existence in the first place.<sup>19</sup> This is not to say that there can be no relevance to what Weber is groping at (or, perhaps more accurately, what he is alleging) when he speaks of some instance of a historical tradition’s “law” being rational and irrational or even formally versus substantively so. What it does mean, however, is that in all of these instances Weber’s ideal types are functioning theoretically or heuristically or technically not over the domain of the theory-heuristic-technical language’s concept of the law but only over its concepts of lawmaking or

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<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 656–57.

<sup>19</sup> *Id.* at 656–57. This is consistent with David Trubek’s trenchant observation that despite his general precision in terminology, Weber did not have any one definition of law. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 725 (1972). Trubek’s own discussion of lawfinding and lawmaking in terms of Weber’s four-fold differentiation of the type of formal and substantive rationality or irrationality animating the different types of legal thought is hindered by this very problem. This is despite his otherwise quite illuminating way of clarifying Weber’s categories of legal thought through relating them to what Trubek claims are the three features of “differentiation,” “generality,” and “universality” that he says defined the real object of Weber’s concern (that is, “the European legal system” in its distinction from all others). See *id.* at 724, 728. This is because the attempt finds Trubek relating only lawfinding and not lawmaking to Weber’s categories of legal thought. See, e.g., *id.* at 724 (“The European legal system was distinct in all these dimensions. Unlike the legal systems of other great civilizations, European legal organization was highly differentiated. The European state separated law from other aspects of political activity. Specialized professional or ‘status’ groups of lawyers existed. Legal rules were consciously fashioned and rulemaking was relatively free of direct interference from religious influences and from other sources of traditional values. Concrete decisions were based on the application of universal rules, and decision-making was not subject to constant political intervention.”).



lawfinding considered as processes of action. The rational and irrational and substantive and formal axes of description, in other words, turn out not to make for ideal types of the body of laws so much as they do ideal typical forms of actor conduct. Therefore, the question of why such conduct was not instead just reconstructed in terms of Weber's general sociological categories of instrumentally rational, value-rational, affective, and traditional action is left unanswered.

This would be a problem of no great moment if the matter were to be left here. For one can make what allowances one must for cases of a scholar, even of Weber's caliber, speaking with less than complete consistency where it comes to the use of the vocabulary of concepts that he, himself, has constructed. In all cases where Weber informally lapses into qualifying "law" as substantively or formally rational or irrational, it could just as well be noted that he really means lawmaking or lawfinding. The problem, however, is that in certain instances, Weber's loose ways of speaking cannot be reconciled so easily. One such instance that occurs systematically is in Weber's treatment of central preoccupation with the legal tradition of the modern West. For it is in this context, alone, that Weber sees there to have emerged—really for the first time in history—a true difference between law and the types of legal action that go into producing and handling it (meaning, the subtypes of legal action of lawmaking and lawfinding). Yet, it is precisely because of these purported facts of Western exceptionalism and thus precisely in this same historical context that the equivocation that undermines the technical precision of Weber's rational and irrational and substantive and formal concepts emerges most forcefully. For it is the inevitable consequence of these very facts—about the novelty of the emergence in the West of a true separation between lawmaking and lawfinding (and hence, between law and legal action)—that a single set of ideal types can no longer suffice for characterizing what have now become the three distinct objects of the sociologist's scrutiny comprised by the law, lawfinding, and lawmaking. In the context of Weber's central-most historical concern with the legal traditions of the modern West, the problem is more than one of inconsistency in his adoption of his own technical concepts. Rather, it is with the way the technical concepts stand in relation to what are now the two different things they are being made to stand for: on the one hand, the standing norms thought to be distinctly embodied as articulable propositions of the modern West's formally rational law, and on the other hand, processes of formally rational lawfinding that exercise themselves over the latter. Given that the notion of formal rationality is drawn from underlying concepts the defining criteria of which are tied only to the latter (that is, to processes of action undertaken by the juristic agent), it is plain to see that these same concepts cannot hold the same technical precision (or theoretical continuity) when applied to the body of laws itself.

The next section of this Article addresses this last claim by arguing that Weber's sociology of law centers on a set of descriptors that refer not to law or legal thought but to what are really varieties of conduct undertaken by juristic actors; as such his sociology of law can better be seen in terms

of his overall sociology of meaningfully oriented action so that the different categories of legal thought will be profitably reconstructed on this more fundamental ideal-typical basis.

### III. THE CATEGORIES OF LEGAL THOUGHT AS TYPES OF MEANINGFULLY-ORIENTED ACTION

What one is left with where legal rationality is concerned is a complex relationship of types and subtypes. This part considers the way in which these can, themselves, be shown to have an even more intricate relation to the general categories of actor orientation that Weber speaks of. These consist of both rational types (including value-rationality and instrumental rationality) and non-rational ones (including traditional and affective orientation).

#### A. THE FOUR CATEGORIES OF LEGAL THOUGHT AS FOUR TYPES OF LEGAL ACTION

In trying to reconstruct Weber's categories of legal thought as ideal types of legal action, it is important to recall the axes on which these different types of rationality turn. The categories of legal thought are meant as characterizations of styles of reasoning deployed in the context of the meaningful action involved, especially, in lawfinding behavior. This last statement is more complicated than is here at the outset being suggested by omitting, for the time being, any discussion of lawmaking alongside of lawfinding in the manner that Weber partakes of when setting out these categories. Yet, as noted earlier, given that he sees the division between these two forms of legal action to have emerged only in the West, it is sensible enough to adopt Weber's own dual usage at the start in order to avoid clouding matters more than needed.<sup>20</sup>

Before proceeding further, Weber's extremely dense and abbreviated discussion of the four possibilities that are yielded by his two axes of distinction—the rational and irrational one and substantive and formal one—should be set out in full:

Both lawmaking and lawfinding may be either rational or irrational. They are *formally* irrational when one applies in lawmaking or lawfinding means which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefor[e]. Lawmaking and lawfinding are *substantively* irrational on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms. "Rational" lawmaking and lawfinding may be rational in a formal

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<sup>20</sup> For the point at hand, this Article ignores the possibility of the distinct existence of various types of "unmade" law, such as sacred law, that may appear side by side with a circumstance in which only lawfinding action (and no distinct lawmaking action) exists. In such a situation there may, indeed, be law that is distinct from lawfinding, but the relevant point here seems to be that Weber would not take his "categories of legal thought" to be descriptors of these forms of unmade law. 2 WEBER, *supra* note 1, at 654–57. See *id.* at 882 (giving a concise summary of Weber's general division of the phases of legal development).

or substantive way. All formal law is, formally at least, relatively rational. Law, however, is “formal” to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account. This formalism can, again, be of two different kinds. It is possible that the legally relevant characteristics are of a tangible nature, i.e., that they are perceptible as sense data. This adherence to external characteristics of the facts, for instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning, represents the most rigorous type of legal formalism. The other type of formalistic law is found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied. This process of “logical rationality” diminishes the significance of extrinsic elements and thus softens the rigidity of concrete formalism. But the contrast to “substantive rationality” is sharpened, because the latter means that the decision of legal problems is influenced by norms different from those obtained through logical generalization of abstract interpretations of meaning. The norms to which substantive rationality accords predominance include ethical imperatives, utilitarian and other expediential rules, and political maxims, all of which diverge from the formalism of the “external characteristics” variety as well as from that which uses logical abstraction. However, the peculiarly professional, legalistic, and abstract approach to law in the modern sense is possible only in the measure that the law is formal in character. In so far as the absolute formalism of classification according to “sense-data characteristics” prevails, it exhausts itself in casuistry. Only that abstract method which employs the logical interpretation of meaning allows the execution of the specifically systematic task, i.e., the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions.<sup>21</sup>

According to the general understanding of this passage, the first axis of description it sets out, the formal to substantive continuum, gauges the degree to which the basis of lawfinding derives from criteria of judgment that are autonomously legal in some discernible sense. If it is formal, lawfinding adopts as its normativizing reference point criteria internal to what is a separate domain of law rather than ones that are drawn from extralegal domains of substantive value, such as the ethical, the religious, the moral, etc. This contrasts with the second axis of measure that the passage introduces—the irrational to rational continuum; this is conventionally understood as being meant to gauge the degree to which the criteria of judgment (whether legal or extralegal) are formulated into

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<sup>21</sup> *Id.* at 656–57.

propositions of general import and are thus prospective in addition to being immediately applicable.<sup>22</sup>

The four ideal typical permutations that result from these two axes—the formally irrational, the substantively irrational, the substantively rational, and the formally rational<sup>23</sup>—are usually illuminated by their respective correspondence to specific exemplars. Thus, formally irrational lawfinding is marked by the tendency toward oracular and magical procedures of divination that are supposed to be, literally speaking, non-rational in their very form. In this respect, they are supposed to be beyond the means of “control[] by the intellect,” as Weber says; therefore, they are unconcerned with articulating the basis of decision they proceed on in the form of propositions of any kind, let alone ones of general (and more than episodically casuistic) import.<sup>24</sup> Alongside of these is the purely casuistic khadi justice<sup>25</sup> of substantive irrationalism, which comes closer to articulating the basis on which it proceeds as propositions only in the sense that it eschews the methods of the first type. Thus, while clearly higher than formally irrational lawfinding, the substantively irrational variety draws on extra-juristic sources of normativization (that is, value) in ways that are said to be opaque to all but the juristic decision maker. Therefore, the substantively irrational variety does not seek more than resolution in the given case and resolution only according to a rather nonspecific sense of justice that is simply indifferent to articulating itself more precisely into propositions, let alone ones of a separate and distinctly legal kind. In contrast to both of the above forms of irrationalism rooted in extralegal domains of value, substantively rational lawfinding involves a form of juristic agency that proceeds as an endeavor in articulating its bases of normativization into propositions. Therefore, it fashions from the ethical, religious, ideological, or other value spheres, discernible principles of decision that can be generalized beyond the given case at hand. Finally, there is the category of formal rationality which is best exemplified for Weber in the form of the judicial systems of the modern West (putting the

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<sup>22</sup> See, e.g., ANTHONY T. KRONMAN, *MAX WEBER* 73, 76–77 (Stan. Univ. Press 1983); DRAGAN MILOVANOVIC, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* 50–51 (3rd ed. 2003); Joyce S. Sterling & Wilbert E. Moore, *Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification*, 2 *SOC. F.* 67, 72–73 (1987); David M. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 *LAW & SOC'Y REV.* 573, 588–90 (1986); David M. Trubek, *Reconstructing Max Weber's Sociology of Law*, 37 *STAN. L. REV.* 919, 925–33 (1985).

<sup>23</sup> KRONMAN, *supra* note 22, at 76.

<sup>24</sup> *Id.* at 75.

<sup>25</sup> While the concept was not particular to the Islamic tradition, Weber's source for it—in the image of the Islamic judge or qadi doling out decision based on a rough impulse of justice—is clear. As Swedberg explains, Weber's concept of khadi justice “represents an irrational type of justice focused on the single case” and is based on the “unstable and emotional” sense of justice. SWEDBERG, *supra* note 4, at 136. In this respect, while casuistic, it is to be distinguished from (because, clearly, lesser than) what Weber suggests is a casuistic sort of “empirical justice.” *Id.* As Swedberg goes on to note “[e]mpirical justice, on the other hand, is characterized by a legal situation in which analogies are used and precedents interpreted.” *Id.* As for further discussion of the concept in relation to the Islamic legal tradition as well as the possible Weberian distortion of that tradition, see for example, Patricia Crone, *Weber, Islamic Law, and the Rise of Capitalism*, in *MAX WEBER & ISLAM* 247 (Toby E. Huff & Wolfgang Schluchter eds., 1999); HAIM GERBER, *STATE, SOCIETY, AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE* 26–42 (1994); and Gulseren Kozak-Isik and Aysegul Kozak, *Weber's Misunderstanding of Traditional Islamic Law*, (May 27, 2004) (unpublished manuscript), [http://www.allacademic.com/meta/p117025\\_index.html](http://www.allacademic.com/meta/p117025_index.html).

so-called England problem aside).<sup>26</sup> As Joyce Sterling and Wilbert Moore note, these exemplars of the four permutations that result from the substantive and formal and rational and irrational distinctions turn out to correspond roughly to the broad stages of world legal history.<sup>27</sup>

In all of these cases, what the exemplifications suggest is that the feature of lawfinding that is most worth highlighting—whether because of its presence or absence—is that of the juristic actor as a font for the articulation (or lack thereof) of the basis on which his decision-making behavior proceeds. When put front and center, this makes it clear just how it is that Weber's categories of legal thought describe processes of meaningful—that is to say, motivated—action by an individual. The juristic decision-maker, in the very act of doing what his very purpose it is to do—namely, of subjecting the facts of other individuals' social intercourse to a normativizing discipline—cannot but be acting “meaningfully” (in Weber's sense of the term). In other words, to normativize the facts of some instance of the disputed social intercourse of others can mean nothing less than for the law-finder to stand in relation to those facts by orienting himself meaningfully in relation to them. For without doing so, he would not be a law-finder at all given that alongside the facts of the dispute there would be no basis for the resolution of the conflict they portend: there would only be an individual who was supposed to have arrived at some such basis, but instead, would now be standing arrested in stasis. This, it is important to see, would be true no matter what type of Weberian lawfinding was supposed to have been at issue; therefore, it is true no matter whether the normativizing basis of decision was supposed to have been articulated into propositions or not (and also no matter whether it was supposed to have been of an autonomously legal kind or not).

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<sup>26</sup> See Trubek, *supra* note 19, at 746–48 (discussing the difficulty posed by the case of England—with a common law tradition of lawfinding that in Weber's eyes did not match the European Continent's achievement in formal rationality—for Weber's sociology of law). *But see* Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 *LAW & SOC'Y REV.* 487, 488 (1987) (“The contradictions and tensions arise because this type of logically formal law existed in Germany but not in England, where capitalism first developed and thrived. In sharp contrast to the logically formal rationality of European codified legal systems, the English case law system is, according to Weber, highly irrational. Thus, his attempt to establish a connection between legal rationality and economic rationality is thwarted by what his critics have referred to as the ‘England problem.’ Weber is depicted as struggling to hold on to a model of legal rationality that simply cannot address in any useful way the question of the relationship between law and capitalism.”).

<sup>27</sup> See Sterling & Moore, *supra* note 22, at 76. Sterling and Moore note the stages as following:

Stage 1. Charismatic legal revelation through the use of prophets. This stage is associated with formal irrationality. Law is “inspired” rather than arising through a process of consensus.

Stage 2. Empirical creation and finding of law by legal honoraries. Decision-making is arbitrary and based on individual cases; it is substantively irrational (*Khadi* justice). The legal sphere is differentiated into criminal and civil law.

Stage 3. Imposition of law by secular or theocratic powers. Since there is a systematic body of rules from religion, ethics, etc., this stage is associated with substantive rationality. This stage represents “deduced” law (natural) and we find the legal spheres differentiated into sacred and secular law.

Stage 4. Systematized elaboration of law and professionalized administration of justice by persons who have been trained in a formally logical manner. This stage of enacted laws (positive) is associated with formal rationality. The legal spheres are differentiated into private and public law.

*Id.* (citations omitted).

Up to this point, each of these four ideal typical permutations of legal action has been equally addressed. In the remaining subsections of this part of the Article, the focus will be primarily on delineating Weber's highest category of formally rational legal thought in terms of his general sociological categories. Then, the category of substantive legal rationality will be considered briefly in these terms. Where the other categories of legal thought stand in relation to Weber's more fundamental types of meaningful action will fall into place only implicitly, and the table at the end of this part of the Article will render this more explicit.

#### B. FORMALLY RATIONAL LAW FINDING AS A TYPE OF VALUE-RATIONAL ACTION

Put front and center, how does the lawfinding actor appear when viewed in terms of Weber's general categories of meaningful action? Considering the last category of legal action, it is essential to see, as Duncan Kennedy has recently suggested, that there is an inverse proportion that holds between the stature assigned to formally rational lawfinding when considered as a form of meaningfully oriented action as compared to the stature assigned to it when considered as a type of "legal action."<sup>28</sup> Thus, just because in Webster's estimation it is the case that relative to the general categories of meaningful action the instrumentally rational sub-type is clearly the most rational, this cannot be taken to dictate why formal legal rationality is the most rational sub-type relative to other categories of legal action. In other words, as Kennedy notes, the formally rational sub-type of legal action should not be considered more rational than the substantively rational sub-type on grounds of supposing that the former harbors a greater degree of instrumental rationality than does the latter.<sup>29</sup> Rather, the opposite holds true: the more formal the type of rationality involved in lawfinding, the more rational it is because the more value rational does it prove to be when considered as a type of meaningful action in general. As will be seen in the next subsection of this part of the Article, this proves true even while it is the case that the converse—namely, that the more substantively rational lawfinding is, the more instrumentally rational it must be—does not.

The same type of inversion appears once again within the category of formal legal rationality when considering the further ideal typical sub-categorization Weber makes in the passage above. Here, the above quoted passage finds him striking a final distinction within the category of formal legal rationality between its lesser "external characteristics" variety and its higher variety of formality based on the "logical interpretation of meaning."<sup>30</sup> While the latter historically corresponds to continental legal science and to the jurisprudence of the German Pandectist movement,<sup>31</sup> the former is surrounded by more controversy. There is strong reason to

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<sup>28</sup> Kennedy, *supra* note 13, at 1041.

<sup>29</sup> *Id.* at 1038.

<sup>30</sup> 2 WEBER, *supra* note 1, at 657.

<sup>31</sup> For Weber's relation to the German Pandectist movement, see SHARYN L. ROACH ANLEU, LAW & SOCIAL CHANGE 25–26 (2010) and KRONMAN, *supra* note 22, at 78–79.

believe, however, that for Weber the closest historical exemplification of the external characteristics variety of formal legal rationality was the English common law. This reading follows Sally Ewing's theory by suggesting that part of the answer to Weber's England problem is that it is not at all the problem it has been made out to be.<sup>32</sup> Therefore, the common law's more rudimentary variety of formal rationality puts it beyond the category of substantively irrational khadi justice, a term that Weber sometimes uses to deride it.<sup>33</sup> And this seems to necessarily derive from a state of affairs in which fact-channeling devices such as causes of action (or even the older writ system) of the type the common law adhered to well

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<sup>32</sup> Ewing, *supra* note 26, at 489–95. Ewing begins from the premise that “one aspect to Weber’s analysis of the relationship between law and capitalism,” for which there is no disagreement, is “his identification of calculability as an essential prerequisite for those who would enter the market as rational economic actors.” *Id.* at 490. Consistent with my own claim here about the inverse proportion that obtains between formal legal rationality and instrumental rationality, Ewing denies any direct linkage between formal rationality in the legal domain and the general instrumental rationality thought to predominate in a truly “modern” society based on market-relations. *Id.* at 487. Her approach differs from the approach in this Article in so far as she distinguishes between the formal rationality of legal thought and what she contends, for Weber was the real legal prerequisite to capitalism: namely, the existence of “formal law as such.” *See id.* at 495 (quoting 2 WEBER, *supra* note 1, at 855). It is this, according to Ewing, and not any particular brand of legal thought (the rationality of which, she claims, is for Weber really an “intrajuristic” phenomenon) that suffices for the purposes of guaranteeing the calculability necessitated by a capitalist economy. *Id.* at 494 (quoting 2 WEBER, *supra* note 1, at 776). In essence, Ewing’s reading here endorses what this Article earlier calls Weber’s rather equivocal way of speaking about formal legal rationality as both a technical descriptor for the types of lawfinding action and as a more casual one referring to the body of law. Therefore, it is preferable to allow that Weber did see the rationality of legal thought to be something of a prerequisite to a properly calculable order of the type necessitated by a capitalist economy. The point being emphasized here, however, is that “the England problem” falls by the wayside once it is allowed that, for Weber, it is the more general category of formal rationality in lawfinding and not its particular sub-category based on the logical analysis of meaning that alone suffices. This solution, admittedly, requires that Weber’s discussion about how the common law was notoriously mixed and his derision of its justices of the peace as founts of a substantively irrational “khadi-justice” not be taken seriously. 2 WEBER, *supra* note 1, at 813. Consistent with such an approach is to instead focus on the various instances in which Weber depicts the common law a substantively rational system of precedent that was, at the same time, in other ways formally rational as well. *See id.* at 855 (noting that the needs of the bourgeoisie “for a ‘calculable’ law . . . may be gratified” not only by a “logically consistent and gapless complex of ‘norms’ waiting to be ‘applied’” as in logically formal legal rationality but also “quite as well, and often better, by a formal, empirical case law.”); 3 *id.* at 1395 (observing that “the specific features of modern capitalism” could arise in either of two circumstances, one of which was, as in England, “where the development of the law was practically in the hands of the lawyers who, in the services of their capitalist clients, invented suitable forms for the transaction of business, and from whose midst the judges were recruited who were strictly bound to precedent, that means, to calculable schemes”). Ewing’s own way of stating her point about Weber’s insistence on “formal law as such” as being synonymous with his insistence on the “formal rational *administration of justice*” for understanding his view of the real link to calculability would seem to suggest as much. Ewing, *supra* note 26, at 489 (quoting 2 WEBER, *supra* note 1, at 813) (emphasis added).

<sup>33</sup> *See, e.g.*, 2 WEBER, *supra* note 1, at 890 (discussing the “charismatic” element that persists in judge-made law in common law systems). At first glance, Professor Kennedy’s own brief mention of the common law in the context of formal legal rationality may seem to overplay Weber’s clarity of view in classifying it. This seems especially so, given that in the first set of passages Kennedy cites, Weber emphasizes the “formalistic treatment of the law” that the nature of English legal training historically inspired only in a clearly derogatory sense. Kennedy, *supra* note 13, at 1041 (citing 2 WEBER, *supra* note 1, at 787). Moreover, Weber is doing so by pointing out that this formalistic-ness simultaneously failed to make for any kind of aim toward a “rational system” but instead aimed toward only a “practically useful scheme of contracts and actions.” 2 WEBER, *supra* note 1, at 787. It is important, however, to avoid potential confusion here. One must see that in this passage Weber seems to be using “rational” in the more ordinary sense of the term (and not, by way of specific reference to his own categories of legal thought). This comes out more clearly when one sees that Weber is here contrasting the civil law’s systematicity with the common law’s lesser degree of the same. *Id.* The point, in other words, seems to be one that is relevant within the category of formally rational lawfinding precisely because he is trying to deny the common law a place only within its “logically formal” top tier. *Id.*

into the nineteenth century (and well into the period of the ongoing capitalist revolutions in British agriculture and industry) still imposed on the juristic actor constraints of an impersonalized rule-boundedness, even if not ones based on the “logical interpretation of meaning” alone.<sup>34</sup> This obviously would have only become more the case, as Weber suggests, once formalities of this type were further supplemented (and displaced) by the fact-channeling device of a more insistent principle of precedent and the “calculable schemes” for which it was made.<sup>35</sup>

This latter point about the England problem aside, the inverse proportion that exists between the level of lawfinding’s rationality when considered as a type of meaningfully oriented action by the juristic agent and the lawfinding’s rationality considered according to the types of general action orientation is not as paradoxical as it may seem at first. Kennedy’s description of this matter is worth quoting in full:

In [logically formal legal rationality], when the lawfinder acts, by deciding the case or making his academic interpretation of what the law “is,” his action is always “value-rational” in Weber’s usage. On the basis of the logical analysis of the meaning of the extant valid norms, he chooses a norm, without regard to the social consequences of his choice, and then applies it to the facts at hand, again without regard to the social consequences. This contrasts sharply with substantively rational legal thought. There, the judge may be, contrary to what some commentators suggest, acting in a value-rational way (say, by applying religious commandments such as “thou shalt not kill” or absolute natural rights such as “respect private property”). But the legal actor is also substantively rational if what he does is to identify a set of societal goals, or a set of partial political objectives of the ruler, and then craft his rule to maximize their accomplishment through a situation-sensitive balancing test.<sup>36</sup>

In other words, it is precisely in the context of adjudication as it is understood within liberal theory that one would expect the highest form of lawfinding action to become capable of portrayal in terms of a maximal rule-boundedness, or conversely, a minimal level of personal discretion. This is because the more rule-bound the process of decision-making is, the less leeway can it be seen to grant to the decision-making juristic actor in

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<sup>34</sup> The reading of formality as rule-boundedness that is implicitly used here concurs with Kennedy’s reading. *See* Kennedy, *supra* note 13, at 1041.

<sup>35</sup> *See* Sterling & Moore, *supra* note 22, at 75. Elsewhere in Weber’s elaborations on the common law, one can gather that the impersonalizing constraints that formally rationalized lawfinding in the common law tradition were precisely these. *See* 2 WEBER, *supra* note 1, at 889–92. Thus, if the principle of deference to earlier adjudications was enunciated more stringently in the modern era of the common law’s history as the doctrine of *stare decisis*, Weber seems to concede that prior to this era the restrictions that followed from the general tendency toward analogical reasoning functioned similarly. *See id.* Finally, Weber would likely agree that an even earlier rationalizing effect followed from the whole vast history of procedurally oriented formalist fictions and through which the common lawyers chastened the facts of new varieties of social conflict and transaction by rendering their “external characteristics” parse-able by the judge administrators. *See id.* This was done by requiring that they plead in conformity with an extremely limited array of writ devices that had long made access to the king’s justice system contingent on casting one’s claim through some one or another of the traditional forms of action. *See id.*

<sup>36</sup> Kennedy, *supra* note 13, at 1041.



relation to the world of values. Where the relevant type of values are those drawn from the class of legal norms already enacted, it will be some form of value-rationality that will, therefore, seem to be the approach to adjudication most consistent with the state's larger legitimacy claim. This is because value-rationality, with the ethic of conviction it inspires, is alone suited to prevent, as per Weber's ideal typical view of this form of action orientation, any capability to re-legislate the norms under interpretation; this, itself, is because of the way interpretation is made to seem no more than norm application in the admittedly quite sophisticated (rather than merely fictitious or foolhardy) sense that Weber specifies when he speaks of logically formal rational lawfinding as confining itself to the "logical analysis of meaning" of the legal norm (that is, of the legislatively juridified value).

It would be wrong, as has become too common now in retrospect, to be too dismissive of the norm application-versus-interpretation distinction. This is the case whether the dismissiveness is expressed through casting past belief in the distinction as the mere product of willful legal fiction or, somewhat more charitably, as the product of an earlier faith in mechanical jurisprudence and legal formalism that posterity has put to rest. Neither formulation suffices for helping to understand why so many of the leading jurisprudential minds of its day held the distinction as valid. Yet more than this, it is also the case that neither formulation adequately acknowledges how such highly over-simplified views of the past are views that there can be too much present incentive to rush to. For to see matters in terms either of a past cynicism or, at best, naivety, obscures how the application-versus-interpretation distinction remains largely intact down to our own day (with modifications, of course, that have been necessary in the context of our own version of a bureaucratized, mixed-capitalist, welfare-statist governing order). Before turning to this matter, however, the next section of the Article turns to the other major category of legal action that necessitates re-description in terms of Weber's general sociological categories of meaningful action.

### C. SUBSTANTIVELY RATIONAL LAW FINDING AS VALUE-RATIONAL OR INSTRUMENTALLY RATIONAL ACTION

The above discussion aside, there is something that remains counterintuitive about the inverse proportion that holds between lawfinding's degree of formal rationality when considered as a type of legal action and its degree of instrumental rationality when considered as a general type of meaningful action. As the excerpt from Kennedy above notes, the same relationship of inverse proportionality does not hold when examining how substantively rational lawfinding appears from the perspective of the general categories of meaningful action. Here, contrary to what might now be expected, it is not the case that substantively rational lawfinding is simply the reverse of formally rational lawfinding in its relationship to meaningful action. Thus, substantively rational lawfinding is not simply instrumentally rational alone. Instead, it proves something of a different beast from formally rational lawfinding altogether; therefore,

there is no simple and set logical correlation that holds between its description according to the categories of legal thought and the categories of meaningful action. Substantively rational lawfinding can be value-rational, like its formally rational cousin, with the difference between them here deriving from the source from which the value commanding deference originates. Substantively rational lawmaking, however, can also be instrumentally rational, as when adjudicatory decision proceeds according to Kennedy's "situation sensitive balancing tests."

Weber, of course, was particularly wary of and preoccupied with substantively rational lawfinding's value-rational dimension because he felt the extralegal values on the basis of which it proceeded would threaten to erode the autonomy of law.<sup>37</sup> This preoccupation, no doubt, was one of the ways in which he sought to deal with his own uniquely elaborated version of a concern with the problem of judicial legislation. In trying to reconstruct the true scope and potential of Weber's ideal types, however, it is important to emphasize that there is no need to follow him in excluding from view the less obvious, but no less important, instrumentally rational form that substantive legal rationality takes on. If anything, its existence is far more discernible and much less easy to ignore in our own day, as suggested directly by our contemporary ways of speaking about balancing as one of the principal modes adjudicatory reason takes on.

It must be asked, then, what it means—in terms of Weber's sociological categories—to say, as Kennedy does, that substantively rational lawfinding involves not only value-rational but also instrumentally rational action. The answer is to be found in the fact that there arise situations in which the substantively rational process of stepping into extralegal domains of value involves more than a simple reference to some single non-legal norm of ethics or morality as the basis of normativizing the lawfinding decision. Where there is a whole range of extralegal values that might each on their own yield equally consistent bases for normativizing the decision, the instrumentally rational dimension of substantive legal rationality is always immanent. When speaking of a balancing calculus as the way to reconcile all these competing values, which are potentially at play, it means, in Weber's terms, that at issue is a type of meaningful action that involves the instrumentally rational weighing of the different possible norms that might be formulated as just so many potential means to the end of the outcome of the application of the derived judicial rule. Once set into proper balance by the norm-discerning judge (at least in cases that throw up a gap within the existing rule system) these conflicting norms or value-positions are considered to make for a composite means for reaching a resultant end that is rightful because it is the one that the juristic actor has made only in the sense of having discerned it as being already there extant within the original rule rather than legislated anew by him.

Given this dual character that substantively rational lawfinding is revealed to have when considered as a type of meaningful action, the

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<sup>37</sup> See 2 WEBER, *supra* note 1, at 882–89 (describing Weber's view of the conflict between formal and substantive legal rationality).

question of how to understand lawmaking from this vantage point is begged even more urgently. This is because Weber suggests that the corollary of a situation in which lawfinding approaches its given level of rationality is one in which so too does lawmaking approach the same. Yet, if as Weber also maintains, the lawfinding-lawmaking distinction emerges only in the age of formal legal rationality (of the type at play in the modern capitalist West alone), he is surprisingly casual in his treatment of the question of wherein the formal rationality of lawmaking, itself, now lies. As noted earlier, this is partly because in so much of his discussion of lawfinding that is made in terms of his categories of legal thought Weber is faced with no urgent need to distinguish the law that is found from the process of its finding. This is because the two—lawfinding and the law it finds—are not separate from one another during the historical epochs Weber is canvassing at these points in his exposition. In all of these moments, Weber's focus on the rationality or irrationality of whatever the type of lawfinding he is considering effectively doubles for a discussion of the rationality or irrationality of the law itself.

As for where the category of formally rational lawmaking stands in relation to Weber's general categories of meaningful action, the final part of this Article will return to this problematic question. Before doing so, however, it will be necessary to step back in order to elaborate more clearly just how Weber's narrative of rationalization within the legal domain is linked to his understanding of the overall character of social life under the circumstance of capitalist modernity (especially, of course, in the West). Before turning to this next section, however, below is presented in table form the master categorization of Weber's types of legal action when considered from the perspective of his more fundamental categories of meaningful action. While this Article has not yet explicitly addressed the types of legal irrationality in terms of Weber's general categories of action, the connections depicted in the first two rows of the table should prove clear enough in light of what has been made explicit already about how the types of legal rationality fare in this regard. Finally, it should be noted that given that the question of lawmaking under a condition of formal legal rationality will be addressed in the last section of this article, the corresponding cells in the table are left blank for now.

TABLE 1.

(1)	(2)	(3)	(4)
<i>Nature of the "body of laws"</i>	<i>Constituent Undertaking of Legal Action that Makes for (1)</i>	<i>Classification of (2) in Terms of Weber's "categories of legal thought" and types of legal action:</i>	<i>Classification of (2) in terms of Weber's general sociological types of the meaningful orientation of action:</i>
"Formally Irrational"	Lawfinding	Formally Irrational legal action (for example, magical	No seeming correspondence

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“Substantively Irrational”	Lawfinding	and oracular procedures) Substantively Irrational legal action (for example, so-called khadi justice; common law justices of the peace)	Affective or Traditional
“Substantively Rational”	Lawfinding	Substantively Rational legal action (for example, natural law jurisprudence; the materialized modern jurisprudence of social welfare)	Value-Rational (reference to extra-juristic norms or, at times, instrumentally rational balancing tests)
“Formally Rational” in virtue of tending only to “external characteristics of fact”	Lawfinding	Formally Rational legal action: (for example, the more contemporary and the historical Common Law: attention to external character of facts that can be readily discerned as sense data; meaning, not only “Does this properly conform to precedent?” but also, “have facts been plead in a way that they appear as a proper action in trespass?” and even, “is there a seal on a deed?”)	Value-Rational (in so far as it does not become necessary to make up for the inadequacies of such a system by some noticeable tendency—as with English common law—to resort to substantively rational law-finding and its attendant forms of instrumentally rational decision as well).

	Lawmaking	To be determined	To be determined
“Logically Formally Rational” (or formally rational in virtue of proceeding strictly as an exercise in the “logical analysis of meaning”)	Lawfinding	Logically Formally Rational legal action  (for example, German Pandectist legal science; continental ‘code’ jurisprudence generally: attention to the logical meaning, alone, of the legal norms comprising the system of legal rules).	Value-Rational (and strictly so).
	Lawmaking	To be determined	To be determined

IV. THE CONNECTION BETWEEN FORMAL LEGAL RATIONALITY AND LEGAL RATIONAL AUTHORITY AS THE CHARACTERISTIC TYPE OF LEGITIMATE DOMINATION UNDER MODERNITY

If it proves possible to defend Weber from the charge of a discontinuity between his general versus legal sociology, it comes only at a certain expense. This ironically takes the form of a discontinuity that emerges from within his legal sociology itself, once lawmaking, lawfinding, and the body of law they act on and produce split apart. This section suggests that this latter discontinuity within the ideal type of formal legal rationality as it applies to these objects of would-be conceptual entailment is problematic for reasons beyond just what it means for legal action itself. This is because the ideal type of formal legal rationality is intimately related to Weber’s sociology of domination and its attendant notion of the legal rational form of authority. Moreover, given the way these highly technical concepts—formal legal rationality and legal rational authority—find their ongoing reflection in our own more casual versions of ideas about the non-discretionary posture of adjudicatory decision-making and the rule of law it is said to underpin, the wider problem posed in this section cannot be seen as one relevant only to exegeting Weber.

A. VALUE-RATIONAL DEFERENCE TO NORMS AND THE INTERNAL ORDERING OF MODERN FORMS OF ASSOCIATION

While more directly related to what is thought of when speaking about law in liberal discourse, as found on display within the institutions of formal judicial lawfinding, legal rationality is only one of the modes through which the legal variety of legitimate domination manifests itself. That being said, formal legal rationality may be the most important exemplar of this form of domination given that it lends clearest credence to the notion of the impersonality of liberal rule. In Weber's view, this is because the crucial characteristic of lawfinding under conditions of formally rational law is how it deals with reasons that are distinct in kind from those figuring into the process of enacting the rules in the first place. This was why lawfinding in such a context could be considered strictly value-rational whereas lawmaking, discussed further below, proves either value or instrumentally rational. In such a conceptualization, in other words, once juridified, the norm delivered to the hands of the lawfinder is understood to elicit absolute value-rational deference to its contents, with all questions about the justification of those contents being strictly external to the interpretation of its meaning. The role of reason giving in the process of formally rational lawfinding, therefore, is understood to be characteristically different from that which is involved in lawmaking. The former involves an exercise of articulating reasons that confines itself to spelling out the bases on which some one view of the logical meaning deemed inherent to the rule itself is to be preferred to all others given the rule's existence as a propositionally embodied statement endowed with willed meaning and represented publicly through words with semantic content. This contrasts with the lawmaking context in which reason-giving is deemed an affair primarily of articulating what motivates the rule's embodiment as a proposition in the first place, be this some value position deemed to necessitate juridification or the outcome of weighing several different such extralegal value positions through a means-ends calculus.

When seen in such terms, it becomes clear that it is not so much formally-rational lawfinding that is the defining criterion of the legal type of legitimate domination in the modern West (both according to Weber as well as our own more casual versions of the thesis of the formal rationality of modern law). Rather, it is the more abstract phenomenon of an internal ordering based on a posture of absolute value-rational deference to norms that matters most; formally rational lawfinding turns out to be just one species of this. For Weber (and it would seem often for our present imagination), it is only this more abstract characteristic of how actors generally stand in relation to the norms of what he calls the "associative" orders they inhabit that makes for a social phenomenon widespread enough to distinguish the West's sociological modernity as historically unprecedented.<sup>38</sup> Weber's image of the modern judge in the European

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<sup>38</sup> I WEBER, *supra* note 1, at 40. In a manner quite similar to Ferdinand Tönnies's (perhaps better known) *gemeinschaft* versus *gesellschaft* distinction, Weber distinguishes social relationships that are "communal" from those that can be called "associative." *Id.* Whereas the former involves an orientation of social action that "is based on a subjective feeling of the parties, whether affectual or traditional, that

continent as an “automaton of paragraphs” epitomizes this phenomenon of value-rational deference to norms in the context of an actor who just so happens to be playing a role within the associative ordering that is the state.<sup>39</sup>

It is easy to forget this crucial importance of value-rationality to Weber's image of modern social life if his understanding of Western exceptionalism is envisioned too exclusively in terms of the “calculating spirit”<sup>40</sup> of modern “economic action.”<sup>41</sup> To the contrary, it must not be forgotten that alongside such instrumentally rational capitalistic economic action in the now generalized space of the market, value-rationality is the predominant ethic in the most important forms of modern organization.<sup>42</sup> This is because orderings based on a non-discretionary deference to autonomous norms recur throughout many of the forms of social aggregation that most visibly characterize modern life. Moreover, according to the predominant conception, it is especially when such forms of aggregation reach a scale necessitating bureaucratic organization that their internal ordering based on value-rationality makes each into a little node from which the celebrated impersonality of a rule-by-rules rather than the ancient regime's rule-by-men radiates more generally across the whole social sphere. Thus, members of countless other types of orders are not too distant from Weber's formally rational lawfinder. These include the staff member of the state's bureaucracy who is, in his or her own way, expected to show absolute, non-discretionary value-rational deference to the extant norms defining his or her role as a public official. At the same time, they also include the managerial functionary of the private capitalist enterprise. For he, just as much as his public office-holding counterpart, is expected to be no less value-rational in the face of the internal norm order of the business firm, considered as a bureaucratically-organized associative order in its own right.

It is only with this last observation that one can see the true extent of the relationship between the rationalization of legal action and the historical emergence of legal rational authority as an actual operative type

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they belong together,” in the latter, the orientation of social action “rests on a rationally motivated adjustment of interests or a similarly motivated agreement, whether the basis of rational judgment be absolute values or reasons of expediency”—that is to say, either to “a value-rational belief in one's own obligation, or to a rational (*zweckrationale*) expectation that the other party will live up to it.” *Id.* at 40–41.

<sup>39</sup> 3 *Id.* at 1395.

<sup>40</sup> 1 *Id.* at 374.

<sup>41</sup> *Id.* at 63. For Weber, economic action is action that “so far as, according to its subjective meaning, it is concerned with the satisfaction of a desire for ‘utilities’” and, thus, includes any “peaceful use of [an] actor's control over resources, which is rationally oriented . . . to economic ends.” *Id.* Economic action, therefore, is to be distinguished from Weber's notion of economically oriented action. *Id.* at 64 (“As distinguished from ‘economic action’ as such, the term ‘economically oriented action’ will be applied to two types: (a) every action which, though primarily oriented to other ends, takes account, in the pursuit of them, of economic considerations; that is, of the consciously recognized necessity for economic prudence. Or (b) that which, though primarily oriented to economic ends, makes use of physical force as a means.”). See RICHARD SWEDBERG, MAX WEBER AND THE IDEA OF ECONOMIC SOCIOLOGY 32 (1998) (pointing out that the difference comes down to economically oriented action including not only those situations where the main goal is extra economic but also those situations where the main goal may be economic but in which violence is also used, such as imperialist wars for profit).

<sup>42</sup> I WEBER, *supra* note 1, at 63–66. Weber further discusses that “[e]conomic action’ . . . is rationally oriented, by deliberate planning . . .” *Id.* at 63.

of legitimate domination. For a situation of legal domination, like the category of formal legal rationality is preeminently a matter of how the individual orients himself so as to normativize his (meaningful) actions.<sup>43</sup> The difference is only that where legal domination in general is concerned, it is the ordinary actor—in all of her multiple identities as a member of the various larger associational enterprises to which she belongs—who comes into view. It is not, in other words, just simply the juristic actor who comes into view because she just so happens to be a lawfinder charged with functioning as an umpire over the associational order of the state, in specific, and addressing its (enacted legal) norms of internal ordering alone. Only with an eye toward the relations of the hierarchies that define the structure of authority necessary for maintaining “modern organized action”<sup>44</sup> does the truly emblematic character of the lawfinder’s formally rational orientation come to seem like the source of an endless echoing, deep into society and far outside of the judge’s chambers.<sup>45</sup> And it is in this sense that the legal rational form of authority comes to harbor, within the historical circumstance of its own rise to dominance, a much more general value-rational orientation than merely just that which obtains in the context of its formally rational law proper.<sup>46</sup>

None of this, of course, is to say that Weber sees older forms of value-rationality as having passed into obsolescence amidst such a modern circumstance. Rather, more to the point is that those are not the forms of value-rationality that he sees, along with instrumentally rational action in the market, to have precipitated the vastly accelerated and multiplied

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<sup>43</sup> Here one must understand the usage of “normativization” to include not just what Weber means as an orientation to norms (of the type at issue in value-rational action) but also an orientation to means-end calculating (of the type at issue in his instrumentally rational action). See 1 WEBER, *supra* note 1, at 25–26. Though it will not come out here, the usage intended also includes more than and something quite different from what Weber seems to mean in his two basic types of meaningful action.

<sup>44</sup> *Id.* at 219. This point makes clear Weber’s expansive view of bureaucracy as relevant to the internal character of modern social aggregations. As he states in the seventh entry of the “fundamental categories of rational legal authority”:

Administrative acts, decisions, and rules are formulated and recorded in writing, even in cases where oral discussion is the rule or is even mandatory. This applies at least to preliminary discussions and proposals, to final decisions, and to all sorts of orders and rules.

The combinations of written documents and a continuous operation by officials constitutes the ‘office’ (Bureau) which is the central focus of all types of modern organized action.

*Id.* (footnote omitted).

<sup>45</sup> It is not cut and dry whether logically formal legal rationality is merely emblematic of these other orientations to the norms of whatever given organizational enterprise or synonymous with them. This is because, to a significant extent, these other norms themselves indirectly belong to the legal domain in so far as they are sanctioned by it once. In this image of things, the state becomes the supreme font of law.

<sup>46</sup> See 1 WEBER, *supra* note 1, at 220–21. As Weber notes concerning his “pure type” of legal authority:

The purest type of exercise of legal authority is that which employs a bureaucratic administrative staff. Only the supreme chief of the organization occupies his position of dominance by virtue of appropriation of election, or of having been designated for the succession. But even his authority consists in a sphere of legal ‘competence.’

. . . . . This type of organization is in principle applicable with equal facility to a wide variety of different fields. It may be applied in profit-making business or in charitable organizations, or in any number of other types of private enterprises serving ideal or material ends. It is equally applicable to political and to hierocratic organizations. With the varying degrees of approximation to a pure type, its historical existence can be demonstrated in all these fields.

*Id.* In the subsequent illustrations Weber elaborates on this point, mentioning the types of “bureaucracy” that are to be found, for example, in private clinics, hospitals maintained by religious orders, and the modern Catholic church. *Id.* at 221.



variety of meaningful social transactions that only modernity is deemed to have brought with it. It is this acceleration and vast multiplication of social transactions that also serves as a precondition of sorts for secularizing modernity's progressive differentiation of the social world into what are then said to be its relatively autonomous domains for inter-personal commerce and hence, meaningful transactions.<sup>47</sup>

B. VALUE-RATIONAL DEFERENCE TO LEGAL NORMS AND LAW AS A CALCULABLE ELEMENT IN MODERN SOCIAL LIFE

The way the value-rationality of the formally rational lawfinder finds its echo in the roles individuals take within modern associative orderings—like the territorial state's bureaucracy or the private business firm's internal management—does not exhaust its relevance to Weber's understanding of modernity. Of still wider importance to his portrayal of the latter is the idea that the formally rational lawfinder's posture of value-rationality vis-à-vis enacted legal rules transforms legal normativity into an unshakeable sort of social facticity. As such, it can be relied on as a given element of the context within which other forms of meaningful action proceed.

It is for this reason that within Weber's conceptualization it may, at first glance, seem little to quibble with when he continues using "formally rational" as a descriptor of both lawfinding and "the body of laws" under the historical circumstance of the modern West. To continue speaking in this way of formally rational law seems, in other words, to be simply a way of alluding to how the value-rationality of the lawfinder guarantees a surrounding of legal rules that make for fixed points of reference of just the type needed to facilitate the variety of social action that characterizes a capitalist market economy. It is the lawfinder's value-rational regard for legal norms that allows the private (economic) actor to go on smoothly functioning in the instrumentally rational way that epitomizes his historical epoch. From this point of view, the rather promiscuous descriptor that "formally rational" appeared to be when applied to the body of laws of such an epoch comes to seem hardly like a defect. To the contrary, the

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<sup>47</sup> These are generally understood to abide a master heuristic division between the public and the private, together with the subdivisions therein between polity, economy, society, and in some formulations, culture. While the location of the domains on each side of this line have tended to shift over time—thus, never entirely clear—their identities have been relatively constant, though not entirely without important modifications and additions. Thus, if in the classical eighteenth century view of the matter—which Hegel canonized for the nineteenth century—the political was public in a way that civil society was not (taking civil society to be understood as the arena of market oriented exchange relations that was private), then with time, the placement of these realms appears to have changed. Today, it seems much more the case that the public side of this division has grown to include not only the domain of the political (that is, "the state," the site of the formal political process, the arena in which actors play functional roles as part of the staff of a government and where they undertake their being of citizens or subjects) but also, to a certain degree, even civil society (in its capacity as the site of public sphere activities of the cultural exercise of inter-subjective personal relationeering, including exchanges of opinion, aesthetic taste, civic feeling, or the like). On the other hand, on the private side of the divide there seems to be more than just the capitalist market or the remaining elements of society having to do with ascriptive and communal aggregation (for example, kinship networks, the family, social structure—but not in the political economic sense of the term). Rather, added to the realm of the private, a further domain has come to be that is best exemplified in the idea of "culture" in the sense assigned the term in the tradition of post-war American social anthropology (that is, the shared representative space of the iconographies of communal imagination, secular leisure, religious piety, ethno-national tradition, and the like).

multiple referents of the term may appear downright necessary, at least insofar as it would be even less ideal to be left with no choice but to speak of the value-rationality of the total body of law.

For Weber, this calculative behavior of the market into which the fixed social facticity of enacted rules figures becomes generalized under capitalism in a way that is contrasted with economic action that is traditional, such as the house-holding of the oikos.<sup>48</sup> This is because it is goal-oriented and, therefore, rational in a way that the latter is not.<sup>49</sup> In this preliminary division according to which Weber separates out the various types of economic action from one another, the latent presence of his more fundamental descriptors for meaningful action in general is more readily apparent than it is in his categories of legal thought. This is because the category of goal-oriented economic action stands in at the outset for both value-goals (in which there is no real separation of means from ends as in value-rational action generally) and purposive goals proper (that is, ends that different means can be calculated as paths toward as in instrumentally rational action). This, of course, is why from the outset of his discussion of economic action, Weber anoints with the mantle of rationality only that type of goal-oriented economic action that is instrumentally rational.<sup>50</sup>

It is this notion of calculability that makes for the essence of the relationship that Weber (and nearly all other modern scholarship) takes to obtain between the rule of law and capitalism (or, development, as the case may be).<sup>51</sup> While this is not the appropriate place to consider the merits of this thesis, it is enough to say that it is in articulation of it that Weber repeatedly suggests that the law is, in effect, one of the crucial pre-conditions of what the classical economists dubbed “marginal utilitarian behavior” under conditions of modern capitalism.<sup>52</sup> This is because insofar as the law serves as a calculable element, this derives from the formal rationality with which it is to be expected that the lawfinder will regard its enacted norms. Only then can the law’s existence be assumed by the economic actor to be stable, dependable, and measurable precisely in the same manner as monetary signs of the price system. Considered to be factual elements of the institutional context in which decisions are to be made in the market, prices and legal rules are the two key elements that the zweckrational economic actor uses to map out a coherent set of forward-

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<sup>48</sup> “The English word ‘household’ covers two concepts in Weber’s sociology: *Haushalt*, or a way of managing resources (the opposite of profit-making), and *Hausgemeinschaft*, or a form of socio-economic organization that includes the family and is sometimes identical to it.” See SWEDBERG, *supra* note 4, at 117.

<sup>49</sup> I WEBER, *supra* note 1, at 69 (“Economic orientation may be a matter of tradition or of goal-oriented rationality.”).

<sup>50</sup> *Id.* at 24–26, 69. See *supra* note 42.

<sup>51</sup> See generally Trubek, *supra* note 19 (making clear the relationship between the rule of law and capitalism); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972).

<sup>52</sup> As noted earlier, Weber explicitly equates formally rational economic action with a mode of instrumentally rational action, thus giving the term an opposite connotation in relation to his general categories of meaningful action as compared to that which previously was argued as obtaining between formal legal rationality and the general category of value-rational action.

looking projections about how different combinations of means will contribute to his or her (self-interested economic) ends.<sup>53</sup>

## V. THE PROBLEMS OF FORMAL LEGAL RATIONALITY AND THE LINGERING PROBLEM OF JUDICIAL LEGISLATION

### A. THE PROBLEM WITH FORMAL RATIONALITY AS A SHARED DESCRIPTOR FOR MODERN LEGAL AND ECONOMIC ACTION

Despite the well-counseled insistence that it is a mistake to see only a single narrative of rationalization in Weber's scholarship, as shown above, there clearly remain very direct correlations between his portrayal of rationalization processes in different domains of social life. In the case of

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<sup>53</sup> See 1 WEBER, *supra* note 1, at 30. As noted earlier, Weber regards formally rational economic action as a type of instrumentally rational action. This aligns it to his general categories of meaningful action in a way that stands at direct odds with the alignment that this Article has argued to exist for Weber between formally rational legal thought and value-rational action:

Many of the especially notable uniformities in the course of social action are not determined by orientation to any sort of norm which is held to be valid, nor do they rest on custom, but entirely on the fact that the corresponding type of social action is in the nature of the case best adapted to the normal interests of the actors as they themselves are aware of them. This is above all true of economic action, for example, the uniformities of price determination in a "free" market, but is by no means confined to such cases. The dealers in a market thus treat their own actions as means for obtaining the satisfaction of the ends defined by what they realize to be their own typical economic interests, and similarly treat as conditions the corresponding typical expectations as to the prospective behavior of others. The more strictly rational (*zweckrational*) their action is, the more will they tend to react similarly to the same situation. In this way there arise similarities, uniformities, and continuities in their attitudes and actions which are often far more stable than they would be if action were oriented to a system of norms and duties which were considered binding on the members of a group. This phenomenon—the fact that orientation to the situation in terms of the pure self-interest of the individual and of the others to whom he is related can bring about results comparable to those which imposed norms prescribe, very often in vain—has aroused a lively interest, especially in economic affairs. Observation of this has, in fact, been one of the important sources of economics as a science. But it is true in all other spheres of action as well. This type [meaning, the *zweckrational*], with its clarity of self-consciousness and freedom from subjective scruples, is the polar antithesis of every sort of unthinking acquiescence in customary ways as well as of devotion to norms consciously accepted as absolute values. One of the most important aspects of the process of "rationalization" of action is the substitution for the unthinking acceptance of ancient custom, of deliberate adaptation to situations in terms of self-interest.

*Id.* After the thought concerning the "uniformities of price determination" and how acting in reference to these differs from doing so for the sake of a "norm . . . held to be valid" (that is, value-rationally), Weber could just as well have added that the same goes for the uniformities of a formally rational legal system. See *id.* In other words, when it is the case that the norms of such a legal system are considered other than from the perspective of the adjudicator who regards them as values to be heeded and confronted only for their logical meaning one can see that they might just as well appear like factual elements of the situation. This is, of course, how they are regarded by the instrumentally rational and calculating economic actor who regards them less as substantive values than as being like economic prices that can be calculable with respect to the role they will (or are meant to) play in the course of events.

One should note Weber's subsequent sentence as well, which bears on the earlier discussion of the way in which law making behavior can proceed through value-rationality in preparing a formally rational law for the lawfinders:

To be sure, this process by no means exhausts the concept of rationalization of action. For in addition this can proceed in a variety of other directions; positively in that of a deliberate formulation of ultimate values (*Wertrationalisierung*); or negatively, at the expense not only of custom, but of emotional values; and, finally, in favor of a morally sceptical [sic] type of rationality, at the expense of any belief in absolute values.

*Id.*

the narratives of the rationalization of economic and legal action, this is especially true. The relationship between them is such that the level of rationality that comes to predominate where the former is concerned is conditioned on that which comes to predominate where the latter is concerned. Thus, the degree of rationality that characterizes legal action functions as a constraint on (or equally a cause of) the degree of economic action's rationalization.

Accordingly, it is no surprise that as Weber's discussion of economic action progresses so as to find him formulating more precise technical concepts, he introduces the ideal typical axis of distinction between formal and substantive rationality into this context of consideration.<sup>54</sup> In so doing, it becomes apparent that Weber is carving up his more casual notion of goal-oriented economic action (originally invoked to be distinguished only from traditional economic action) into two distinct types of action.<sup>55</sup> And here again, with this new axis of distinction in hand, in the economic domain, as in the legal, the highest form of rational action is that which is formally so—rather than substantively so.

In and of itself, the way in which the connection between legal and economic action is made explicit at the level of conceptual vocabulary may not seem very surprising. After all, it is precisely the rich examples of connections like these that have necessitated the warnings against generalizing from one domain of social life to another with respect to the rationalization process taking place therein. Yet what is surprising is that once surveyed more expansively from the point of view of the most general of Weber's rationalization narratives—namely the one pertaining to the rationalization of meaningful social action—what this Article has been calling “legal action” and what Weber calls economic action appear to fall under plainly conflicting categories. For if legal action is formally rational in virtue of its value-rationality and substantively rational in virtue either of its value or instrumental rationality, the same is not true of economic action. To the contrary, economic action is formally rational when it is instrumentally rational, as alluded to above and as Weber himself makes it a point to explicitly emphasize; the whole notion of the calculating spirit of capitalist modernity underlines nothing less. Conversely, economic action is substantively rational only when it proceeds on the basis of value-rationality, a point that Weber again makes explicit. He does so, moreover, not only at the level of conceptual elaboration but also at the level of his

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<sup>54</sup> *Id.* at 85 (“The term ‘formal rationality of economic action’ will be used to designate the extent of quantitative calculation or accounting which is technically possible and which is actually applied. The ‘substantive rationality,’ on the other hand, is the degree to which the provisioning of given groups of persons (no matter how delimited) with goods is shaped by economically oriented social action under some criterion (past, present, or potential) of ultimate values (*wertende Postulate*), regardless of the nature of these ends.”).

<sup>55</sup> *Id.* at 85–86 (“The concept of ‘substantive rationality,’ on the other hand, is full of ambiguities. It conveys only one element common to all ‘substantive’ analyses: namely, that they do not restrict themselves to note the pure formal and (relatively) unambiguous fact that action is based on ‘goal-oriented’ rational calculation with the technically most adequate available methods, but apply certain criteria of ultimate ends, whether they be ethical, political, utilitarian, hedonistic, feudal (*ständisch*), egalitarian, or whatever, and measure the results of the economic action, however formally ‘rational’ in the sense of correct calculation they may be, against these scales of ‘value-rationality’ or ‘substantive goal rationality.’”) (emphasis added).

historical exemplifications. For Weber, formally rational economic action dominates the modern West, while in contrast, substantive economic rationality dominates the emerging planned socialist and communist systems of economic allocation, which he sees to have been based not on an ethic of means-end calculating self-interested utility but instead on concrete quasi-absolute deference demanding values of equality and social justice.<sup>56</sup>

The equivocal nature of the formal rationality of these types of actions—economic and legal—from the standpoint of their quality of meaningfulness (when taken as general types of orientation) proves quite problematic considering its implications. In light of this equivocal quality, for example, it begins to prove quite difficult to look past Weber's description about the West's formally rational law as was suggested in the previous section. Chalking up formal rationality's multiple referents—to both juristic legal thought and the body of laws—to its role as a necessary third term for speaking simultaneously about both the lawfinder and the private (economic) actor's posture vis-à-vis the judicial process now becomes untenable. This is because the more precisely Weber clarifies economic action in term of its formal rationality, the less possible is it to insist that it merely stands as an empty placeholder for speaking jointly of the lawfinder's and the private economic actor's respective ways of regarding the norms of the law. Likewise, as the concept of formal rationality retreats further and further from any role as a description of the legal action of the juristic lawfinder alone, so too is the reader more and more reminded that there is not just a single economic type of private social action into which the law figures in the fashion of monetary price. Thus, if the body of law's formal rationality from the standpoint of the marginal utilitarian actor of the modern capitalist market is staked on her penchant for means-end calculating, then what is to be made of some other (or even just the same?) actor when she is found orienting herself to some given rule of law (or perhaps the same rule of law?) quite differently? For example, when it comes time to choosing whether or not to steal a loaf of bread, this same actor might well find herself regarding the existence of the relevant norm of criminal sanction not from the point of view of her own faculty for instrumental rationality but from that of her faculty for value-rationality. From its point of view, there is nothing that prevents a proscription against theft from appearing, primarily, as a legal value position (to be added, perhaps, to the moral value position that it may simultaneously be assigned in her cognition). Therefore, there is also nothing that prevents her from finding herself in need of paying absolute deference to the prohibition—rather than regarding it as a factor in a means-end calculation—when considering how to meaningfully act in the social world.<sup>57</sup> Of course she

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<sup>56</sup> *See id.* at 86.

<sup>57</sup> This is not the only way such action can be explained. Indeed, much of the enterprise of law and economics can be seen as an endeavor of precisely this latter sort. From this perspective, the explanation of the actor's choice not to steal the loaf of bread could just as well be recast in terms of what, in Weber's framework, could be called an instrumentally rational calculating-ness. Of course, what is good for the goose is good for the gander and may apply to the description of efficiency-seeking economic action. In other words, even within Weber's own conceptual framework, any given instance of economic action might be characterized, or, perhaps, retrospectively reconstructed by the inquirer

might regard the prohibition through a means-end calculus, but the point is that there is nothing in the concept of the formal rationality of the given rule of law that requires that this be so. In other words, once more than just the lawfinder's action is taken into account as defining modern law's formal rationality, it must be acknowledged that there may not be any consistent mode of actor orientation to its rules that stands capable of defining them as such. All that remains left to carry out this task is the legal action of the value-rational lawfinder. Yet, as discussed in the next section, even this remains something of an illusory defining criterion given that under properly modern conditions in which lawfinding and the body of law it finds are split apart, the lawfinder is no longer the only type of individual who is engaged in legal action proper.

#### B. THE PROBLEM WITH THE IDEA OF FORMALLY RATIONAL LAWMAKING ACTION

As illustrated in the previous sections, it proves inadequate to understand formal legal rationality as a third term meant to capture the different action orientations—the instrumentally rational and the value-rational—from which economic actors and legal actors proper, like the lawfinding judge, can be said to respectively stand in relation to the norms of the law. Weber's continued tendency to speak of law and lawfinding under the same heading long after arriving at his epoch of formal legal rationality when they are said to have historically split in two, therefore, is problematic. This, however, is for reasons other than just that meaningful non-legal action in relation to the law cannot be reduced simply to economic action alone. Even more serious is the difficulty that results from trying to understand the formal rationality of lawmaking in the context of modern capitalist society. In fact, matters become most difficult here, precisely at the point in Weber's narrative of legal rationalization when elaboration is most needed. This is because, as noted in Part II, under conditions of modern capitalist society in the West, according to Weber, there are three clearly distinct objects of analytical scrutiny: two processes of action (that is, lawmaking and lawfinding) and the body of propositions in relation to which or over which they exercise themselves. The most important consequence of this state of affairs is that it no longer remains the case that both lawmaking and lawfinding, considered as types of action in their own right, will have to fall under a single category of ideal typical description. Once this becomes true, so too does it increasingly become the case that the category of formally rational legal thought loses its technical meaning save, possibly, for the way in which it describes lawfinding.

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other than in terms of its marginal utilitarian instrumental rationality. Note that this point directly deals with how to best capture and reconstruct the economically "rational" component of such economic action. Weber would, perhaps, well concede the point (even if, making such a concession would not be pertinent to denying the historical thesis he is making about how economic action has generally changed with time). The point, however, is one that has all too rarely been given adequate attention in our own day, perhaps because such a concession tends to call into question the scientific foundation of economic inquiry. In any case, it is from the starting point of this observation that a much more forceful critique of Weber's ideal types of rationality can be made, rather than from one emphasizing either their abstractness in light of actual historical fact or their alleged mutual unintelligibility given the separate axes according to which they divide legal and general action.

This means that if formally rational lawfinding is defined by its value-rationality, the same will no longer necessarily be the case for its counterpart concept of formally rational lawmaking. If any such thing as the latter can be sensibly spoken of at all, when it comes time to describing it as a type of meaningful action, it would have to resemble more closely substantively rational rather than formally rational lawfinding. In other words, like substantively rational lawfinding, formally rational lawmaking would have to involve action that was either value-rational or instrumentally rational. Therefore, when it comes to enacting laws under the circumstances of modern capitalism, it would not just be instrumental rationality that predominates, as is so commonly thought, nor would it even just be value-rationality that does so. In order to deliver to the hands of the adjudicator what Weber equivocally calls a formally rational law, the lawmaker would proceed either in a value-rational manner or according to some other form of instrumental rationality.<sup>58</sup> Such is the case, for example, when the lawmaker, like the substantively rational judge, undertakes his decision through a “situation-sensitive balancing” calculus that identifies “a set of societal goals, or a set of partial political objectives” that are then used to “craft his rule to maximize the[] accomplishment” of these goals or partial objectives.<sup>59</sup>

Ultimately, this means that in contrast to the highest type of (formally rational) lawfinding, in order for there to be any such thing as a formally rational body of laws, there has to be a process of lawmaking that is, at best, a mix of value-rationality (for example, natural rights getting enshrined as positive rights because they are just that uncompromisable) with a good and, perhaps, even predominant dose of instrumental rationality (for example, political, ethical, and other possible substantively, non-juristic ends identified and different candidate legal rules that might be enacted as means to those ends or some combination of them formulated).

The reader can gather from one of Weber's few explicit (though quite spare) statements on lawmaking under a circumstance of what he calls formally rational law that he adopted something very much like the view described above. Weber says “[A]ny given legal norm may be established by agreement or by imposition, on grounds of expedience or value-rationality or both, with a claim to obedience at least on the part of the members of the organization.”<sup>60</sup> In this passage, the notion of expedience substitutes for the type of zweckrational balancing of different substantive values that is involved when the lawmaker's action proceeds as an exercise in identifying different legal rules that might be enacted or combined as so many different means to these different value-ends. In the passage, this is clearly distinguished from the lawmaker's more plainly value-rational action of choosing some extra-juristic value position that he or she feels no choice but to positivize because it is felt to be that indispensably binding.

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<sup>58</sup> Recall, again, the situation in which the legislator enacts the moral norm “thou shalt not kill!” into a legal prohibition against murder because the value position it bespeaks demands his absolute value-rational deference to it by commanding that he act to juridically positivize it.

<sup>59</sup> See Kennedy, *supra* note 13, at 1041.

<sup>60</sup> 1 WEBER, *supra* note 1, at 217.

With these observations, the entries left blank in Table 1 can now be filled in for the types of formally rational lawmaking. Before proceeding further, below is the overall table as it now appears in final form.

TABLE 2.

<i>(1)</i> <i>Nature of the</i> <i>“body of laws”</i>	<i>(2)</i> <i>Constituent</i> <i>Undertaking of</i> <i>Legal Action that</i> <i>Makes for (1)</i>	<i>(3)</i> <i>Classification of</i> <i>(2) in Terms of</i> <i>Weber’s</i> <i>“categories of</i> <i>legal thought” and</i> <i>types of legal</i> <i>action:</i>	<i>(4)</i> <i>Classification of</i> <i>(2) in terms of</i> <i>Weber’s general</i> <i>sociological types</i> <i>of the meaningful</i> <i>orientation of</i> <i>action:</i>
“Formally Irrational”	Lawfinding	Formally Irrational legal action (for example, magical and oracular procedures)	No seeming correspondence
“Substantively Irrational”	Lawfinding	Substantively Irrational legal action (for example, so-called khadi justice; common law justices of the peace)	Affective or Traditional
“Substantively Rational”	Lawfinding	Substantively Rational legal action (for example, natural law jurisprudence; the materialized modern jurisprudence of social welfare)	Value-Rational (reference to extra- juristic norms or, at times, instrumentally rational balancing tests)



<p>“Formally Rational” in virtue of tending only to “external characteristics of fact”</p>	<p>Lawfinding</p>	<p>Formally Rational legal action: (for example, the more contemporary and the historical Common Law: attention to external character of facts that can be readily discerned as sense data; meaning, not only “Does this properly conform to precedent?” but also, “have facts been plead in a way that they appear as a proper action in trespass?” and even, “is there a seal on a deed?”)</p>	<p>Value-Rational (in so far as it does not become necessary to make up for the inadequacies of such a system by some noticeable tendency—as with English common law—to resort to substantively rational law-finding and its attendant forms of instrumentally rational decision as well).</p>
<p>“Logically Formally Rational” (or formally rational in virtue of proceeding strictly as an exercise in the “logical analysis of meaning”)</p>	<p>Lawmaking</p>	<p><i>Not Applicable—See Column 4</i></p>	<p>Value-Rational and instrumentally rational</p>
<p>“Logically Formally Rational” (or formally rational in virtue of proceeding strictly as an exercise in the “logical analysis of meaning”)</p>	<p>Lawfinding</p>	<p>Logically Formally Rational legal action (for example, German Pandectist legal science; continental ‘code’ jurisprudence generally: attention to the logical meaning, alone, of the legal norms comprising</p>	<p>Value-Rational (and strictly so).</p>

	the system of legal rules).	
Lawmaking	<i>Not Applicable— See Column 4</i>	Value-Rational and instrumentally rational

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Given the above observations, there seems little way around the view that for Weber, lawmaking's formal rationality in such a situation cannot mean that it is a process of formally rational action in any singly-specifiable (and technical) sense. At best, it can mean only that under these historical conditions, the outcome of whatever kind of process lawmaking may be is a body of laws that might be called by this name. Yet if this is all that formally rational lawmaking can mean, one is naturally left to wonder how it would be any different from its substantively rational counterpart. The difference would not appear to be in the rationality part of the characterization of the resultant norms (that is, in their general applicability). Nor would it appear to lie in how substantively rational lawmaking would be distinct when considered from the perspective of Weber's general categories of meaningful action (since it too, like formally rational lawmaking, would be either value-rational or instrumentally rational). One is left to conclude that the best that can be done is to acknowledge that substantively rational lawmaking and formally rational lawmaking would prove equally capable of giving rise to what one could now only casually (non-technically) refer to under either heading. An immediate problem presents itself, however, even with this solution, and it cannot be dismissed by tricking ourselves into thinking that it is only a problem under Weber's ways of speaking. The problem is that such a solution proves equally as consistent with portraying the result in terms of a substantively rational body of laws as it does with a formally rational one. Whether an instance of casual or failed technical speech, this is plainly not a way of speaking that Weber—let alone the current legal culture given the persistence of formality as an ideal—would seem content with.

There is also a second and deeper problem with any such notion of formal rationality (that is, any such notion that leaves the concept to be a descriptor of the law that is made rather than the process of meaningful action by which it is made under conditions like those that are said to obtain in the modern West). This second problem is that it proves inconsistent not only with what the same concept meant in the context of economic action but also just what it has meant already in the context of lawfinding legal action. To confront this problem is to simply be delivered back to the difficulty made explicit at the end of the previous section. The question of whether it is in virtue of the alleged instrumental rationality of the zweckrational economic actor that legal norms are to be deemed formally rational or in virtue of the value-rationality that some other (or even, simultaneously, that same) private individual's orientation may bring to bear on them that they are to be deemed as such is left unanswered. Once this ambiguity is recognized, it also calls into question the whole notion that legal norms are calculable in the way Weber (and much of the current legal culture) emphasizes when suggesting that they are fixed elements like

the signs of the price system because of the absolute value-rationality with which the formally rational lawfinder is expected to regard them. This is because once the class of meaningfully-driven private (and not just private economic) actors is considered more inclusively, any value-rationality the lawfinder would be expected to regard the rules of the law through would qualify as value-rationality for two distinct reasons. It would qualify as such, in other words, first because of the lawfinder's own perspective, according to which he or she is restricted to an analysis of the "logical meaning" of the rules and nothing more. Second, however, so too would it qualify as value-rationality because from the perspective of the private actor, the lawfinder's decision is just as likely to appear as an instance of substantively rational legal thought based on endorsing or denying the ethical, moral, or other concrete value content inherent in the rules.

#### VI. CONCLUSION: WEBER'S CATEGORIES OF LEGAL THOUGHT AS MEANS FOR OBSCURING THE PROBLEM OF JUDICIAL LEGISLATION

This last observation clarifies something quite important that this Article has not yet discussed. On its face, the concept of value-rationality clearly bears greater resemblance to the concept of substantive rationality than it does to formal rationality. This is why, in the context of economic action, Weber makes the connection explicit as he also does the corollary linking of formally rational economic action to instrumental rationality. In the legal context, it was only the appeal to the unique perspective of specialist juristic functionaries like the lawfinder, as an actor in his or her own right, that made it plausible to sever this intuitive correspondence and instead link the concept of value-rational action to formal (legal) rationality. Yet this remained plausible only so long as there was no reason to ask further in what sense the formally rational lawfinder could be regarded as strictly value-rational in relation to the enacted norms delivered to his or her hands.

It should be noted that in this latter point no reference is being made to some need to ask further about Weber's high nineteenth century image of the judge as an automaton of paragraphs or Weber's equivalent notion of the lawfinder engaging in the logical analysis of the enacted norm's meaning alone. Rather, the point is that Weber's seeming linkage of formal legal rationality to value-rational action remains plausible only so long as there is no reason to ask further about the nature of the value-rationality with which the lawfinder acts in the course of being an automaton of paragraphs. If it is carefully considered that it is not only the lawfinder but also ordinary actors who orient themselves to the law that he or she claims to impersonally find, then the basis for assuming that the lawfinder's action is made in deference to the juridified values or enacted rules as mere social facts on a par with monetary price rather than as concrete normative stuff begins slipping away. Consequently, the attendant sense that the lawfinder's value-rationality was merely formal in its regard for the legal rules also then slips away, as it is revealed to be, instead, concrete in whatever way substantive legal rationality must always be.

With this last observation, then, an explanation begins to present itself as to why the notion that Weber's concept of formally rational lawfinding being value-rational has been so often overlooked. The sense that the highest form of legal action, like the highest form of economic action, should also correspond to the highest form of meaningful action in general has something more that recommends it than just its intuitive appeal. It also obviates the need that seems to present itself—for the sake of consistency—to tread the path of unifying Weber's narratives of rationalization, only to discover that doing so leads to the eventual exhaustion of the very concept of formal legal rationality that prompted the original journey. It also, therefore, obviates the need to consider whether along the way our own more commonplace ordinary language concepts of legal formality and the legal order's impersonality—the very ones, in other words, that Weber was unsurpassed in elaborating and celebrating by enshrining in a technical set of concepts—may not also be exhausted.

This leaves the question of why Weber, himself, so intricately constructed a path to a destination of this seemingly futile kind. Of course, part of the answer is simply that he saw it leading elsewhere. Another part of the answer is that the various elements within an historical sociology of such sophistication and scope as his are bound to not always line up properly. Still further, of course, it is also the case that Weber's image of the rationality of the chimerical entity that formally rational law turns out to be was, in many ways, a late nineteenth century image. As such, it largely ignored the type of critique that was mounting during his own time, which contested the supposedly closed character of the law's enacted rules as well as the supposedly resulting coherence this lent to the notion that they only needed to be interpreted (or applied) according to their logical meaning.<sup>61</sup>

By the same token, however, it is also important not to make too much of this last observation. Clearly, one compelling underlying rationale behind Weber's view is derived from its consistency with the preferred intellectual portrait of the liberal state—both of the perceived *laissez-faire* variety as well as its bureaucratized incarnation. In order for the coherence of this intellectual construction to hold (and also for the integrity of its perceived historical reality within liberal discourse to hold), it requires the strong separation between lawmaking and lawfinding described earlier. And, in this latter respect, it would hardly be incorrect to understand the virulent battles within so much of twentieth century Anglo-continental legal theory and speculative jurisprudence as being about the same ongoing desire to uphold the ultimate coherence of the formalist construction of the liberal state through some relaxed, though always very much intact, version

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<sup>61</sup> See 2 WEBER, *supra* note 1, at 657. In fairness, one must note that this was not all there was to the matter for Weber, who acknowledged that oftentimes the decision maker would really be proceeding only "as if" the system of (logically) formally rational law was entirely complete. This would include not just an interpretive process reduced to the deciphering of existing logical meaning but also the filling in of gaps in the rule system by this manner of "as if" proceeding. Consider, for example, his discussion of the five postulates of his highest forms of legal rationality, the third of which requires "that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system . . ." *Id.* at 657.

of the distinction between lawmaking and lawfinding, legal and political reasoning, and the like.<sup>62</sup>

Something very much like this sort of enterprise has proved to be the common thread running through the great majority of the responses following the intellectual turmoil seen to result in the wake of the critique waged in Weber's own day against what he called logically formal legal rationality. According to this perception, the triumph of this critique came with a turn toward substantively rational adjudicatory social engineering in much of the world from the early part of the twentieth century through to the early post-War period. It is no surprise, then, that in the period after the demise of so-called formalist jurisprudence and the rise of so-called adjudicatory social engineering, the major trends in legal thought often involved the attempt to reconstitute the distinction between legal and political reason. Each attempt has been rich, varied, and interesting. Yet, at the same time, they have each tended to share the essential agenda of trying to extend the scope of reasons that figure into lawfinding without conceding that such reasons may be indistinguishable from those that factor into legislative lawmaking. This has repeatedly involved advocating for the inclusion of reasons born from the logical meaning of the rule itself alongside the reasons said to derive from some appropriately delimited stock of extra-juristic values and shared overall social purposes amenable to being portrayed as near inherent within the rule as its direct semantic or logical content itself.<sup>63</sup>

Weber's portrayal of legal rationalization cannot, thus, be dismissed too lightly. Doing so underestimates its rigor and overestimates the sense that subsequent (including many contemporary) efforts at intellectually reconstructing the nature of legal rationality do any better at isolating what is thought to be so unique and exceptional about liberal legal modernity. Additionally, however, dismissal fails to capture how Weber's view not only fell prey to the nineteenth century formalism of his day but also how it outstripped it as well. For much like a great deal of our own jurisprudential speculation, the overall function of his categories of legal thought, when

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<sup>62</sup> For the purposes of showing the parallel, it matters not how much Weber's motive for ignoring, dismissing, and opposing the rising critique of his day may have been related to his purely intellectual (as compared to ideological) attraction to the formal theoretical "elegance" of the lawmaking versus lawfinding distinction, which was tied to the image of the liberal state as a distinct entity in history. For whether he sought to preserve that elegant formal construction on grounds of some implicit ideological conviction or on grounds of self-professed intellectual aspirations, the preservation of that formal construction would have remained as a shared outcome. The same is equally true for later defenders and resuscitators of the formal theoretical construction of the liberal (bureaucratic) state, based on whatever modifications of the legal versus political reasoning distinction that have been deployed. Both motives lead to the same result, with it mattering not (at least for the present descriptive purposes) whether, for example, in our own day this follows from a self-confessed or implicit ideological conviction that the formal model is worth preserving because it speaks to the real superiority of the liberal bureaucratic state as a political formation in history or whether it follows from an intellectual hankering for the type of stark distinction only formal construction can allow so as to then facilitate some further intellectual pursuit (like, say, theorizing modern exceptionalism in virtue of the unique/quasi-unique political formations that define it).

<sup>63</sup> In the American tradition, where this project has been spelled out, perhaps, most cogently, these become, for example, the constraints inherent within Hart's and Sacks's process models of adjudication, the Herculean personal political theory of Dworkin's ideal-judge, and Joseph Raz's set of institutional constraints on judging. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* 30–38, 118–19 (1997).

seen only on their own terms, was to minimize the problem of judicial legislation. This occurs in a way that is significantly different from how, for example, Dworkin posits the judge's personal political theory as intervening between the "easy cases," in which no more than what Weber would call the logical analysis of the legal rule's meaning is required, and the "hard cases," which Dworkin wants to insist involve something less than substantive value legislation.<sup>64</sup> Yet in its effect, Dworkin's suggestion may not be so different given that the rigorous (and rigorously dichotomous) analytical perspective that Weber's categories of legal thought strive for is also precisely about drawing a very bright line between the law as its own source of (already enacted) value-rationality and the extralegal sources of value that factor into the lawmaker's deliberation. As this Article illustrates, only when the great ambition of Weber's legal sociology is further expanded by fusing it with his general sociology are the limitations paradoxically uncovered. Only when the lens provided by the categories of legal thought is increased in power by alloying it to Weber's foundational sociological categories of meaningful action will those interested in these questions be staring the true problem of judicial legislation squarely in the face, as they had to immediately after Weber and nineteenth century formalism's much rued wake. Even if Weber's concepts were more methodologically tinted, than, say those of Dworkinian coherence theory, it is only then that the innovation of his categories of legal thought truly reveals its full agenda as a means for attempting to solve the intellectual problem of judicial legislation that he faced and that we, ourselves, still do as well.

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<sup>64</sup> RONALD DWORKIN, *LAW'S EMPIRE* 265–66 (1986).

