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Article 1

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MAX WEBER AND THE CONCEPT OF LEGITIMACY IN CONTEMPORARY JURISPRUDENCE*

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Perhaps the central problem of legal[1] and political[2] philosophy is the need to establish a basis for the claim of legitimacy for the rule of law. Central

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1. *See, e.g.,* J.W. HARRIS, LAW AND LEGAL SCIENCE (1979). Harris distinguishes the empirical effectiveness of a legal rule (which may be explained by reference only to coercive force) and the justificative or normative, which in this paper is termed the legitimacy of a law or the rule of law. Harris points out:

> These assumptions about the relation of legal rules to official decisions are of different logical types: the one empirical and causal, and the other evaluative and justificative. Yet the value of legality would be empty if either were ill-founded. So also would be the closely associated value of constitutionality, which, among other things, requires officials to choose among conflicting rules according to certain criteria, and which requires legislatures, in laying down rules, to observe certain procedures.

Id. at 3.

2. *See, e.g.,* W.J. STANKIEWICZ, ASPECTS OF POLITICAL THEORY: CLASSICAL CONCEPTS IN AN AGE OF RELATIVISM (1976). Stankiewicz identifies three senses in which the term *legitimacy* is used in political theory: "firstly, the existence of social power; secondly, the attainment of power; thirdly, the way power is exercised." *Id.* at 87. The significance of the concept of legitimacy is that it transforms coercive power into binding authority; "the 'must' of obedience becomes an 'ought.' " *Id.* One way Stankiewicz maintains that this significance can be observed is in the explanation given to the notion of tyranny: "[W]ithout some such idea [of legitimacy] it is difficult to account for tyrannies" because a tyrant is defined as illegitimate in some sense. Stankiewicz suggests some improper uses of the concept of legitimacy. One erroneous use is to view legitimacy only in terms of effective power. A second is to equate it with acceptable methods of attaining or succeeding to power. This latter approach to the issue of legitimacy "does not sufficiently define government, since it says nothing about the policy pursued by the government which must consist of something more than the mere issue of fiats." *Id.* at 88. A third improper use is to equate legitimacy with the concept of sovereignty, which tends to "promote the notion that any and all laws of the sovereign are 'legitimate' if the sovereign power is considered 'legitimate'; the latter is either a term for the logic of sovereignty—a sort of seal of approval set on its cogency—or it is a more complex term, namely an approval coupled with the view that sovereign power has been established in a regular fashion." *Id.* at 89. Again the mistake lies in a disregard of the purposefulness of law. It views the sovereign as having the sole function of maintaining the law, the function of enforcement. Stankiewicz properly concludes that "[w]e need a term to distinguish between such a condition and the condition of 'government,' in which the laws of sovereign power are not designed to gratify private tastes and wishes, but to serve a social function. Only such laws are 'legitimate.' " *Id.*

to an inquiry into the legitimacy of law is the need to establish a ground for the binding force of law which is independent of coercive sanction imposed for noncompliance.[3] Rousseau identified what was at stake when he wrote, "However strong a man, he is never strong enough to remain master always, unless he transform his Might into Right, and Obedience into Duty."[4]

The problem of legitimacy is particularly perplexing when considered within the tradition of legal positivism.[5] John Austin, considered to be one of the "fathers" of modern legal positivism,[6] defined law to be "a command which obliges a person or persons."[7] A command was, for Austin, an expression of a wish that someone do, or refrain from doing, some act; a command was distinguished from other wishes "by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded."[8] "Obliges" carried the sense for Austin of compelling compliance rather than creating a sense of duty to obey. Positive law was so called because of the position of those issuing the commands relative to those subject to the sanctions for failure to follow the commands.

According to Austin, an independent political society was composed of two elements:

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3. *See* H.L.A. HART, THE CONCEPT OF LAW (1961). Hart identifies three grounds for the inadequacy of a coercive theory of law:

> First, even a penal statute, which comes nearest to it, has often a range of application different from that of orders given to others; for such a law may impose duties on those who make it as well as on others. Secondly, other statutes are unlike orders in that they do not require persons to do things, but may confer powers on them; they do not impose duties but offer facilities for the free creation of legal rights and duties within the coercive framework of the law. Thirdly, though the enactment of a statute is in some ways analogous to the giving of an order, some rules of law originate in custom and do not owe their legal status to any such conscious law-creating act.

Id. at 47-8.

4. Rousseau, *The Social Contract,* in SOCIAL CONTRACT 172 (E. Barker ed. 1960).

5. The difficulty in distinguishing legitimate authority from coercive authority is immediately apparent if one considers, for example, Thomas Hobbes's definition of law, which provides: "[T]hose rules, which the Common wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, what is contrary, and what is not contrary to the Rule." T. HOBBES, LEVIATHAN 140 (1651).

6. *See* A. WATSON, THE NATURE OF LAW (1977), in which the central features of legal positivism are identified as follows:

> Legal Positivism insists that a rule is law precisely because it is created and accepted as such by a particular human society. On this approach the morality or immorality of a rule or any supposition of divine origin is irrelevant to the question whether the rule is or is not a legal rule. For the positivists, the historically seminal view is that of John Austin, for whom positive law is the command of a sovereign backed by sanction. By his definition the command of a sovereign is habitually obeyed.

Id. at 2-3.

7. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 24 (London 1954) (1st ed. London 1832).

8. *Id.* at 14.

> 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and common *superior:* let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. . . . [T]here is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.[9]

As this brief description of legal positivism indicates, the legal positivist tradition holds that a rule of law has binding force if it is issued by an independent sovereign that has the means to compel obedience through the use of coercive sanctions.

A central feature of the work of Max Weber[10] is his effort to address the question of legitimacy within the tradition of legal positivism.[11] Weber's

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9. *Id.* at 193-94 (emphasis in original).

10. Max Weber, who was born Germany in 1864 and died in 1920, is often regarded as one of the founders of modern social science; his analysis of sociological and political concepts continues to exert a tremendous influence on contemporary thought. He also is considered by many to have made an important contribution to jurisprudence. A major part of his monumental work, *Economy and Society,* is devoted to jurisprudential concepts such as legal order, the emergence and creation of legal norms and rights, and the forms of primitive, natural, and modern law.

Weber studied law at the universities in Heidelberg, Berlin, and Göttingen. After passing his first law examination in 1886, Weber entered the Berlin law courts. He continued graduate studies at the University of Berlin, where, in 1889, he completed his doctoral dissertation, *A Contribution to the History of Medieval Business Organization,* which was an analysis of the impact of legal relations on economic activities. In 1891, he became an instructor of Roman, German, and Commercial Law at the University of Berlin. In addition to his teaching activities, he served as a consultant to a number of government agencies conducting studies on such subjects as rural labor and the stock exchange. In 1894, he moved to the University of Freiberg and in 1896, to the University of Heidelberg, where he served as a professor of economics. After four years of poor health, he was forced to resign from his academic post in 1902.

Weber continued to edit a leading social sciences journal and, in 1904, published the first part of his very influential work, *The Protestant Ethic and the Spirit of Capitalism.* Between 1902 and 1921, Weber wrote on a broad range of topics including urban life, the law, and the economy. Most of his works were published posthumously. Perhaps his most significant work, *Wirtschaft und Gesellschaft* (Economy and Society), was written as the introduction to a series of books he planned to edit on the interrelationship of society and economy. In this work, Weber developed a terminological framework and a method of conceptual analysis. His aim was to formulate precisely the various categories central to social analysis, which included bureaucratic, legal, and economic categories. Weber's other works take up specific themes such as religion and society, social stratification, and the relationship between power and bureaucracy.

A very useful biography of Weber is R. BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT (1962). An examination of Weber's work as it relates to legal theory is provided in A. KRONMAN, MAX WEBER (1983). A bibliography of Weber's work is provided in J. ALEXANDER, THE CLASSICAL ATTEMPT AT THEORETICAL SYNTHESIS: MAX WEBER 221-22 (1983). A useful bibliography of commentary on Weber's work is provided in FOR WEBER: ESSAYS IN THE SOCIOLOGY OF FATE 369-97 (B. Turner ed. 1981).

11. *See* Rheinstein, *Introduction* to M. WEBER, ON LAW IN ECONOMY AND SOCIETY (1954). Rheinstein suggests that Weber had a strong affinity for the basic framework of legal positivism but strove to transcend the particular formulations of positivists such as Austin. Rheinstein observes:

treatment of legitimacy is important to the development of modern legal positivism because it affirms the positivists' account of legitimacy, while criticizing their account of the nature and meaning of law.[12] In addition, an examination of Weber's discussion of legitimacy compels one to consider the relevance of contemporary hermeneutics to an understanding of law;[13] this allows one to see the very problematical nature of legal positivism.

This article will examine Weber's definition of law and his concept of formal rationality, which for Weber is the hallmark of a mature legal system. Next, Weber's concept of legitimacy will be explored. Through an understanding of Weber's definition of legitimacy and of his grounds for ascribing legitimacy to a legal system, Weber's conviction—that a formally rational legal system is most likely to be accepted as legitimate—can be explained. Finally, this article will criticize Weber's concept of formal rationality and his concept of legitimacy. This article will conclude that Weber's efforts to provide an account of legitimacy beyond that provided by legal positivists ultimately failed because Weber attempted to eliminate the question of value from an inquiry that is essentially evaluative in nature.

I. WEBER'S CONCEPT OF LAW AND OF A MATURE LEGAL SYSTEM

A. The Concept of Law

The first objective of Weber's theory of law was to distinguish mere social convention, or rule, from law. He denied that these concepts could be distinguished on the ground that conventions entail mere voluntary compliance

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> In its positivity, Weber's concept of law is reminiscent of Austin's definition of law as the command of the sovereign. But it is in better correspondence with common parlance and the actuality of facts. . . . By introducing the concept of sovereign, Austin has limited his concept of law to that of the modern state, which was indeed, quite satisfactory for his purposes. Such a concept of law would be too narrow, however, for the sociologist, who must consider such phenomena as ecclesiastical law, gang law, the law merchant of the Middle Ages, or tribal, international, or other forms of primitive law.

Id. at lxvi-lxvii. *See generally* Albrow, *Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law,* 2 BRIT. J.L. & SOC'Y 14 (1975) (critical analysis of Weber's study of law in society).

12. *See* A. HUNT, THE SOCIOLOGICAL MOVEMENT IN LAW (1978). Hunt stresses that Weber adopted legal positivism's definitional mode while, at the same time, he strove to transcend the conceptual confines of legal positivism which, while stressing formality, ignored the internal features of law. Hunt argues:

> Weber thus starts with an unashamedly positivistic definition of law. However caution should be adopted before attributing too great a significance to the positivism of his starting point. In the context of his subsequent treatment it provides a relatively neutral starting point, one that remains acceptable to jurists and sociologists alike. Its most significant consequence is that it reinforced his marked concern with what I shall argue are the "internal" characteristics of law. Martin Albrow is wrong in placing the emphasis that he does on Weber's positivist definition of law; it is not sufficient grounds for labelling him a "legal positivist."

Id. at 104.

13. For a discussion of contemporary hermeneutics, see *infra* notes 76-79 and accompanying text. *See* Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Society,* 36

while law entails compliance at the threat of sanction.[14] According to Weber, a violation of social norms or conventions often involves sanctions, such as social boycott, which may be more onerous than legal sanctions. In Weber's view, people comply with social conventions because they are met with general social disapproval if they violate those conventions. On the other hand, compliance with law is guaranteed by "a staff with the specialized function of maintaining enforcement of the [legal] order, [by] such [functionaries] as judges, prosecuting attorneys, administrative officials, or sheriffs."[15] Accordingly, an "order" is to be regarded as a law "if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation."[16] Thus, for Weber the "law" requires the "presence of a staff engaged in enforcement."[17]

Weber's definition of law differs from the legal positivist definition in two primary ways. First, Weber separated himself from a crude version of legal positivism that he viewed as equating the coercive sanction supporting law with physical force. He maintained that the particular form of coercion was irrelevant, suggesting that "brotherly admonition[s]" and "censorial reprimand[s]" are properly viewed as coercive sanctions; to him, the important feature of sanctions is that they compel observance.[18] Weber concluded, " 'Law' may be guaranteed by hierocratic as well as political authority, by the statutes of a voluntary association or domestic authority or through a sodality or some other association."[19] This broad view of the coercive sanction supporting law permitted Weber to avoid the type of criticism developed by H.L.A. Hart, according to whom the coercive theory of law was inadequate to explain the functioning of the law of voluntary agreements or the

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U. MIAMI L. REV. 379, 398-409 (1982); *see also* Hermann, Book Review, 55 So. CAL. L. REV. 1155, 1172-74 (1982) (reviewing N. MACCORMICK, H.L.A. HART (1981)).

14. The distinction between social convention and law to which Weber objected is identified by H.L.A. Hart. *Cf.* H.L.A. HART, *supra* note 3, at 8-10. Hart distinguishes between social convention, or "merely convergent behavior in a social group," and law, or "a [legal] rule of which the words 'must,' 'should,' and 'ought to' are often a sign." The crucial difference, he states,

> consists in the fact that deviations from certain types of behavior will probably meet with hostile reaction, and in the case of legal rules be punished by officials. . . . [T]his predictable consequence is definite and officially organized, whereas in the non-legal case, though a similar hostile reaction is probable, this is not organized or definite in character.

Id.

15. M. WEBER, ECONOMICS AND SOCIETY 34 (G. Roth & C. Wittich eds. 1968).

16. *Id.* (emphasis in original).

17. *Id.*

18. *Id.* at 35.

19. *Id.* Weber defined a political organization as one whose "existence and order is continuously safeguarded within a given *territorial* area by the threat and application of physical force on the part of the administrative staff." *Id.* at 54. In contrast, a hierocratic organization is one "which enforces its order through psychic coercion by distributing or denying religious benefits. . . ." *Id.*

functioning of laws that confer powers rather than impose obligations.[20]

The second, and perhaps more significant, way in which Weber separated himself from the legal positivism of the Anglo-American tradition, particularly from the view developed by John Austin, was by denying the existence of any particular origin or genesis of a rule of law.[21] He rejected the theoretical requirement that law be found to originate in a particular sovereign body or determinate office.[22] Rather, Weber viewed the essential characteristic of law to be the manner in which it is administered. For Weber, the special feature of a law or legal norm is that it is administered by a specialized staff charged with the particular responsibility of enforcement.[23] According to Weber, "The purest type of exercise of legal authority is that which employs a bureaucratic administrative staff."[24]

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20. H.L.A. HART, *supra* note 3, at 26-43. Hart criticizes the view, which he ascribes to John Austin, that all legal rules are merely prescriptions or proscriptions, to be observed in order to avoid legal sanction. Hart maintains that laws are not only rules that forbid certain conduct under the threat of sanction, but also rules that confer power. *Id.* at 27. According to Hart, the law of contracts is one scheme of power-conferring rules: "So, when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others; in lawyers' parlance we exercise 'a power' conferred by rules to do this." *Id.*

21. J. AUSTIN, *supra* note 7. Austin defined law to include only those orders issued, enforced, or tacitly approved by the sovereign. Everything that was to be viewed as law originated from the sovereign who received habitual obedience. *Id.* at 193-95; *see supra* notes 6-9 and accompanying text.

22. *See* A. KRONMAN, MAX WEBER (1983). Kronman contrasts John Austin's theory of law, which holds that the primary feature of law is that it is a "command of the sovereign," with Weber's theory, which finds the sources of law to be varied. Kronman observes the following:

> One can define a legal rule, for example, as any rule promulgated by a sovereign authority, such as the Queen in Parliament. On this view, for a norm to be a legal norm, it must have been enacted by some determinate person or body of persons, or be derivable from some other norm that has been enacted in the specified manner. Weber also rejects this way of defining law. According to Weber, the individuals subject to a legal norm need not view it as having had a particular genesis or even any genesis at all. Indeed, in some cases—those in which the legal system rests upon traditionalist attitudes—legal rules are considered binding precisely because they cannot be traced back to an original enactment or other norm-establishing event.

Id. at 29-30.

23. The requirement of staff administration as an essential characteristic of law is the original and critical feature of Weber's definition of law. *See* H.L.A. HART, *supra* note 3, at 104. Hunt elaborates on the meaning of the "staff administration" requirement: "[Weber] stresses that his concept of 'staff' is broad and includes non-professional roles and even situations in which individuals merely play a socially recognised 'legal' role (for example a tribal chief who puts on a symbolic garment or headdress before commencing 'legal' adjudication)." *Id.*

24. M. WEBER, *supra* note 15, at 220. According to Weber, a bureaucratic administrative staff is composed of individual officials who operate under the following rules:

> (1) They are personally free and subject to authority only with respect to their impersonal official obligations.
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> (2) They are organized in a clearly defined hierarchy of offices.
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> (3) Each office has a clearly defined sphere of competence in the legal sense.
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> (4) The office is filled by a free contractual relationship. Thus, in principle, there is free selection.

B. The Concept of a Mature Legal System

Weber's theory of law, then, does not turn on the identification of any particular source of law, nor on the establishment of any proper content for law. Rather, it is a theory of law that emphasizes the mode of administration of rules or norms. The structure for such administration is crucial; it requires a staff of persons charged with responsibility for ensuring compliance. Compliance with the law is ensured through the existence of coercive sanctions, but such sanctions have no inherent form.

Weber's theory of a legal system turned not only on the presence of an enforcement staff but also on the methods used by that staff to administer the law. In Weber's view, the purest, most mature type of legal system was one in which the law is administered in a "formally rational" manner, that is, in a logical and internally coherent manner.

Weber maintained that the administration of the law (both establishment of legal norms and application of those legal norms to concrete facts) could be either rational or irrational in either a formal or a substantive sense. Administration of the law is irrational if it is not guided by general rules.[25] Thus, administration is formally irrational to the extent that it employs "means which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefor."[26] Administration is substantively irrational to the extent that particular cases are decided on ethical, emotional, or political reaction to the facts of the particular case.

In contrast, administration of the law is deemed rational to the extent that it is guided by general rules. Thus, a substantively rational legal system decides cases by reference to empirical fact and logical analysis within a system of rules recognized as binding.[27] In other words, substantively ra-

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(5) Candidates are selected on the basis of technical qualifications. In the most rational case, this is tested by examination or guaranteed by diplomas certifying technical training, or both. They are *appointed,* not elected.

(6) They are remunerated by fixed salaries in money, for the most part with a right to pensions. Only under certain circumstances does the employing authority . . . have a right to terminate the appointment, but the official is always free to resign. The salary scale is graded according to rank in the hierarchy, but in addition to this criterion, the responsibility of the position and the requirements of the incumbent's social status may be taken into account. . . .

(7) The office is treated as the sole, or at least the primary, occupation of the incumbent.

(8) It constitutes a career. There is a system of "promotion" according to seniority or to achievement, or both. Promotion is dependent on the judgment of superiors.

(9) The official works entirely separated from ownership of the means of administration and without appropriation of his position.

(10) He is subject to strict and systematic discipline and control in the conduct of the office.

Id. at 220-21.

25. Rheinstein, *supra* note 11, at 1.

26. M. WEBER, *supra* note 15, at 656.

27. *Id.* at 657.

tional administration of the law exists when the enforcement staff is guided by general rules that incorporate the policies of the ideological system that the laws are intended to effectuate.[28]

Finally, administration of the law is formally rational "to the extent that . . . only unambiguous general characteristics of the facts of the case are taken into account."[29] Weber identified two types of formal rationality. In the first category of formal rationality, only those facts of a case that are "perceptible as sense data" are considered legally relevant.[30] For example, such a system would determine that property had not been transferred unless a clod of earth had been delivered, or that a contract was not binding unless it was sealed.[31] Alternatively, formal rationality of the "logical" type looks beyond such rigorous formalism and invokes "logical analysis of meaning" to determine which facts of a particular case are legally relevant.[32] Moreover, "logical rationality" involves formulation and application of "definitely fixed legal concepts in the form of highly abstract rules."[33]

Weber noted correctly that formality is relaxed in the context of logical rationality to the extent that it permits the exercise of decisional discretion, adaptation of norms to particular facts, and accommodation to contextual equities. This flexibility reduces both the predictability and the awareness of preexisting rules which Weber so greatly valued in his emphasis on systematization in the rule of law. Nevertheless, Weber contended that only through logical rationality, which minimizes the influence of extrinsic evaluative standards, could a legal system "collect[ ] and rationaliz[e] by logical means . . . all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions."[34]

Weber believed that formal rationality of the logical type was a unique form of law in a mature legal system.[35] Weber identified five basic postulates

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28. Rheinstein, *supra* note 11, at l. Rheinstein poses the following examples of substantive rationality:

> Substantively rational . . . is Mohammedan law in so far as its "makers" and finders have been trying to implement the religious thought and commands of the Prophet; substantively rational is Soviet law in so far as it is conceived as the Communist ideology; substantively rational, too, is any law which a conqueror imposes upon a subject population as a means of maintaining and strengthening his rule, or the law by means of which a ruling nation tries to "elevate" the population of a backward territory to its own, "higher" level of civilization.

Id.

29. M. WEBER, *supra* note 15, at 656-57.

30. *Id.* at 657.

31. Rheinstein, *supra* note 11, at xlix.

32. M. WEBER, *supra* note 15, at 657.

33. *Id.*

34. *Id.*

35. Weber described primitive legal systems as based on charismatic authority, which he denominated as irrational. *See id.* at 243, where it is observed:

> There are no established administrative organs. In their place are agents who have been provided with charismatic authority by their chief or who possess charisma of their own. There is no system of formal rules, of abstract legal principles, and hence no process of rational judicial decision oriented to them. But equally there

by which to recognize the existence of a formally rational legal system:

> first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.[36]

In light of the foregoing discussion, Weber's theory of a mature legal system may be summed up thus: A mature legal system is one in which norms and rules are administered by a staff of persons in a formally rational manner. For Weber, those subject to such a formally rational legal system were also those most likely to accept a legal order as legitimate. To understand why this is so, it is necessary to examine Weber's concept of legitimacy.

II. WEBER'S CONCEPT OF LEGITIMACY

Weber maintained that a legal system was legitimate if those subject to the system have made a value judgment that the laws promulgated by the system ought to be obeyed. Weber recognized the inherent obstacles to ascribing value judgments to others.[37] Nevertheless, Weber postulated that one could infer that a *value* judgment concerning the validity of the legal system had been made by observing the empirical *fact* of general compliance with the law. It was Weber's belief in this fact-value distinction that lay at the foundation of his account of the way in which legitimacy can be established.

A. Legitimacy Defined

Weber viewed the legitimacy of the legal system as central to the meaning and force of the rule of law.[38] Legitimacy, or "belief in the existence of

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> is no legal wisdom oriented to judicial precedent. Formally concrete judgments are originally regarded as divine judgments and revelations. From a substantive point of view, every charismatic authority would have to subscibe to the proposition, "It is written . . . but I say unto you. . . ."

Id.

36. *Id.* at 657-58.

37. *See infra* note 95.

38. In identifying the broad significance of legal legitimacy, Weber observed:
> For a domination, this kind of justification of its legitimacy is much more than a matter of theoretical or philosophical speculation; it rather constitutes the basis of very real differences in the empirical structure of domination. The reason for this fact lies in the generally observable need of any power, or even of any advantage of life, to justify itself.

M. WEBER, *supra* note 15, at 953.

a legitimate order," entails for Weber "the prestige of being considered binding" and has the consequence that those who accept the legitimacy of their legal system will view its rules as valid. This acceptance of the legal system then serves to guide the conduct of those subject to the law.[39] Two forces are identified as significant to the concept of legitimacy. The first is belief in the validity of law, either because one is in agreement with the content of the rule or because one accepts the authority of the power establishing the rule. The second is the notion that this belief in the rule or the authority will motivate compliance; belief will produce conforming behavior. While compliance with the rules of a legal system is neither a necessary nor a sufficient basis for establishing that there is acceptance of its legitimacy, compliance may be an indicium of that acceptance. Of course, compliance may be the consequence of coercive force, while noncompliance may stem from something other than a denial of the legitimacy of the legal system.[40] Weber pointed out that even a thief can be seen as recognizing the validity of the criminal law through his surreptitious conduct, which reflects his belief that he must act in a way to avoid detection and to foreclose punishment.[41] Other deviations from legally conforming conduct can be explained by good faith error on the part of citizens and differences in interpretations of the meaning of legal systems. Good faith errors and differences in interpretation result from the necessary ambiguity of language and the lack of transparency in intersubjective expressions of will.

B. Grounds for Ascribing Legitimacy to a Legal System

Weber identified both subjective and objective grounds for belief in the legitimacy of a legal system by those subject to it.[42] The subjective grounds entail those beliefs and attitudes held by an actor which lead that actor to view the legal system as right and proper or, alternatively, as the expression of will by a duly constituted authority to which the actor ought to defer.[43] The objective grounds involve the manifest benefits of compliance, whether they be avoidance of sanction or the realization of social benefit, which are

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39. *Id.* at 31-32.

40. Weber observed:

> It is possible for action to be oriented to an order in other ways than through conformity with its prescriptions, as they are generally understood by the actors. Even in the case of evasion or disobedience, the probability of their being recognized as valid norms may have an effect on action.

Id. at 32.

41. *Id.*

42. Weber noted that these beliefs are "motives for maintaining a legitimate order in force." *Id.* at 60 n.20.

43. Three subjective grounds are identified: "1. *Affectual:* resulting from emotional surrender; or 2. *Value-rational:* determined by the belief in the absolute validity of the order as the expression of ultimate values of an ethical, esthetic, or any other type; or 3. *Religious:* determined by the belief that salvation depends upon obedience to the order." *Id.* at 33.

independent of the "rightness" of the legal system.[44] Additionally, Weber suggested that the subjective and objective grounds for establishing legitimacy may operate simultaneously.[45]

The subjective attitudes that ground a belief in the legitimacy of a legal system are best exemplified by ethical beliefs that give an order binding effect independent of the threat of sanction. Weber provided a description of the process of ethical motivation:

> From a sociological point of view an "ethical" standard is one to which men attribute a certain type of value and which, by virtue of this belief, they treat as a valid norm governing their action. In this sense it can be spoken of as defining what is ethically good in the same way that action which is called beautiful is measured by esthetic standards.[46]

Weber maintained that it is possible for ethically normative beliefs to influence action in the absence of any sort of external guarantee, as in the case of compliance with rules relating to "victimless" crimes.[47]

Weber suggested that some form of disapproval accompanies violation of norms that are recognized as entailing some ethical content. Nevertheless, Weber was quick to point out that "it is by no means necessary that all conventionally or legally guaranteed forms of order should claim the authority of ethical norms."[48] Weber echoed the positivist tenet of the separation of law and morals, a view which holds that there is no necessary relationship between law and ethical norms.[49] According to Weber, it is important to recognize that many legal rules are adopted on the basis of "expediency" rather than derived from the "realm of 'ethics.' "[50] Thus, the actors' subjective belief in the legitimacy of certain laws cannot be the only criterion of the legitimacy of the legal system as a whole, because every legal system has laws that were adopted solely on the basis of expediency. To the extent that those subject to a legal system view it to be without ethical force either in content or as a manifestation of the exercise of legitimate authority, compliance must be seen to rest either on an objective belief in the system's legitimacy or, alternatively, in the obtaining of some extrinsic benefit or the avoidance of some penalty. This recognition of alternative grounds for compliance creates a continuing problem for Weber insofar as it results in a failure to provide a clear basis for distinguishing the valid law from the coercive order. Such a distinction is central to the concept of legitimacy, but as will be apparent later in this discussion, Weber's commitment to the

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44. *Id.* According to Weber, "The legitimacy of an order may, however, be guaranteed also (or merely) by the expectation of specific external effects, that is, by interest situations." *Id.*

45. "A system of order which is guaranteed by external sanctions may at the same time be guaranteed by disinterested subjective attitudes." *Id.* at 35.

46. *Id.* at 36.

47. Weber noted that "ethically normative beliefs of this kind have a profound influence on action . . . when the interests of others would be little affected by their violation." *Id.*

48. *Id.*

49. *See* H.L.A. HART, *supra* note 3, at 7-8, 195-207.

50. M. WEBER, *supra* note 15, at 36.

separation of fact and value and his solution to the problem of intersubjective understanding makes the establishment of grounds for drawing this distinction difficult, if not impossible.

One way in which Weber attempted to establish the grounds for distinguishing mere submission to coercion or force from recognition of the validity or legitimacy of law is by shifting the focus from a question of why the actors believe they should comply with a law to one of why the actors believe the system is legitimate. Weber identified four grounds upon which the actors may believe the legal system to be legitimate. First, they may believe the system is legitimate because it is traditional; the way things are done is valid because that is the way things have always been done. Second, to the extent the system departs from tradition, it may be deemed legitimate because it was revealed by a recognized prophet. Third, the system may derive its legitimacy from a belief that it is a logically deduced to be absolute. Finally, the actors may believe that the system is legitimate because it is legal.[51] It is the last ground for ascribing legitimacy with which Weber was concerned.

Weber articulated two alternative reasons why a belief in the legality of the system would be grounds for ascribing legitimacy to the system. First, a system that is legal is legitimate because "it derives from a voluntary agreement of the interested parties."[52] This ground corresponds to the social contact theory,[53] which has been a traditional mainstay of liberal democratic theory serving to legitimize the rule of law. This tradition is exemplified by the works of Hobbes,[54]

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51. *Id.* at 36-37.

52. *Id.*

53. *See* P. RILEY, WILL AND POLITICAL LEGITIMACY (1982). Riley provides a description of the essential features of classical social contract theory:

> The seventeenth and eighteenth centuries are commonly and accurately represented as the great age of social contract theory: the still popular doctrine that political legitimacy, political authority, and political obligations are derived from the consent of those who create a government (sometimes a society) and who operate it through some form of quasiconsent, such as representation, majoritarianism, or tacit consent. On this view legitimacy and duty depend on consent, on a voluntary individual act, or rather on a concatenation of voluntary individual acts, and not on partiarchy, theocracy, divine right, the natural superiority of one's betters, the naturalness of political life, necessity, custom, convenience, psychological compulsion, or any other basis.

Id. at 1.

54. Hobbes identifies the establishment of the political state with his version of the social contract:

> A *common-wealth* is said to be *Instituted,* when a *Multitude* of men do Agree, and *Covenant, every one, with every one,* that to whatsoever *Man* or *Assembly of Men,* shall be given by the major part, the *Right* to *Present* the Person of them all, (that is to say, to be their *Representative;*) every one, as well he that *Voted for it,* as he that *Voted against it,* shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of Men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.

T. HOBBES, LEVIATHAN 133 (Oxford Univ. Press 1967) (emphasis in original).

Hume,[55] Locke,[56] and Rousseau.[57]

The social contract theory has been the subject of persuasive criticism and has been summarized by one commentator as a theory that is "mechanical," "juristic" and "*a priori.*"[58] Moreover, "historians have not loved the idea [of social contract]; they know the records of history, and they do not believe that there ever was such a thing. Lawyers have not loved the idea; they know what actual contracts are, how lawyers draft them and courts enforce them, and they do not believe that the social contract is anything more than a sham—a *quasi* or an *als ob.*"[59] While the idea of the social contract may aid in political and legal analysis, as it does in the work of John Rawls,[60] it does not seem to provide a persuasive basis for establishing the legitimacy of a concrete legal system.

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55. Hume, *Of the Original Contract,* in SOCIAL CONTRACT 147 (E. Barker ed. 1960). Hume viewed the origin of government to lie in consent but denied that the authority of contemporary government existed by virtue of consent; according to Hume:

> [W]e must assert that every particular government which is lawful, and which imposes any duty of allegiance on the subject, was, at first, founded on consent and a voluntary compact. . . . Almost all the governments which exist at present, or of which there remains any record in history, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people.

Id. at 151.

56. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (C.B. MacPherson ed. 1980). Locke provides what is the classic formulation of the social contract for Anglo-American political theory:

> Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the *bonds of civil society,* is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.

Id. at 52 (emphasis in original).

57. Rousseau, *supra* note 4, at 59-61. Rousseau, like Hobbes, vested all authority and right in the sovereign. Unlike Hobbes, he identified the sovereign as general will rather than as a determinate person or body:

> [S]ince men can by no means engender new powers, but can only unite and control those of which they are already possessed, there is no way in which they can maintain themselves save by coming together and pooling their strength in a way that will enable them to withstand any resistance exerted upon them from without. They must develop some sort of central direction and learn to act in concert. . . .
>
> If, then, we take from the social pact everything which is not essential to it, we shall find it to be reduced to the following terms: "each of us contributes to the group his person and the powers which he wields as a person, and we receive into the body politic each individual as forming an indivisible part of the whole."

Id. at 179-81.

58. Barker, *Introduction* to SOCIAL CONTRACT vii (E. Barker ed. 1960).

59. *Id.* at xliii.

60. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971), in which the social contract theory is used as a procedure for establishing the terms of a fair distribution. According to this procedural use of the social contract theory, prospective parties to an agreement of the terms to govern social distribution assume a veil of ignorance about their respective positions in a society and are asked to determine what principle they would choose to govern social distribution.

As an alternative to the social contract theory, Weber maintained that a legal system is treated as legitimate because "it is imposed by an authority which is held to be legitimate and therefore meets with compliance."[61] Under Weber's theory, it is unnecessary to secure the participants' voluntary agreement to the specific terms of law that will govern their society. Rather, the law is imposed in accordance with procedures that have been established and accepted as prerequisites to establishing law. This view, which is central to legal positivism, permitted Weber to minimize the need for the social contract theory; he observed that, given the actors' belief in the legality of the social order, "the distinction between an order derived from voluntary agreement and one which has been imposed is only relative."[62]

Weber suggested that legitimacy is a matter of degree rather than an all or nothing matter. Law enacted in compliance with procedural formality carries a presumption of validity and leads to a view of the entire legal system as legitimate. Social agreement as to the content of law may establish a firmer claim of legitimacy because the unity of individual wills demonstrates a strong belief in the binding effect of each particular law; nevertheless, a particular law, independent of its content, will carry a binding force if people view the system that enacted it to be legitimate. Thus, to the extent that there is not unanimity of will, laws may still be accepted as legitimate if they have been enacted according to established procedures. This view allowed Weber to overcome the arguments made by critics of the social contract theory. These critics pointed out that in a democratic society, the will of the majority is frequently imposed upon the minority, thus refuting the claim of voluntary agreement of all participants. Moreover, the reins of power in a democratic society are in the hands of an effective minority that may impose its will on the majority.[63] The notion of legitimacy through conformity to procedural formality answers these arguments by explaining why those who did not voluntarily agree to a particular law (those on whom it was "imposed") will nevertheless view the law as legitimate.

Thus, according to Weber, not only is it unnecessary for a legally valid

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61. M. WEBER, *supra* note 15, at 36. According to Weber, "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner." *Id.* at 37 (emphasis in original).

62. *Id.* at 37.

63. Weber observed:

> For so far as the agreement underlying the order is not unanimous, as in the past has often been held necessary for complete legitimacy, the order is actually imposed upon the minority; in this frequent case the order in a given group depends upon the acquiescence of those who hold different opinions. On the other hand, it is very common for minorities, by force or by the use of more ruthless and far-sighted methods, to impose an order which in the course of time comes to be regarded as legitimate by those who originally resisted it. Insofar as the ballot is used as a legal means of altering an order, it is very common for the will of a minority to attain a formal majority and for the majority to submit. In this case majority rule is a mere illusion.

Id.

norm to incorporate or further some ethical norm or value, it is also unnecessary that it represent a majoritarian sentiment as held by conventional democratic theory. Rather, to determine the existence of a system that is legitimate because it is accepted as legal, it is only necessary that the legal norms conform to the formal procedural requirements of law. This, according to Weber, provides an objective criterion for determining legal legitimacy. In asserting this justification for the legitimacy of law, however, Weber comes very close to a position of legal positivism that he insistently wishes to avoid or transcend.[64]

Yet, Weber did not dispense entirely with subjective attitudes as an element of legal legitimacy. It should be recalled that Weber viewed legal legitimacy as resting on both subjective and objective grounds. He suggested, however, that the subjective element can best be cast in a negative form. Weber's view does not require a positive understanding of the subjective views of a person who is viewed as accepting a legal system as binding or legitimate; instead, Weber's view only requires a showing that the binding effect of the order cannot be merely the result of coercion: "So far as it is not derived merely from fear or from motives of expediency, a willingness to submit to an order imposed by one man or a small group, always implies a belief in the legitimate authority (*Herrschaftsgewalt*) of the source imposing it."[65] Although he recognized that submission to coercive force can contribute to producing effective compliance with the legal system, Weber insisted that this recognition does not negate his claim that a person acts in recognition of the validity or legitimacy of the legal system. According to Weber:

> Submission to an order is almost always determined by a variety of interests and by a mixture of adherence to tradition and belief in legality, unless it is a case of entirely new regulations. In a very large proportion of cases, the actors subject to the order are of course not even aware how far it is a matter of custom, of convention, or of law.[66]

C. Why the Formally Rational Legal System is Legitimate

With this background understanding of Weber's concept of legitimacy, Weber's position that a formally rational legal system is most likely to be viewed as legitimate can be explored. Weber defined a formally rational legal system as one that was administered solely by logical application of abstract legal principles to particular cases without reference to ethical, religious, political, or other norms.[67] Weber's concept of legitimacy depends upon the actors' evaluation of legitimacy which, in turn, can be inferred by observing compliance with laws enacted in conformity with established procedures. While an individual actor will judge the "rightness" or "wrongness" of a

64. For a discussion of legal positivism, see *supra* notes 6-9 and accompanying text.
65. M. WEBER, *supra* note 15, at 37.
66. *Id.* at 37-38.
67. *See supra* notes 25-36 and accompanying text.

particular law according to his or her ethical, religious, and other beliefs, the actor will nevertheless regard a law with which he or she disagrees as legitimate if the law was enacted in compliance with accepted procedures.

The procedure by which laws are enacted is likely to be accepted as legitimate by the actors if it is formally rational. Because a formally rational procedure for administering the law can be justified as the logical application of valid abstract legal principles, there is no apparent need to refer to ethical, religious, or other beliefs to justify the procedure. Thus, to the extent the individual's personal values differ from those effectuated by a particular law, the individual can still accept the binding force of the law because the procedure by which the law was enacted was a logical one.

To illustrate the operation of a formally rational approach to law, one may consider the United States Supreme Court's decision in *Roe v. Wade,*[68] which held that the right to an abortion is guaranteed by the Constitution. After noting the wide variety of moral, ethical, philosophical, and religious beliefs that determine an individual's attitudes toward the abortion issue, the Court stated that its task was "to resolve the issue by constitutional measurement, free of emotion and of predilection."[69] In Weber's terminology, this statement indicated that the Court was aware that its function was limited to administering the Constitution in a formally rational manner. The Court then proceeded to extract an abstract legal principle that was found embodied in the Constitution, and then, in a logical manner, applied the abstract principle to the abortion issue. In so doing, the Court concluded that the right of personal privacy, which was found to be implicit in the abstract legal principles of the Constitution, "encompass[es] a woman's decision whether or not to terminate her pregnancy."[70]

While a large number of American citizens may believe that abortion is morally, ethically, philosophically, or religiously "wrong," proponents of formal rationality will suggest that they are nevertheless more likely to accept *Roe v. Wade* as binding because the rule of law it announced was derived in a formally rational manner, that is, without apparent reliance upon moral, ethical, philosophical, or religious norms. Yet, as the critic would immediately respond, reliance on any rule entails endorsement of, or acquiescence to, the ethical, moral, or political values necessarily inherent in any legal rule. Nevertheless, it is maintained by the proponent of formal rationality that the procedure by which the Court arrived at its decision is to be viewed as an established procedure and, moreover, as a formally rational procedure. Although individual Americans may disagree with the rule of *Roe v. Wade,* according to this view, citizens are more likely to accept the rule as binding because it was logically deduced from legitimate principles.

Thus, to the extent one believes in the legitimacy of the abstract legal principles (in our society, those embodied in the United States Constitution),

68. 410 U.S. 113 (1973)
69. *Id.* at 116.
70. *Id.* at 153.

one can accept as legitimate all laws logically deduced from those abstract legal principles. Had the Court arrived at its decision based on the individual moral beliefs of each of the Justices, the decision would not have been accepted as legitimate except by persons whose moral beliefs corresponded with those of the Justices. Thus, it is maintained that only a legal system in which laws are administered in a formally rational manner (i.e., without reference to external evaluative standards) can be justified and, accordingly, be accepted as legitimate by a population adhering to a diversity of values.

III. Criticism of Weber's Concept of Law and Legitimacy

The remainder of this article will analyze critically Weber's theory of law and of legitimacy. It will be asserted that not only was Weber's theory of the formally rational legal system unrealistic, but also that Weber's approach to the issue of legitimacy was fundamentally misconceived.

A. Criticism of Formal Rationality

Weber postulated that a formally rational legal system was the system most likely to be accepted as legitimate. However, this formulation of the criteria for a legitimate legal system is self-refuting.[71] First, it is axiomatic that the ideal of a "gapless" system,[72] one in which there is an abstract legal norm corresponding to every conceivable fact situation, is simply not realizable in a world of social and economic activity characterized by dynamic change and evolution.[73] Second, the very nature of language precludes the absolute

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71. *See* M. Albrow, *supra* note 11, at 28-29, wherein the author asserts that the error of Weber's position lies in his view that the meaning of a rule can be deciphered by logical interpretation. Albrow posits that

> it is on the distinction of formal and substantive rationality that the whole of Weber's historical developmental account depends. It is an account founded upon an untenable belief in the irreducibility of law and in its possession of the same characteristics as formal logic. On Weber's analysis it is indeed possible for law to operate like the slot machine: feed in the fact and the judgment engages. . . . [I]n his account of law it is possible for the interpretation of a rule to have determinacy of pure logic. Repeatedly he uses the phrase "the logical interpretation of meaning." But meaning is not interpreted by logic. Meaning is understood through experience. Logic refers to the structure of an argument, not to the meaning of its terms. The "correct" or "objective" interpretation of rules depends on shared understanding and not on logic.

Id.

72. Weber wrote 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. . . . [E]very social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.

M. Weber, *supra* note 15, at 657-58.

73. The view that law provides a "gapless system" or a total system covering all possible cases through application of deductive logic has been subject to telling criticism. *See, e.g.*,

clarity that would be necessary for the kind of mechanical nondiscretionary law-making or law-finding activity that Weber maintained is characteristic of a mature, legitimate legal system. Finally, it seems apparent that a method of pure logical analysis is insufficient to separate legal norms from the social and value systems in which they are necessarily enmeshed.[74]

B. Criticism of Weber's Concept of Legitimacy

Two problems are implicit in Weber's position that procedural formality and a subjective view of the binding effect of legal systems are necessary and sufficient conditions for inferring that the legal system is legitimate. The first problem, and one that Weber distinctly recognized, is that when compliance is solely the consequence of coercion, it cannot be assumed that those persons subject to the legal system accept its legitimacy. As Weber acknowledged, any action, including an act of compliance, is motivated by a mixture of motives. Nevertheless, for Weber, the mere fact of compliance became a basis for inferring that an actor recognizes the legitimacy of the legal system.[75] Clearly, this inference is unfounded. There is no basis for

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Albrow, *supra* note 11, at 29, where it is argued that

> the ability to include the whole world within a single set of propositions is not of itself rational. The fact, for instance, that I may assert that all that happens in the world is an expression of either the "yin" or the "yang" factor does not, in spite of the promising comprehensiveness of my belief, guarantee rationality.

Id.

In one sense it seems perfectly clear that no rule can be written that will accommodate all future cases arising under it. Two approaches stand as particularly powerful devices to avoid these "gaps" of rule application. The first approach finds general principles inherent in the adopted rule, while the other invokes the concept of discretion to provide implicit authority to extend such a rule in a manner which is said to be anticipated by the enactment of the rule. A critical judgment of such approaches is provided in J. HARRIS, LAW AND LEGAL SCIENCE (1979), where the author argues that it is misleading to assert that the law compels a given decision in a given case. Rather, Harris asserts that a more honest approach would be to admit that the law contains gaps. *Id.* at 162-63. Harris suggests that the process of deciding on "the best rule" requires the judge to take into account the effect that the decision will have on the legal system as a whole. According to Harris, the judge should determine, first, the extent to which the existing law is clear and, second, the extent to which the law is uncertain. With regard to the latter determination, Harris observes, "This marks the area within which [the judge] can 'legislate,' either by 'developing' the common law or by 'filling gaps' in statutes." *Id.*

74. See *infra* notes 76-82 and accompanying text for a discussion of how these apparent obstacles to the realization of Weber's ideal theory of law stem from his insistence on the fact-value distinction which is central to the entire corpus of Weber's work.

75. M. WEBER, *supra* note 15, at 31. Weber maintained that a belief in the legitimacy of a legal order would result in greater social stability than when compliance is a consequence of mere coercion. Weber argued:

> An order which is adhered to from motives of pure expediency is generally much less stable than one upheld on a purely customary basis through the fact that the corresponding behavior has become habitual. The latter is much the most common type of subjective attitude. But even this type of order is in turn much less stable than an order which enjoys the prestige of being considered binding, or, as it may be expressed, of "legitimacy." The transitions between orientation to an order from

inferring the presence of any particular motive from the single fact of compliance. Nor does the fact that a legal system remains stable provide a basis for inferring that those subject to it view it as legitimate. It was a mere article of faith on the part of Weber that a legal order which is stable is viewed as legitimate rather than as effectively coercive.

The second problem involves the process of imputing motives, beliefs, or bases for conduct to an actor. As will be discussed below, Weber attempted to avoid this problem by distinguishing the comprehension of an actor's particular beliefs (which Weber suggested is not possible) from the observation that an actor holds some set of beliefs (which Weber maintained can be done). Weber's approach, however, does not resolve the problem of determining whether an actor is motivated by some set of beliefs other than a belief that he is threatened by coercive force. If action is to be explained, in part, by the fact that an action is motivated by a particular set of beliefs, then some understanding of what beliefs the actor actually holds must be obtained. Of course, it may be that one can never know what beliefs an actor in fact holds; this would mean that a theory of legitimacy that is rooted in identifying an actor's particular set of subjective beliefs may be doomed from the outset.

The apparent impossibility of the realization of the "methodological and logical rationality" of the rule of law that Weber urged stems from the fallacy of his fact-value distinction.[76] Weber's succumbing to this fallacy in part follows from his failure to provide an adequate resolution to the problem of intersubjectivity and understanding, or *verstehen*.[77] The problem of intersubjectivity and verstehen has become the central concern of contemporary hermeneutics, which seeks to explore the possibility that one individual can truly and fully understand another.[78] For example, hermeneutics addresses

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> motives of tradition or of expediency to the case where a belief in its legitimacy is involved are empirically gradual.

Id.

76. Professor Roberto Unger of the Harvard Law School has identified the origin of the fact-value distinction as resting in its rejection of natural law theory and its failure as lying in a refusal to accept that the content of a rule or practice lies in shared understandings that are necessarily evaluative. R. UNGER, LAW IN MODERN SOCIETY 4-5 (1976).

77. *See* Abel, *The Operation Called* Verstehen, 54 AM. J. SOC. 211-18 (1948). Abel explains the general significance of the term *Verstehen* as follows:

> [W]e prefer to use the German term instead of its English equivalent, which is "understanding." Understanding is a general term approximating the German *Begreifen* and does not convey the specific meaning intended by the term *Verstehen,* which implies a particular kind of understanding, applicable primarily to human behavior. Understanding is synonymous with comprehension [which] "is the end at which all methods aim, rather than a method in itself." In this sense "understanding" is the goal of all sciences. *Verstehen,* on the other hand, is viewed by its proponents as a method by means of which we can explain human behavior.

Id. at 211 n.1. *See generally* F. DALLMAYR & T. MCCARTHY, UNDERSTANDING SOCIAL INQUIRY (1977).

78. *See* Taylor, *Interpretation and the Sciences of Man,* 25 THE REVIEW OF METAPHYSICS 3-51 (1971), where the author first notes the centrality of interpretation to the sciences of man,

the question of the meaning of a written text and seeks to determine the accessibility or meaning of the author's intent.[79] Contemporary hermeneutics and theories of interpretation suggest the need to reject Weber's proffered solution to the problem of the intersubjective evaluative judgments,[80] which is central to Weber's account of the legitimacy of the rule of law.

Weber fundamentally misunderstood the significance of the question posed when it is asked whether a legal system is legitimate. Weber formulated the question as whether those who were subject to a legal system viewed it as binding or legitimate rather than merely submitting to the demands and constraints of a rule in order to avoid threatened sanctions, such as threats of physical force or other forms of coercion.[81] Weber's error lay in his attempt to provide a basis for an observer to determine the legitimacy of a legal system solely from the point of view of those subject to the rules of that legal system. From the outset, it is clear that one cannot have immediate access to another's point of view. Moreover, Weber's approach rejected the position that legitimacy, determined from an external point of view, required the observer to determine the binding force of that legal system independently of the evaluation of those subject to the legal system. Similarly, Weber seemed to deny the propriety of assessing the "validity" of the legal system in accordance with the views of those subject to that system. An actor's judgment of validity was, for Weber, a subjective matter not capable of verification. Weber's fact-value distinction led him to view the question of legitimacy as a factual question concerning the holding of beliefs or values of persons subject to observation. There was, for Weber, no possibility of addressing the "truth" of those beliefs or values.

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id. at 3, and then goes on to identify intersubjective understanding as a primary concern of the interpretative activity of hermeneutics. *Id.* at 29.

79. *See* S. Mitchell, *Post-structuralism, Empiricism and Interpretation,* in S. MITCHELL & M. ROSEN, THE NEED FOR INTERPRETATION: CONTEMPORARY CONCEPTIONS OF THE PHILOSOPHER'S TASK 56-57 (1983) (explaining the textual boundaries of contemporary hermeneutics). *See generally* R. HOWARD, THREE FACES OF HERMENEUTICS (1982).

80. *See* Abel, *supra* note 77, at 211-18 (emphasis in original), where the need for self-involvement in interpretation is described: "The term *verstehen* ('to understand') denotes the position of those who claim that the social scientist can and must make use of his own inner experience. . . . He must use the methods of *introspection* and *empathy*, which have nothing in common with the procedures of natural science."

81. *See* M. WEBER, *supra* note 15, at 31, where Weber asserts that "[a]ction, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order." Weber explained:

> Thus, the validity of an order means more than the mere existence of a uniformity of social action determined by custom or self interest. . . . [W]hen a civil servant appears in his office daily at a fixed time, he does not act only on the basis of custom or self-interest which he could disregard if he wanted to; as a rule, his action is also determined by the validity of an order (viz., the civil service rules), which he fulfills partly because disobedience would be disadvantageous to him but also because its violation would be abhorrent to his sense of duty (of course, in varying degrees).

Id.

At this point, it is important to recognize that an alternative approach to the question of legitimacy focuses upon the "truth" of an evaluation of the legal system under scrutiny.[82] This approach, which examines a legal system by utilizing evaluative criteria, can be equally applied by one subject to a particular legal system as it can by one who is judging the validity of that legal system from another cultural or historical vantage point.

Weber held two convictions that constrained him from providing an account of legal legitimacy that centers around the view of those persons subject to a legal system and, yet, does not judge the "truth" or validity of those views. The first was Weber's manifest rejection of the tradition that accepted a notion of a common human nature.[83] Under this tradition, reason serves as the final arbiter of the grounds for human action and the objectives to be sought by the members of any particular society. The second was Weber's belief in the possible development of the human sciences according to which cultural phenomena could be analyzed from a value-free position with reference to standards of coherence and rationality.[84] Proponents of contemporary hermeneutics, social criticism, and study of cultural

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82. This alternative approach maintains that there is a necessary connection between the fact of a legal order and the evaluation of its validity. One formulation of the judgment of legal legitimacy is that of natural law. *See* R. UNGER, *supra* note 76, at 76-83. Unger wrote that "the idea of a universal law of nature . . . [opens the way] for a type of social consciousness that accepts the rule of law ideal." *Id.* at 76-80.

83. *See id.* at 4-5. Unger drew a distinction between classical and scholastic commitment to the notion of a common human nature and explained why classical social theorists such as Weber rejected the assumption of a universal human nature:

> [S]ocial theory is engaged in a quest for an understanding of the different forms that people's awareness of each other, of nature, and of themselves assume in each kind of social life. It is less interested in the psychology of individual minds or in the constitution of a universal human nature than in the historically unique systems of shared understandings and ideals that make up the culture of a society. Indeed, it is often willing to sacrifice the very notion of a unitary human nature to the sense of history.

Id.

84. Weber emphasized the "rationality" of social behavior as the necessary ground for the human sciences:

> It is customary to designate various sociological generalizations, as for example "Gresham's Law," as "laws." These are in fact typical probabilities confirmed by observation to the effect that under certain given conditions an expected course of social action will occur, which is understandable in terms of the typical motives and typical subjective intentions of the actors. These generalizations are both understandable and definite in the highest degree insofar as the typically observed course of action can be understood in terms of the purely rational pursuit of an end, or where for reasons of methodological convenience such a theoretical type can be heuristically employed. In such cases the relations of means and end will be clearly understandable on grounds of experience, particularly where the choice of means was "inevitable." In such cases it is legitimate to assert that insofar as the action was rigorously rational it could not have taken any other course because for technical reasons, given their clearly defined ends, no other means were available to the actors.

M. WEBER, *supra* note 15, at 18-19.

phenomena have revealed the provincialism and naïveté of Weber's latter conviction.[85] While there may be cross-cultural structures that shape the expression of cultural experience, it is increasingly recognized that there is no basis for imposing a common evaluative standard of either a formal or a substantive nature on the diverse experiences of human cultures.[86] It simply is not the case that one can impose on the members of a primitive tribe the utilitarian evaluative criteria of liberal democratic society to establish the grounds for the beliefs and practices in a primitive tribe that is committed to magical or religious beliefs. On the other hand, one cannot necessarily deny that there is, or was, a utilitarian motivation behind such practices. As an observer, evaluator, and nonparticipant in such cultural practices, one is simply precluded from making such a judgment for those involved in that society. One simply cannot say whether, according to the experience of the societal participants in a primitive legal system, it was or was not formally rational.[87]

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85. *See, e.g.*, Taylor, *supra* note 78, where the perspectival interpretation of human action is described by reference to the "hermeneutical circle":

> Our conviction that the account [of human action] makes sense is contingent on our reading of action and situation. But these readings cannot be explained or justified except by reference to other such readings, and their relation to the whole. If an interlocutor does not understand this kind of reading, or will not accept it as valid, there is nowhere else the argument can go. Ultimately, a good explanation is one which makes sense of the behavior; but then to appreciate a good explanation, one has to agree on what makes good sense; what makes good sense is a function of one's readings; and these in turn are based on the kind of sense one understands.

Id. at 14.

86. *See, e.g.*, Winch, *Understanding a Primitive Society*, 1 AM. PHIL. Q. 307-24 (1964). Winch describes the relativity of explanation in the human sciences as follows:

> Like many other primitive people, the African Zande hold beliefs that we cannot possibly share and engage in practices which it is peculiarly difficult for us to comprehend. They believe that certain of their members are witches, exercising a malignant occult influence on the lives of their fellows. They engage in rites to counteract witchcraft; they consult oracles and use magic medicines to protect themselves from harm. An anthropologist studying such a people wishes to make those beliefs and practices intelligible to himself and his readers. This means presenting an account of them that will somehow satisfy the criteria of rationality demanded by the culture to which he and his readers belong: a culture whose conception of rationality is deeply affected by the achievements and methods of the sciences, and one which treats such things as a belief in magic or the practice of consulting oracles as almost a paradigm of the irrational. The strains inherent in this situation are very likely to lead the anthropologist to adopt the following posture: *We* know that Zande beliefs in the influence of witchcraft, the efficacy of magic medicines, the role of oracles in revealing what is going on and what is going to happen, are mistaken, illusory. Scientific methods of investigation have shown conclusively that there are no relations of cause and effect such as are implied by these beliefs and practices. All we can do then is to show how such a system of mistaken beliefs and inefficacious practices can maintain itself in the face of objections that seem to us so obvious.

Id. at 307 (emphasis in original).

87. *See id.* at 317 (explaining that standards of rationality are necessarily relative and dependent on shared understanding).

A second and equally significant criticism of Weber's account of legal legitimacy centers on his efforts to determine the empirical status of some set of beliefs held by those subject to a legal system. Weber judged the legitimacy of a legal system from an external analogical viewpoint rather than from the evaluative point of view of an observer.[88] Weber failed to see that the question of legitimacy of a legal system is necessarily an evaluative matter which can be taken either to involve the evaluation by a nonparticipant observer or by a participant observer. Because the question of legitimacy is necessarily an evaluative and subjective matter, and not a factual or objective matter, Weber erroneously accepted that a nonevaluative position could be assumed by someone judging the question of legitimacy of a legal system.

Weber's position turns out to be very compatible with the legal positivist viewpoint, which asks only whether there is an official body capable of maintaining civil order.[89] The question posed by legal positivists is often synonymous with the question asked in the world of practical affairs, which is whether a regime can maintain effective order. This issue is central to the recognition of one government by another in the establishment of diplomatic relations. It is often termed as a question of the "legitimacy" of a foreign regime; however, this is really a very different question from the one that Weber purported to address. It is clearly not the question posed by legal and political theory when it asked whether a legal system is legitimate. Rather, the question posed by legal and political theory is whether a legal rule is, and should be viewed as, valid and binding on those subject to the rule.[90]

In summation, Weber's approach to the question of legal legitimacy can be traced to four basic errors. Weber's first error was in his formulation of the question of legal legitimacy in terms of some set of unspecified beliefs or attitudes, held by those subject to a legal system, that produced conformity with the requirements of that legal system.[91] The real question is whether

88. Weber's approach to understanding the beliefs of another was premised on the idea that some set of beliefs are held, and an empathizing (through analogical evaluation) of those beliefs through reference to one's own understanding of the relation of such beliefs to one's own conduct and purposes. For a description of this method of understanding, see J. ALEXANDER, THE CLASSICAL ATTEMPT AT THEORETICAL SYNTHESIS 30-31 (1983).

89. *Compare* M. WEBER, *supra* note 15, at 49 (the existence of an organization [or legal system] is viewed as dependent upon an authority with power to ensure compliance with the orders of the organization) *with* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 193-94 (H.L.A. Hart ed. 1954) (a political society requires "a determinate human superior, not in a habit of obedience to a like superior, receiving habitual obedience from the bulk"; this superior is termed a "sovereign" and its commands are denominated "positive laws").

90. *See* R. SCRUTON, A DICTIONARY OF POLITICAL THOUGHT 264 (1982), where the author identifies the inquiry in political and legal theory as "What gives a state the right to exercise such power over the citizen, and which of the powers so exercised are rightly exercised? These questions are related to that of political obligation: what obliges the citizen to obey the state?"

91. "So far as it is not derived merely from fear or from motives of expediency, a willingness to submit to an order imposed by one man or a small group, always implies a belief in the legitimate authority (*Herrschattsgewalt*) of the source imposing it." M. WEBER, *supra* note 15, at 37.

the legal system of a regime is valid and binding from an evaluative standpoint, irrespective of whether that evaluation is made by one subject to the particular legal system or by one in a position external to that legal system. Weber's second error was in his attempt to avoid the distinction between the viewpoint of one subject to a legal system and the viewpoint of one external to it; this avoidance led to his assertion that one could infer at least the existence of some set of beliefs or values as held by an actor through observing the actor's particular conduct.[92] Weber's third error was in his rigid adherence to the fact-value distinction; this was largely the result of his view of the issue of legitimacy as a matter of scientific validity rather than as a question of evaluation.[93] The fourth mistake of Weber was in his view of the matter of legitimacy as a matter of power and stability rather than as one of evaluative significance.[94]

It should be clear from the account given that Weber considered the question of legal legitimacy to entail some set of subjective beliefs held by those who were subject to the legal system, which in turn caused the legal system

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92. Weber asserted, "Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order. The probability that action will actually be so governed will be called the 'validity' (Geltung) of the order in question." *Id.* at 31. For a discussion of the problematical nature of this formulation, see J. ALEXANDER, *supra* note 88, at 78.

93. After conceding that the distinction between normative and empirical questions related to the issue of legitimacy, Weber nonetheless gave primacy to the empirical. Weber commented:

> It is true, of course, that there is no causal relationship between the *normative* validity of an order in the legal sense and any empirical process. In that context there is only the question of whether the order as correctly interpreted in the legal sense "applies" to the empirical situation. The question is whether in a *normative* sense it *should* be treated as valid and, if so, what the content of its normative prescriptions for this situation should be. But for sociological purposes, as distinguished from legal, it is only the probability of orientation to the subjective belief in the validity of an order which constitutes the valid order itself.

M. WEBER, *supra* note 15, at 33 (emphasis in original).

94. Weber posited that compliance based on belief in validity gives rise to a more stable legal order than compliance based on coercive threat or mere expediency:

> Only then will an order be called "valid" if the orientation toward these maxims occurs, among other reasons, also because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him. Naturally, in concrete cases, the orientation of action to an order involves a wide variety of motives. But the circumstances that, along with the other sources of conformity, the order is also held by at least part of actors to define a model or to be binding, naturally increases the probability that action will in fact conform to it, often to a very considerable degree. An order which is adhered to from motives of pure expediency is generally much less stable than one upheld on a purely customary basis through the fact that the corresponding behavior has become habitual. The latter is so much the most common subjective attitude. But even this type of order is in turn much less stable than an order which enjoys the prestige of being considered binding, or, as it may be expressed, of "legitimacy." The transitions between orientation to an order from motives of tradition or of expediency to the case where a belief in its legitimacy is involved are empirically gradual.

Id. at 31.

to be viewed as valid and its orders as having binding effect. However, Weber, while suggesting the possibility of analogical understanding of the inner experiences of another through intuition and empathy, was aware, as modern hermeneutics stresses, that the beliefs and ideas of one individual or group of individuals are inaccessible to another individual acting as observer or interpreter.[95] This problem of verstehen, or the problem of obtaining a valid interpretation of the set of beliefs or ideas of another person, leads to what has become known as the "hermeneutic circle," in which the interpreter struggles to develop an understanding of the beliefs of another while remaining confined by his own presumptions and personal beliefs. The result is that the interpreter, based on his own predispositions, necessarily draws conclusions as to the beliefs or ideas of another person.[96]

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95. Weber noted the distinction between immediate and observational experience. Weber attempted to solve the problem of intersubjectivity through the process of empathetic understanding. However, he conceded that at best this can provide a hypothetical understanding rather than a congruence of understanding between the observer and the observed. Weber described his solution to the problem of verstehen in this way:

> "Immediate experience" and "observational experience" . . . are in fact antitheses. But this holds in the domain of "inner" processes in the same sense that it holds in the domain of "external" processes. It holds in the domain of "action" in the same sense that it holds in the domain of "nature." On the one hand, "understanding"—in the sense of self-evident "interpretation"—and "observational experience" are not antitheses. Every instance of "understanding" presupposes (psychologically) "observation." Its validity is (logically) demonstrable only on the grounds of "observation." On the other hand, from the following point of view, the two categories are not equivalent: the quality of "*self-evidence*" which we ascribe to "objects of understanding" and "possible objects of understanding" differentiates them from merely "conceptualized" products of empirical generalization. There is certainly a sense in which the play of human "passions" can be "inherited" and reproduced in "inner experience," a sense in which this cannot be said about processes of "nature." But this "self-evidence" of the object of interpretive "understanding" must be carefully distinguished from every relation germane to "logical validity." From a *logical* point of view, it presupposes only the *conceivability* of "interpretation." From a *substantive* point of view, it presupposes the objective possibility of "interpretation." Precisely because it has this quality of *self-evidence,* the role of "interpretive understanding" in the analysis of concrete reality is limited to the following. It functions as a hypothesis when used in the explanation of a concrete process. Or it functions as an "ideal-typical" concept when employed in the formation of general concepts, whether for heuristic purposes or for the development of a precise terminology.

M. WEBER, ROSCHER UND KNIES 174-75 (1875) (emphasis in original).

96. *See* D. HOY, THE CRITICAL CIRCLE (1978). Hoy identifies the fundamental nature of the hermeneutic circle:

> Formulated variously in different theories of hermeneutics, the circle generally describes how, in the process of understanding and interpretation, part and whole are related in a circular way: in order to understand the whole, it is necessary to understand the parts, while to understand the parts it is necessary to have some comprehension of the whole.

Id. at vii. This understanding is further conditioned by the presuppositions of the interpreter: "All understanding presupposes a prior grasp, a preunderstanding of the whole. Since preconceptions always condition our knowledge, it is impossible to suppress every 'subjective' determinant of our understanding." *Id.* at 4.

Weber adopted two devices to escape the hermeneutic circle and to avoid the problem of verstehen. The first was the theory of the "ideal type" by which a theoretically conceptual point of view was constructed. Under this construct, a set of beliefs was ascribed to the ideal type, with a validation of the ascription being made by observing whether the behavior of the "ideal type" was consistent with the construct.[97] The effort was not so much to obtain an understanding of the set of beliefs actually held by the ideal type as it was to show that "a type" having subjective beliefs of some form could be seen to engage in some particular pattern of behavior.[98] Weber's methodology involved matching the behavior attributed to the "ideal type" with the pattern of perceived behavior; the problem of understanding was thus transformed into an empirical problem. Through this process, the problem of verstehen was replaced by the process of verification.

This joining of meaning and behavior into an ideal type is basic to Weber's theory of legal legitimacy because he completely accepted that those who are subject to a legal system feel that it is binding; this becomes the standard for legal legitimacy.[99] Weber's approach does not necessitate going

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97. Weber described the methodology and function of the "ideal type" as follows:

> For purposes of the causal *imputation* of empirical events, we need the rational, empirical-technical and logical constructions, which help us to answer the question as to what a behavior pattern or thought pattern (e.g. a philosophical system) would be like if it possessed completely rational, empirical and logical "correctness" and "consistency." . . . For the purpose of characterizing a specific type of attitude, the investigator may construct either an ideal-type which is identical with his own ethical norms, and in this sense objectively "correct," or one which ethically is thoroughly in conflict with his own normative attitudes; and he may then compare the behavior of the people being investigated with it. Or else he may construct an ideal-typical attitude of which he has neither positive nor negative evaluations. Normative "correctness" has no monopoly for such purposes. Whatever the content of the ideal-type, be it an ethical, a legal, an aesthetic, or a religious norm, or a technical, an economic, or a cultural maxim or any other type of valuation in the most rational form possible, it has only one function in an empirical investigation. Its function is the comparison with empirical reality in order to establish its divergences or similarities, to describe them with the *most unambiguously intelligible concepts,* and to understand and explain them causally.

M. WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 42-43 (1949) (emphasis in original).

98. *Id.* at 91. Weber asked, "What is the significance of such ideal-typical constructs for an *empirical* science, as we wish to constitute it?" His response is one that stresses the instrumental value of the construct: "[T]here is only one criterion, namely that of success in revealing concrete cultural phenomena in their interdependence, their causal conditions and their significance. The construction of abstract ideal-types recommends itself not as an end but as a *means.*" *Id.* at 91-92 (emphasis in original). Weber proceeded to identify the function of the ideal-type for determining the "significance" of legal norms:

> The universe of legal norms is naturally clearly definable and is valid (in the *legal* sense!) for historical reality. But social science in our sense is concerned with practical *significance.* This significance however can very often be brought unambiguously to mind only by relating the empirical data to an ideal limiting case.

Id. at 94 (emphasis in original).

99. *See* M. WEBER, *supra* note 15, at 31: "Only then will an order be called 'valid' if

beyond the fact that a set of beliefs is held in order to judge the validity of those beliefs.

The second methodological device developed by Weber to escape the problem of intersubjective understanding was the replacement of a consideration of evaluation with the ascertainment of fact, which turned on Weber's fact-value distinction.[100] The issue of legitimacy was seen by Weber to entail some set of beliefs resulting in the binding force of the legal system.[101] Weber postulated that a legal system viewed by those subject to it as legitimate will be more stable than one that is perceived merely as coercive.[102] This, in turn, permits Weber to infer that a legal system which is stable is in fact viewed as legitimate by those subject to it.[103] For Weber, there must necessarily be some subjective, evaluative criteria applied from the point of view of the person subject to the legal system.[104] Yet, this subjective, evaluative view cannot be ascertained by the observer or interpreter. For Weber, however, this was irrelevant because under his theory, observation of action or conduct becomes the basis for ascribing beliefs that are otherwise unascertainable. The evaluative question of legal legitimacy is transformed into an empirical question of compliance on the part of actors and of the stability of the legal system.

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the orientation toward these maxims occurs, among other reasons, also because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him."

100. Weber explained the nature of the fact-value distinction as follows:

> What is really at issue is the intrinsically simple demand that the investigator and teacher should keep unconditionally separate the establishment of empirical facts (including the "value-oriented" conduct of the empirical individual whom he is investigating) and *his* own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory (including among these facts evaluations made by the empirical persons who are the objects of the investigations). These two things are logically different and to deal with them as though they were the same represents a confusion of entirely heterogeneous problems.

M. WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 11 (1949) (emphasis in original).

101. Weber identified a "belief" in the validity of the law as one of three requirements of legal legitimacy; Weber observed that "today, the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner." M. WEBER, *supra* note 15, at 37 (emphasis in original). "[I]t is only the probability of orientation to the subjective belief in the validity of an order which constitutes the valid order itself." *Id.* at 33 (emphasis in original).

102. *See supra* note 91.

103. *See supra* note 75.

104. M. WEBER, *supra* note 15, at 29-31. Weber first related "empirical uniformities" to "subjective meanings": "Within the realm of social action certain empirical uniformities can be observed, that is, courses of action that are repeated by the actor or (simultaneously) occur among numerous actors since the subjective meaning is meant to be the same." *Id.* at 29. Weber then asserted that belief in the validity of an order would result in greater stability than where action is based on custom or self-interest. "[That] order is also held by at least part of the actors to define a model or to be binding, naturally increases the probability that action will in fact conform to it, often to a very considerable degree." *Id.* at 31. The converse of this proposition is necessarily that the greater the observed stability of an order, the greater is the likelihood that it is regarded as legitimate.

The result of Weber's application of his methodology to the question of legal legitimacy is the development of a theoretical construct that purports to take into account the subjective attitudes of those subject to the legal system. Weber's aim is to escape from the confines of legal positivism's commitment to the view of law as simply coercive orders.[105] However, Weber's failure to deal with the problem of verstehen dooms his project to circularity. Weber's concept of legal legitimacy turns on the acceptance of legal authority, while the stable existence of the legal system establishes the validity of its legal authority. The final result of Weber's approach is that he provides an illusion of a fuller account of legal legitimacy without resort to extrinsic standards of evaluation. In fact, he provides no more than an elaborate analytical construct which confirms a legal positivistic concept of law.

Weber was correct in his identification of the centrality of the problem of verstehen to the development of an account of legal legitimacy.[106] He was mistaken, however, in his assumption that the problem of verstehen necessarily had to be surmounted in order to provide an account of legal legitimacy. By implying that the issue was one of stability and power rather than of truth and value, he was even more mistaken in his view that the question of legal legitimacy could be transformed from an evaluative question into a factual question.

The question of legal legitimacy is a question of whether a legal system is valid and binding. Two polar approaches to the question of legal legitimacy are thus available: at one pole, one can view the matter as one of ultimate objective truth or validity (this is the perspective of natural law); the other pole is one of radical subjectivity which requires one to determine one's own standard of truth and validity. Under either approach, the question of legitimacy, which rests on a determination of truth and validity, is necessarily either an evaluative question that can be considered and answered from the perspective of one subject to the legal system, or is an evaluative question to be posed and answered by an observer external to the legal system. The response given will be the response of the person making the evaluation. One can only judge for oneself whether a legal system is legitimate. The making of this judgment necessarily requires resort to extrinsic criteria of evaluation; one cannot maintain a fact-value distinction in making a judgment about legal legitimacy because the matter is a question of both fact and value. The value determination is itself the fact upon which a judgment of legitimacy is based. The question of legal legitimacy cannot be considered from a viewpoint that separates form and content, as Weber's does, or that separates procedures and substance, as does legal positivism. Weber con-

105. *Id.* at 31. Weber maintained, "[T]he validity of an order means more than mere existence of a uniformity of social action determined by custom or self-interest." *Id.; cf.* A. WATSON, *supra* note 6, at 2-3, where the author identifies the central feature of legal positivism as compliance to avoid a threatened sanction.

106. *See* J. ALEXANDER, THE CLASSICAL ATTEMPT AT THEORETICAL SYNTHESIS: MAX WEBER 78 (1983) (identifying the centrality of verstehen to Weber's methodology and linking the concept of verstehen to Weber's account of legitimacy).

cedes the impropriety of such a separation. But Weber attempted to transform both content and substance, and matters of value into matters of fact. His error lay in his effort to eliminate the evaluative character from judgments of legal legitimacy.

Jürgen Habermas has identified the two alternative views of legitimacy that have been described in this discussion as factual and evaluative, and he poignantly suggests the grounds of Weber's failure. According to Habermas:

> If belief in legitimacy is conceived as an empirical phenomenon without an immanent relation to truth, the grounds upon which it is explicitly based have only psychological significance. Whether such grounds can sufficiently stabilize a given belief in legitimacy depends on the institutionalized prejudices and observable behavioral dispositions of the group in question. If, on the other hand, every effective belief in legitimacy is assumed to have an immanent relation to truth, the grounds on which it is explicitly based contain a rational validity claim that can be treated and criticized independently of the psychological effect of these grounds.[107]

Habermas correctly concludes that Weber's attempt to solve the problem of legal legitimacy, by employing sociological methods, necessarily failed. Habermas suggests that there is "the *possibility* of justifying [*egründen*] normative-validity claims, that is, of providing rational grounds [*rational motivieren*] for their recognition."[108]

Ultimately the question of legal legitimacy is, and must remain, a question of evaluation. The question of the legitimacy or binding effect of a legal system must rest on the validity or truth of the values incorporated into the substantive content of the legal system. Weber's failure is the same as the failure of legal positivism, which results from the effort to separate the validity of the substantive content of the legal system from the validity of the legal system. The need to impose evaluative standards, whether they be rooted in reason or fundamental right, cannot be avoided. Legal positivism's effort to separate form and content was rightly criticized by Weber. However, Weber's effort to avoid evaluation of the value content of the legal system, his effort to transform the question of value into one of fact, was equally mistaken. Neither the power nor the stability of a legal system establishes its legitimacy. The question of legal legitimacy can only be answered by an evaluative judgment of the validity of the legal system; this cannot be avoided by ascribing belief in its validity to others.

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107. J. HABERMAS, LEGITIMATION CRISIS 97 (1973).

108. *Id.* at 101 (emphasis in original).