

1985

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Recommended Citation

John M. Finnis, *On 'Positivism' and 'Legal Rational Authority'*, 5 Oxford J. Legal Stud. 74 (1985).

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ON 'POSITIVISM' AND 'LEGAL RATIONAL AUTHORITY'

J. M. FINNIS*

I

Of the hidden streams nourishing jurisprudence in Oxford during the past thirty years, the work of Max Weber is among the most significant. Tracing out that influence will not be simple. Anthony Kronman's *Max Weber*¹ may well arouse an interest in this project of cultural history. But the book is not concerned at all with Weber's influence,² and this article, too, is concerned only with the issues of jurisprudential method raised by Kronman.

Kronman's powerful and suggestive book offers a tightly integrated interpretation of Weber's theory of law (and of authority, economy and religion). It is an interpretation intended to show that Weber's social theory not only is concerned with a single subject—the development of the institutions and forms of thought characteristic of modernity—but also has 'an overarching conceptual unity' (2). That unity derives, according to Kronman, from Weber's 'theory of value and the distinctive conception of personhood associated with it' (4). Kronman's own most striking thesis goes beyond the interpretation of Weber's theory of society, and even beyond the views of Weber concerning the proper methodology of such a theory. Kronman's thesis concerns the fact that in Weber's typology of authority relations, one type—legal-rational authority—has a 'conceptual' or 'logical' primacy, a 'privileged position in the sense that it is taken to provide the standpoint from which the other two types [traditional and charismatic] are to be understood' (50, 55). This fact deserves, but has not often

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¹ In the series *Jurists: Profiles in Legal Theory* (Edward Arnold and Stanford University Press 1983). Parenthetical references to page numbers in the text are to this book. The present article does not attempt a full description or assessment of the book's many qualities.

² Kronman (194) remarks that Winch's book, *The Idea of a Social Science* (London 1958) 'establishes an intellectual link (though not an historical one) between Weber and those social and legal philosophers, such as Hart, who have been influenced by the Wittgensteinian notion of rule-governed behaviour (anticipated by Weber's own treatment of the same concept in his *Critique of Stammler*)'. It is not quite clear why Kronman wishes to contrast intellectual with historical links, in this context. As MacCormick says (very cautiously), 'Hart's adoption of a variant on [one of the most important elements in Weber's sociological thought] appears to have been filtered wholly or in part through his reading of Winch, op cit, 57–65': MacCormick, *H. L. A. Hart* (Edward Arnold and Stanford University Press 1981) 166 (cf. 30). I would say 'in part' rather than 'wholly' (for reasons quite apart from the fact that Weber's work was mediated to Oxford jurisprudence not only by Winch but also by, e.g. Kelsen *General Theory of Law and State* (Harvard University Press 1945) 171–2, 175–8, 188).

received, the prominence Kronman gives it. But his thesis is more arresting. It is that Weber 'was bound', by reason of 'certain logical or conceptual considerations', to 'accord this form of authority a privileged place in his classification of the various pure types of domination', 'because legal-rational authority is the one form of domination whose fundamental principle of legitimation expresses what Weber considered to be the truth about values' (52, 55).

For 'the truth about values', according to Weber, is that 'all norms, regardless of their content' 'must be created by men', a truth or opinion labelled by Kronman the principle of the *positivity of values*, or *principle of positivity* (55). And 'among the various types of domination, only legal-rational authority is based upon an explicit endorsement of this same [positivistic] conception of normativity':

Every form of authority exemplifies this principle (in the sense that all authority relationships rest upon humanly created norms) but only legal-rational authority employs the principle of positivity as the basis of legitimation. (55)

'[I]t is this feature of legal-rational authority', he adds, 'which gives it its peculiarly self-conscious character', 'a self-consciousness which traditional authority lacks' and which 'explains the priority Weber assigns [to legal-rational authority] in his classificatory scheme' (55).

Kronman's thesis thus has four components:

- 1 To understand the pure types of authority (each of which 'is based upon a distinct conception of legitimacy' (43)), 'and, indeed, [to understand] the structure of authority relationships in general', one must first understand that pure type of authority which appeals to a principle or method of legitimation or justification which is or rests upon a *true* theory of value, i.e. upon a true or warranted 'epistemological assumption' about the way (the only way) that values can be established (52, 53).
- 2 The legal-rational pure type of authority, as identified by Weber, explicitly and with self-consciousness 'embraces the principle that [all] norms must be created by men' (55), and that 'binding social norms have no existence apart from those purposeful human acts of human legislation that bring them into being' (53).
- 3 Weber believed that it is a truth of epistemology that all norms must be created by men; all principles or methods of legitimating authority, other than the legal-rational method, lack self-consciousness in that they deny or fail to acknowledge a truth about human value, about 'is' and 'ought', about the 'conceptual distinction' and 'separation of facts and values' (66-67).

From these three premises, it follows that:

- 4 Weber was bound to give explanatory and conceptual priority to the accurately self-conscious legal-rational pure type of authority.

I shall consider the three premises in turn.

II

The first premise or component in Kronman's thesis is, broadly, that in descriptive and explanatory social theory, the concepts one uses to describe, classify and explain existing and past human institutions, attitudes and practices had better be concepts one would oneself use in a philosophically critical account of the power and limitations of human knowledge. Suppose, for example, that philosophical argument shows that particular actions can be justified only by first *choosing* (without any justifying reason) to treat something as a value and then (all the time treating the chosen value as valuable just because chosen) assessing the actions in question in terms of their conformity to the chosen value. On this supposition, the concepts to be employed in describing the human affairs studied in sociology or history had better be concepts used, or at least usable, in the self-conscious practices of persons whose beliefs include or are at least consistent with this philosophically warranted position.

The sense of this thesis will be clearer if we look at what is involved in selecting concepts for use in descriptive and explanatory social theory. Here, and throughout, I use Weber's sociology as the exemplar, because of its fundamental good sense and realism in seeking to understand social action, social relationships and social order by understanding those actions and dispositions of human individuals which constitute those social actions, relationships and forms of order. On opening Weber, we sense immediately that we have left behind the fog of abstraction that renders so much social theory barely intelligible and certainly untestable. We sense, too, that we have rejoined the great co-operative effort to understand human society without illusions, which Aristotle launches with the opening sentence of his *Politics*:

Observation shows us, first, that every *polis* is a species of association, and, secondly, that all associations are instituted for the purpose of attaining some good—for all men do all their acts with a view to achieving something which is, in their view, a good.³

Weber, no doubt, will refine and complexify our conception of what it is to act 'with a view to . . .', and will expand our knowledge of the things men have believed worth doing. But the Weberian programme is part of Aristotle's, a programme which Aquinas, in his reflective introduction to the *Politics*, defines as seeking knowledge of social wholes by careful consideration of their parts and their *principia*, their intelligible originating factors, particularly the (more or less) intelligent human *doings* (as distinct from *makings*) that actually constitute those social wholes,⁴ doings which are to be understood by understanding their motivating *objectives*.

So: the empirical existence of that form of social relationship which we call authority (or 'domination') is understood when we distinguish the regularities of behaviour involved in authority-compliance relationships from those involved in

3 Aristotle, *Politics* I:I 1252a1.

4 Aquinas, *In Octo Libros Politicorum Aristotelis Expositio*, proem.

such relationships as robbery, monopolistic or cartel control of a market, dominance in a discussion-group, and so forth. The distinction is made by adverting to the beliefs of the persons involved in the relationship, in particular their beliefs as to the obligatoriness or peculiar propriety (in short, the legitimacy) of behaving as they do. As Weber puts it, there is authoritative domination when the manifested will or directive of the ruler(s) is meant to influence the conduct of the ruled and actually does influence it as if the ruled had made the content of the directive the maxim of their conduct for its very own sake.⁵ This the ruled will do just insofar as they ascribe to the directive, and to its issuance from that author, some sort of legitimacy. Such ascriptions are made for many reasons; but these reasons or motivations tend to cluster into three or four characteristic types ('ideal' or, better put, 'pure' types):

- (i) belief in the legality of enacted rules and in the right of those exercising authority under such rules to issue the directives in question;
- (ii) belief in the sanctity of immemorial traditions, and in the personal authority of the chief who issues directives from within a traditionally sanctioned sphere of authority binding even upon him;
- (iii) belief and trust in the revelatory, heroic, saintly or exemplary qualities of an exceptional individual and in the novel directives revealed or ordained by him.⁶

Here, then, are three types of authority. Only very exceptionally is any one of them to be found instantiated in history in a pure form, unmixed with elements of the other.⁷ For the *beliefs* on the basis of which authority is ascribed to those who actually exercise it are rarely simple. Indeed, Weber says, 'In the case of *legal authority*, it is never purely legal. The belief in legality comes to be established and habitual, and this means that it is partly traditional . . .'.⁸ Similarly, purely traditional authorities 'have never been stable indefinitely and, as is also true of bureaucratic authority [the specific instrument of legal rational authority], have seldom been without a head who had a personally charismatic status by heredity or office'.⁹ But none of this suggests that it is useless to try to understand the history of many communities, including our own, in terms of the meaningful clusters of features picked out by concepts such as legal-rational, traditional and charismatic authority.

5 Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds Roth and Wittich (Berkeley, 1968, 1978) (hereafter *Economy and Society*) 946, 941-5, 212-15, 31-2. It may be helpful to add the equivalent page references in widely used editions of portions of Weber's treatise, editions which, moreover, supply the English translations used (with emendations) by Roth and Wittich: viz, Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard University Press 1954) (hereafter *On Law*) 328, 322-7; Parsons (ed), *Max Weber: The Theory of Social and Economic Organisation* (New York 1947) (hereafter *Theory . . .*) 324-8, 124-5.

6 *Economy and Society* 215-16 (= *Theory . . .* 328-9).

7 *Economy and Society* 216, 262 (= *Theory . . .* 329, 382).

8 *Economy and Society* 263 (= *Theory . . .* 382).

9 *Ibid.*

The significance of the clustering together of the features picked out by any one of these concepts is carefully illustrated by Weber. He begins with legal authority 'in order to make it possible later to contrast the others with it'.¹⁰ That is to say, as he remarks at the outset of the corresponding chapters of explanation, 'we shall proceed from the type that is the most rational and the one most familiar to us . . .'.¹¹ (Note the easy conjunction of 'most rational' with 'most familiar to us', of rationality and modernity). This, then is the 'conceptual primacy' which Kronman noted and seeks to account for: what we might call an explanatory priority.

What does explanatory priority amount to? Well, look at Weber explaining a pure type to which he does not ascribe such priority, e.g. traditional authority: he does it largely by a series of privations, i.e. of negations of the features of legal-rational rule:

The person exercising authority is *not* a 'superior', but a personal master, his administrative staff does *not* consist mainly of officials but of personal retainers, and the ruled are *not* 'members' of an association but are either his traditional 'comrades' or his 'subjects'. Personal loyalty, *not* the official's impersonal duty, determines the relations of the administrative staff to the master. Obedience is owed *not* to enacted rules but to the person who occupies a position of authority by tradition . . . In the pure type case of traditional authority it is *impossible* for law or administrative rule to be deliberately created by legislation . . . In the pure type of traditional rule, the following features of a bureaucratic administrative staff are *absent*: (a) a clearly defined sphere of competence subject to impersonal administrative rules, (b) a rationally established hierarchy, (c) a regular system of appointment on the basis of free contract, and orderly promotion, (d) technical training as a regular requirement, (e) (frequently) fixed salaries, in the type case paid in money . . . *In place of* a well-defined functional jurisdiction, there is a conflicting series of tasks and powers which at first are assigned at the master's discretion.¹²

And traditional rule tends to negate the distinction between private right and public authority; wherever traditional rule develops an administrative staff, there will be an assimilation of the ruler's authority to the status of an economic good, which can be sold, pledged as security or divided by inheritance; where this assimilation is extended to the administrative staff itself, we have a very widespread type of patrimonial rule in which, Weber says, 'the decisive fact is that, regardless of content, governing powers and the related emoluments are treated as private rights'.¹³

The explanatory description of charismatic forms of authority follows the same strategy of contrast with the features of legal-rational authority.

Could the order of these accounts have been reversed? Could the forms of authority have been as well explained by treating first the charismatic pure type, and describing the traditional and the legal-rational by a series of negations? This

¹⁰ *Economy and Society* 217 (= *Theory* . . . 329 n 5).

¹¹ *Economy and Society* 954 (omitted from *On Law* 337).

¹² *Economy and Society* 227, 229 (= *Theory* . . . 341, 343) (emphasis added).

¹³ *Economy and Society* 237; also 232 (= *Theory* . . . 353, 347).

is not a question of formal logic, which can readily generate an affirmative proposition out of a series of negations. The question rather concerns the formation and selection of the concepts to be used in the account. The proposed account is to be an account of *authority*, as distinct from other forms of motivation whereby one person 'follows' the directives of another. We hope to differentiate authority from terrorism or highway robbery, and from co-ordinations of action by constellations of interest such as the relations between the monopolist and the others in his market.¹⁴ But if we treated, say, charismatic rule as primary, main elements of authority would not come into view (except as apparently arbitrary importations into the accounts of the secondary forms): for example, the elementary distinction between exercises of authority by the ruler and mere expressions of his personal wishes. Similarly, if we treated traditional rule as primary, we would have no account (save by subsequent importation) of that elementary feature of authoritative rule, *legislative enactment*, the introduction, on the ruler's authority, of a *new* 'standing order' or general rule. Moreover, as we have seen from Weber's account of traditional patrimonial rule, we would lose sight of such elementary distinctions as that between public and private powers of control, or between acting as representative of the community, in some common interest, and acting as curator of one's private or family fortunes.

I have been suggesting an explanation of Weber's decision to give an expository and, in that sense at least, an explanatory priority to the legal-rational form of authority and legitimation. I have not appealed, and neither does Weber, to Kronman's principle that priority in social theory should be given to concepts justifiable in a philosophically critical epistemology.

Still, that principle has some attractions. A philosophically critical epistemology is attained by asking intelligent questions, and to the extent that it is a warranted or true epistemology is relatively invulnerable to further questions. A social order, or method of legitimation, which makes unwarranted assumptions about the source or status of its aims and methods is vulnerable to questions. No social order can suppress human questioning (though some can sometimes suppress, for a very long time, many of the results of such questioning); so one can discern a kind of instability in social orders resting on untrue assumptions about human good and the principles of social order. But what is at stake in determining method in social theory is not 'What is the wave of the future?' or 'What is the long-run successful social order?' We do not know how the human mix of good and evil, truth and error, will work out in the long run. What is at stake for us is explanatory power. A social order, actual or conceivable, resting on mistakes about human good is relatively opaque or unintelligible (because to some extent unintelligent).

One may, however, hesitate to affirm Kronman's first premise in all its universality. For it asserts that authority is to be understood primarily in terms of that pure type of authority which rests on an epistemologically warranted theory

¹⁴ Cf *Economy and Society* 214, 942-46 (= *Theory* . . . 326; *On Law* 323-8).

of value. But what if epistemology warrants no authority, but rather demonstrates that all forms of authority are illegitimate, unjustifiable claims by one human being upon another? What is it about legal-rational authority that makes it invulnerable to critical questions about its justifiability as directive of human action? Should we not be cautious, and accept Kronman's first premise just to this extent: that if there is a form of authority and corresponding principle of legitimation which is critically justified, then that form has an explanatory priority relative to forms of authority and principles of legitimation which are vulnerable to the critical questions of epistemology.

It is clearly time to look at Kronman's treatment of legal-rational authority and legitimation.

III

Kronman's second premise is that legal-rational authority rests upon an assumption which corresponds to the epistemological claim that 'binding social norms have no existence apart from those purposeful acts of human legislation that bring them into being' (53).

Now it is clear that legal-rational authority, as explained by Weber, is differentiated from traditional authority precisely by its assumption or postulate that binding social norms can be created by acts of legislation; indeed, it is differentiated also from charismatic authority by its postulate that such norms can become binding without the authority of inspiration or at least can, once made, remain binding without the continued sponsorship of an inspired author.

But Kronman slides from 'some' to 'all'. It does not follow that legal-rational systems of domination appeal for their legitimacy *exclusively* to acts of legislation. And in fact, the great teachers of Western lawyers, say, Aristotle, Cicero, Gaius, Ulpian, Augustine, Justinian, Aquinas, St Germain and Blackstone, all without exception deny that a system of legal-rational authority rests exclusively on acts of legislation. They all flatly deny the epistemological thesis which Kronman makes characteristic of rational-legal thought: that 'binding social norms have no existence apart from . . . purposeful acts of human legislation'. Yet these, especially Aristotle and Aquinas,¹⁵ are the very theorists who most vigorously affirm the capacity of a human act of legislation to make binding what was, before that act, in no way binding. All take care to show that this significance of the purely positive, of sheer legislation, must be explained by appeal to pre-existing, non-positd principles, binding (on legislator and subject alike) independently of any act of legislation.

Nor is this a freak of Western intellectual history. Consider what Kronman says:

15 Aristotle, *Nicomachean Ethics* V:7 1134b19-24; Aquinas *Summa Theologiae* I-II q 95 a 2c.

. . . only legal-rational authority acknowledges the basic distinction between facts and values that is central to Weber's own theory of value. Traditional authority conflates 'is' with 'ought': from a traditionalist point of view, it is the age-old existence of a practice or institution which gives it legitimacy and normative force . . . Any argument intended to establish the legitimacy of a particular rule from a legal-rational point of view must . . . appeal to the fact that it, or some other rule, has been enacted in the proper way. (53)

Have we not here some conflating of fact with value, of 'is' with 'ought'? Kronman continues with a trace of unease:

But this 'fact', unlike those invoked by all traditionalist justifications of power, has normative significance only because it is itself the product of, or more precisely, because it *consists in*, a deliberate and wilful act of norm-creation, an act of legislation. Legal-rational authority rests on the epistemological assumption that values can only be established in this way . . . (53)

I have observed that the last proposition is simply not true of the last two and a half millennia of legal-rational authority. But look at the preceding proposition: an act of legislation has normative significance only because it consists in a deliberate and wilful act of . . . legislation! What do we have here? *Reason*, the intelligent and rational, the epistemologically justified . . .? Or rather, dogmatism pure and simple, if not a belief in magic . . .? Someone's directive has normative significance, binding me to act or not act, *just* because he issued his directive deliberately and wilfully as a directive . . . To say the least, such a principle of legitimation is not invulnerable to questions.

Nor have such questions been lacking in the history of legal-rational orders. It is just such obvious questions that created the constant market for explanations such as those offered by Aristotle, Cicero and Aquinas.

It is time to point out that Weber rejects Kronman's second premise. Kronman, for all his familiarity with Weber's works, has simply overlooked Weber's principal observations on the problem of legitimacy, particularly legal-rational legitimacy. We can begin with a fact that Kronman does notice (44n): although Weber usually speaks of three pure types of method or principle of legitimation, there is one place (prominent because it is precisely Weber's first mention of legitimation) where he lists *four*—tradition, affectual faith in the revealed or exemplary, positive enactment believed to be legal, and 'value-rational faith: valid is that which has been deduced as an absolute'.¹⁶ Weber's explanation here is brief:

The purest type of legitimacy based on value-rationality is *natural law* . . . its logically deduced propositions . . . must be distinguished from those of revealed, enacted, and traditional law.¹⁷

One notices the uneasiness in an account which focusses on logical deduction without inquiring into the premises for the deductions. Kronman makes nothing

¹⁶ *Economy and Society* 36 (= *Theory* . . . 130).

¹⁷ *Economy and Society* 37 (= *Theory* . . . 131).

of this. He simply observes (44n) that what Weber means by 'natural law' is not clear, and says not a word more. But Weber himself offers his profoundest reflections on legal legitimacy in the pages overlooked by Kronman.

The most important discussion is headed by Weber 'Natural Law as the Normative Standard of Positive Law'. It begins by remarking that conceptions of the rightness of law are sociologically relevant within a rational, positive, legal order only in so far as they give rise to practical consequences for the behaviour of legislators, legal practitioners, and other persons interested in the law, in other words

when practical legal life is materially affected by the conviction of the particular 'legitimacy' of certain legal maxims, and of the directly binding force of certain principles which are not to be disrupted by any concessions to positive law imposed by mere power.¹⁸

So Weber's discussion is going to describe, not endorse, the claims made by those with natural law conceptions. And what is such a conception?

Natural law is the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimation for the binding force of positive law. Natural law has thus been the collective term for those norms which owe their legitimacy not to their origin from a legitimate lawgiver, but to their immanent and teleological qualities.¹⁹

And now Weber adds what seems to be his own assessment of the whole problem of legitimating authority:

It [natural law] is *the specific and only consistent type of legitimacy of a legal order* which can remain once religious revelation and the authoritarian sacredness of a tradition and its bearers have lost their force.²⁰

That is: when charismatic and traditional forms of authority have given way to the legal-rational, nothing but principles of natural law could provide a consistent type of legitimacy specifically for the legal order.

Weber's truthfulness is the cause of his lasting value. The predicament of modernity is spelled out in full (only to be overlooked by so competent a modern man as Kronman). In the past,

natural law dogmas have influenced more or less considerably both lawmaking and lawfinding. . . . Formally, they have strengthened the tendency towards logically abstract law, especially the power of logic in legal thinking.²¹

But now things are different:

¹⁸ *Economy and Society* 866 (= *On Law* 287).

¹⁹ *Economy and Society* 867 (= *On Law* 287-8).

²⁰ *Ibid* (emphasis added).

²¹ *Economy and Society* 873 (= *On Law* 296).

All metajuristic axioms in general have been subject to ever continuing disintegration and relativization. In consequence of both juridical rationalism and modern intellectual scepticism in general, the axioms of natural law have lost all capacity to provide the fundamental basis of the legal system. . . . Consequently, legal positivism has, at least for the time being, advanced irresistibly. . . . In the great majority of its most important provisions, [the law] has been unmasked all too visibly, indeed, as the product or the technical means of a compromise between conflicting interests.

But this extinction of the metajuristic implications of the law is one of those ideological developments which, while they have increased scepticism towards the dignity of the particular rules of a concrete legal order, have also effectively promoted the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment. Among the practitioners of the law this attitude has been particularly pronounced.²²

(This was written, one will recall, in Germany and not long before 1920. The claim made in the last sentence quoted was to be confirmed by Weber's philosophical friend, Gustav Radbruch, who after close acquaintance with the matter accused 'legal positivism' of encouraging supine acceptance of Hitler's legally authorized regime).²³

The moral is not far below the surface of Weber's text. Insofar as contemporary legal and social thought denies that there are any principles valid by reason just of their intrinsic point and content, it rejects the only consistent justification of legal authority.

Two things follow. First, in continuing to accept such authority as legitimate, (these) modern men think and act without consistent reason, i.e. irrationally. Weber brings himself to admit this. In a section entitled 'Natural Law and Vocational Ethics', he again offers a portrait of the modern state, prefaced by the remark that in

the medieval . . . traditionalistic ethics of vocation . . . relationships of domination have a character to which one may apply ethical requirements in the same way that one applies them to every personal relationship . . . Today, however, the *homo politicus*, as well as the *homo economicus*, performs his duty best when he acts . . . sheerly in accordance with the impersonal duty imposed by his calling . . . All politics is oriented [today] to *raison d'état*, to realism, and to the autonomous end of maintaining the external and internal distribution of power. These goals . . . must necessarily seem completely senseless from the religious point of view. Yet only in this way does the realm of politics acquire a peculiarly rational mystique of its own.²⁴

²² *Economy and Society* 874-5 (= *On Law* 298).

²³ See Friedmann, 'Gustav Radbruch', 14 *Vanderbilt L Rev* 191 at 205 (1960); and the sources cited by Hart, 'Positivism and the Separation of Law and Morals' 71 *Harvard L Rev* 593 (1958), reprinted with additions in *Hart Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 50, 73-75. If Radbruch thus showed, as Hart says (*ibid*, 74), 'extraordinary naivety', it was a naivety which (as the passage just quoted shows) he shared with Max Weber, whom most will judge hard-headed and perceptive.

²⁴ *Economy and Society* 600-601.

Secondly, as the assimilation of *homo politicus* to *homo economicus* confirms, the differentiation between authority and constellations of interest is fundamentally obscured in such an attitude.

On both these counts, the very reasons which Weber himself had for giving legal-rational authority expository and explanatory priority in the sociology of authority—reasons concerning both superior rationality and increased differentiation from other ways of orientating social action, e.g. from constellations of interests—indicate that legal-rational authority can fully merit that priority only on condition that it itself (precisely as a source of purely positive laws as well as of laws *jure gentium*) is legitimated in the substantively- or value-rational mode, i.e. by belief in some principles of the type traditionally labelled 'natural law'.

IV

Yet Weber himself, as Kronman's third premise says, did assert that belief in natural law is unreasonable or unwarranted faith. That is easy to understand, given his account of natural law theory:

'Nature' and 'Reason' are the substantive criteria of what is legitimate from the standpoint of natural law. Both are regarded as the same, and so are the rules derived from them, so that general propositions about regularities of factual occurrences and general norms of conduct are held to coincide. . . . The 'ought' is identical with the 'is', i.e., that which exists in the universal average. . . .²⁵

Thus some other characteristics of modernity begin to come into view: for example, that one of the most learned, and most representative of really learned men of the modern age, himself not ignorant of Greek or Latin, can thus be simply unaware, or blankly uncomprehending, of the main lines of the classic philosophical and theological account(s) of practical reason, an account in which 'regularities of factual occurrences' and 'general norms of conduct' (let alone 'the universal average'), so far from being considered to 'coincide', are quite sharply and self-consciously distinguished.²⁶

But of course the problem goes deeper than mere, grotesque misunderstandings of (some possible uses of) the (in any case not too happy) term 'natural law'. Here

25 Ibid, 869 (= *On Law* 290–1).

26 Consider, e.g., Aristotle's explicit contrast between the best (and thus the natural: *Nic. Eth.* V:7 1135a5) with the average, in his fundamental methodological reflections on the study of societies and their constitutions: *Politics* IV:I, 1288b10–40. Or Aquinas's view that most people and their deeds are foolish and corrupt: *Summa Theologiae* I, q 113, a 1; I–II, q 9, a 5 ad 3; q 14, a 1 ad 3; q 58, a 5; q 94, a 4; q 99, a 2 ad 2. Once again, the curious fact emerges that modernity, in the person of Weber (and Kronman), is not only unaware of the mistakes of antiquity, but actually repeats them. But since modernity also comprises those who are more or less aware of these mistakes and take some care to avoid them, it becomes apparent that appeal to the category of 'modernity' is a more than usually confused attempt to derive a normative conclusion from a bare statement of historical fact—in this case an insufficiently clarified fact, too.

we are in the principal domain of that epistemological principle called by Kronman the positivity of values. As Kronman says: 'In Weber's view, the meaning of the world is something that can only be established by an act of will, by the deliberate imposition of some meaning-giving value on the world (which considered by itself, constitutes a meaningless series of amoral occurrences devoid of normative significance)' (54).

Hilary Putnam has credited Weber with introducing 'the modern fact-value distinction', by which he means the modern denial of 'the objectivity of value judgments'²⁷. Putnam treats Weber as having had one argument for that denial, and a bad argument at that: that people, or educated people, in fact disagree about values. The argument is indeed as weak as Putnam says, but Weber had others which Putnam and Kronman tacitly ignore.

There was, for example, the neo-Kantian argument that all judgments must rest upon presuppositions, and that selection amongst competing presuppositions must be a matter, not of rational judgment (which would itself require further presuppositions), but of the non-rational, ungrounded adoption of basic presuppositions. Weber, of course, like most neo-Kantians, strove to avoid the conclusion that logical and scientific (e.g. causal), not to mention philosophical, judgments are rationally baseless. He sought to limit the sting of his argument to questions of value. But the argument in itself is perfectly general (and thus self-refuting). So Weber's effort involves an arbitrary limitation, and shows the way out of its grip. For human intelligence has the capacity to *understand* data, whether the data be found in the realm of nature, or of logic, or of cultural artefacts including language, or of the meaningful action of other human beings. And such insights are not the less intelligent and reasonable for being 'underived' from any higher or more basic principles. Their intelligibility and warrantedness is confirmed, moreover, by their satisfactoriness as answers to further questions about their subject-matter and by their coherence with other insights and judgments. The neo-Kantian foundations of Weber's denial of the objectivity of 'value-judgements' go unmentioned today²⁸ because they are as clearly self-refutatory and arbitrary as the verificationist principle of the logical positivists, a principle which Weber did not know or hold, but which some have used to support conclusions which sound like his. During its brief reign, logical positivism was bolstered by the claim that the correct linguistic analysis of statements about human good and evil is that they report or, in another version, *express* the attitudes of the speaker and thus have either no truth value or truth value only concerning the state of the speaker's own attitudes. That claim had no plausibility as an account of the logic of human speech about good and evil.

27 Putnam, *Reason, Truth and History* (Cambridge University Press 1981) 174-5.

28 They are not, I think, alluded to by Kronman. They are rightly given a central place in the account offered by Turner and Factor, *Max Weber and the Dispute over Reason and Value* (London 1984) esp. 34ff. For Weber's own use of the notion of presuppositions, see especially his 'Science as a Vocation' in Gerth and Mills (ed), *From Max Weber: Essays in Sociology* (London 1948) 143-5.

So today the denial of the objectivity of evaluative or moral propositions is once again framed in ontological terms. Such propositions do not figure in causal explanations of observations, so they do not affirm facts of nature which are the only sort of facts, truths or knowledge.²⁹ But none of these arguments give any clear account of what it is to be a fact, or a fact of nature, or part of the world; nor are they able to show that entities or qualities or relationships such as the belonging of propositional meaning to concatenations of symbols, or of truth to propositions, or of validity to inferences, are not 'queer'³⁰ compared to the relation of billiard ball to billiard ball. These denials of the objectivity of evaluative and ethical judgments all depend upon an illusion: the illusion that that to which true judgments have their truth by corresponding ('the facts', 'the world', 'nature', 'reality') somehow lies open to an inspection conducted otherwise than by a truth-seeking process of rationally inquiring, understanding, considering and judging, a process in which (as the debate about the proper analysis of evaluative and ethical discourse showed) evaluation and moral judging clearly intend to participate, in their own ways.

Reasonably enough, Kronman's exposition omits the shifting struggles of those who have tried to support Weber's conclusions about the 'subjectivity' of all values. However, Kronman also omits to mention the arguments that Weber himself did use: (i) the argument from the irrationality of basic presuppositions, an argument which was rapidly abandoned by Weber's colleagues and immediate disciples for reasons already noted; (ii) the argument from certain supposed political and/or ethical antinomies or dilemmas, before which reason is supposed to fall silent and call upon sheer decision, but which in fact, on careful analysis, prove to be no more than a stimulus to a more nuanced and resourceful practical reasoning which can identify good reasons for preferring one horn of the dilemma, or for settling upon some other course of action, or for narrowing the choice to a small range of reasonable alternatives to be contrasted with the indefinitely vast range of irrational or unreasonable alternatives;³¹ and (iii) the argument that there are distinct and incommensurable 'spheres' of practical judgment, such as the political, the erotic, and the ethical, each with its own ultimate values between which reason cannot adjudicate because reason operates only within spheres (a claim never worked out or defended by Weber, and contradicted by his own acknowledgement that these spheres interpenetrate one another).³²

In place of all these, Kronman offers a new argument: a positivistic

29 Harman, *The Nature of Morality* (New York 1977), Chaps 1-2.

30 Cf. Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1977) 38-43. For an assessment, see Finnis, *Fundamentals of Ethics* (Oxford University Press and Georgetown University Press 1983) 57-66.

31 See Strauss, *Natural Right and History* (Chicago 1953) 67-74; Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 51; Turner and Factor, *Max Weber and the Dispute over Reason and Value* 31-38.

32 See Turner and Factor, *op cit*, 45-6; Brubaker, *The Limits of Rationality: An essay on the Social and Moral Thought of Max Weber* (London, 1984), 69ff.

epistemology, denying that values can be known prior to their creation by non-rational human acts of will, is a prerequisite of any descriptive sociology. For

the sociologist enters into the value-orientations of his subjects; only by doing so can he understand their behaviour in a meaningful way. At the same time, however, he abstains from making their values his own. . . . In order for this kind of detached empathy (and hence for the discipline of sociology) to be possible at all, normative evaluation and judgment must be distinct from understanding. This distinction in turn requires us to assume that a person's values are established through the exercise of a creative faculty (the will) distinct from the power of rational insight. (28)

Consider the decisive step in this argument: 'If evaluation and understanding were the same, no one could understand another person's values without having made them his own' (18).³³

Whether or not Kronman's argument is Weber's, there is a simple fallacy in it. For the sake of a word, let us call the alternative to detachment 'attachment'—as in 'I am deeply attached to sport, or scholarship . . .'—or 'commitment'. Then Kronman's argument amounts to this: the fact that there can be detached

33 Kronman says (20) that the assumption that understanding and evaluation are 'fundamentally different' may seem uncontroversial, but that not all philosophers have accepted it:

One philosopher who denied the distinction was Socrates, judging from his views as they are presented in certain of Plato's early and middle dialogues. In these dialogues, Socrates defends the position that knowledge or understanding is a necessary and sufficient condition for virtue and hence for right conduct, a view that implies the impossibility of detached understanding of the sort that Weber claims is characteristic of all sociological inquiry. (18)

Or again:

Unlike Socrates' theory, which assigns the central role in moral life to our capacity for knowledge or understanding, Weber's positivistic theory of value assigns this same role to an entirely distinct power, to the will, the power of creative choice. (21)

One would not guess from Kronman's book that the rejection of Socrates' views began with Plato and was a foundation of the entire tradition of non-positivistic ethical thought in Aristotle, Aquinas and their successors. Nor would one guess that one of the great mistakes in the arguments by which Socrates is said to have defended his view that knowledge is sufficient for virtue was precisely an assumption shared with Hume and Weber: that 'reason moves us only because it depends on some previous desire for an end'. As Irwin put it:

In Socrates' view a rational desire is formed by deliberation about instrumental means to the final good; and therefore no desire for components of the final good can be rational. Plato rejects this view, and tries to show how the desire for something as an end in itself can be a rational desire formed by reference to intelligible and intelligible considerations (deliberation)

Terence Irwin, *Plato's Moral Theory: The Early and Middle Dialogues* (Oxford University Press 1977) 80, 170, 173, 253.

For Plato, like Aristotle, also rejected Socrates' essential assumptions that the end of human life is determinate, like the end of a craft, and that it is antecedently fixed for all by a determinate natural wanting to which reason or intelligence does not contribute: *ibid.* 85–6, 166–7, 170. Thus the upshot of the classical critique of Socrates is that understanding is necessary but not *sufficient* for right dispositions and right action. The content of this understanding is explored in my *Natural Law and Natural Rights*, Chaps III–V, and *Fundamentals of Ethics*, Chaps II–III.

understanding, i.e. understanding without attachment (or commitment), entails that attachment must be without understanding. Equally fallacious would be the weaker version of the same argument, *viz.*: the fact that there can be understanding without attachment entails that there *can* be attachment without understanding.

Such fallacies are evident enough. But behind them is a more interesting equivocation on the notion of 'understanding values', an equivocation between understanding that someone values X, and understanding that X is a value, i.e. is a human good.

Take the first-person case first. I can observe and report that I myself regard some possibility as a good, and that I have a desiring or committed disposition towards the possibility thus regarded. Such a detached act of understanding (intelligent) observation and description is not an expression of desire or commitment. When I do express or pursue my desire or attachment, or act on my commitment, I do so with understanding—not, indeed, an understanding of the same 'theoretical' sort as is involved in the descriptive report of my own desires and attitudes, but an understanding of the value of the relevant possibility in terms of its human goodness or badness, i.e. its *desirability*: what the classics called practical understanding, which (*pace* Socrates, Weber and Kronman) can be of ends, even ends-in-themselves, as well as means. At least when we are acting humanly (and not merely in some quasi-reflex, automatic, or 'animal' fashion), we desire things because they seem desirable, good, worthwhile; it's not that we think things good because we desire them.

Analysis of what is involved in *choosing* certainly shows that any account of it must include reference to that active interest, that bestirring of oneself in pursuit of something, that attachment, and equally that positive aversion from other possibilities, all of which we can call 'will', willingness, decision (act of will) . . . But equally the account will be quite inaccurate unless it fully adverts to the fact that this attachment, this interest, this bestirring, this willingness to act and to reject, is motivated and directed by one's understanding (reasonable or unreasonable) that there is some good at stake, that one's interest and efforts have some point.

The process of deriving 'purely positive' schemes of legislation or common law from general principles deemed requirements of reason is not (usually) a deductive process, but it is a rational process. The classics, hazardously but accurately, thought of it as an interaction between reason and will.³⁴ 'Hazardously', because human willing (even when unreasonable or wicked) is never intelligible otherwise than as pursuit of understood good—a fact which the ancients (providing the essential but nowadays neglected corrective for their vocabulary) sought to convey by the definition of *will* as 'appetitus rationalis', and the slogan '*voluntas est in ratione*'.³⁵

34 See Finnis, *Natural Law and Natural Rights* 281–90, 295, 337–42.

35 Ibid, 338. On 'understood good', see *Fundamentals of Ethics* 30–53.

Where does this leave our understanding of *other people's* desires and principles of action? We are now in a position to consider this question on its merits, without pressure from the fallacy that if detached understanding is possible, understanding (intelligent) commitment must be impossible. And the merits of the question are, I think, settled by what I have just said: human choices are for intelligible ends, for understood goods. So, just as we can understand another's assertion without sharing in or reproducing his performance of asserting it, or another's question without ourselves being puzzled, so too we can understand the point of another's choice or longing without ourselves choosing or longing for it.

Similarly, we can understand a muddle (such as Kronman's about detached understanding) by sorting it out into its clear components, to each of which we do or could assent but whose combination is invalid and unworthy of assent. And, in descriptive jurisprudence, like anthropology, sociology or history, we understand intentions, attitudes, practices, conventions and institutions by sorting them out as attempts to pursue and participate in one or more of the basic human goods under the guidance of all, or all too few, of the basic requirements of practical reasonableness.³⁶ This need not degenerate into 'rationalism', a complacently limited range of concepts uncritically claiming rational necessity and thus exclusiveness as categories for understanding human action. The critique of rationalism can, and can only, proceed from within the same project, i.e. by making intelligible those aspects of human good which escape the rationalist's net of categories. And one can always make a human action or practice intelligible without showing that it is reasonable; for practical reasonableness is only one of the basic human goods, and its own requirements are manifold, so that an action can be reasonable in some respects while unreasonable in others. Finally, it is not to be overlooked that the effort of understanding, in which the descriptive and explanatory theorist draws upon his own understanding of human opportunities and of practical reasonableness, proceeds towards a kind of reflective equilibrium, in which his own prior beliefs about human good may have been expanded and corrected in the very process of descriptive sorting and explaining.³⁷

v

My conclusions about the three stages of Kronman's general thesis are evident enough.

Explanatory priority in social theory should indeed be given to those action-guiding and institution-forming concepts which can be integrated into an epistemologically justified view of the goods for the sake of which human persons act and form institutions. But this explanatory priority is possible only if the epistemologically justified view of human goods is the view denied by Weber, namely, that human goods can be recognised and affirmed in acts of

³⁶ *Natural Law and Natural Rights* 29–33, 81–5, 127.

³⁷ *Ibid.*, 16–19.

understanding, identifying (a) desirable objects-for-desire and worthwhile point-for-striving, and (b) requirements which guide critical assessments of desires in situations of choice, and which direct choices, just on the basis that such-and-such truly is the reasonable (rational) mode of participation in true human goods. For if the epistemologically justified view were that affirmed by Weber, all human acts and institutions would be afflicted with radical arbitrariness, and to attribute to one type of act, practice or institution an explanatory priority over others would be without reasonable justification. In particular, the ascription of explanatory priority to legal-rational authority would be unjustified. For if the positive rules of a legal-rational order rest on nothing more than other rules likewise posited by sheer acts of will, the uncritical arbitrariness of ascribing authority to all or any of those rules is undisguised, and the distinction between recognition of authority and mere (perhaps coerced) convergence of interests completely collapses.

Of course, more remains to be said about *whether* or *why* authority *should* be distinguished from mere constellations of interest or from other forms of order.³⁸ Here it suffices that no good reason has been produced for accepting Weber's 'positivist' theory of value, and the new reasons produced by Kronman are no reason at all. Indeed, their weakness once again tells us something about modernity, something that will remove all temptation to give explanatory priority to a concept just on the score that it is the accepted modern concept.

38 Ibid, Chap IX.