Cornell Law Library
Scholarship@Cornell Law: A Digital Repository

Cornell Law School Graduate Student Papers | Cornell Law Student Papers

9-27-2010

Max Weber on Property: An Effort in Interpretive Understanding

Laura R. Ford
Cornell University, Doctoral Candidate, Sociology, lrf23@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/lps_papers

Part of the Jurisdiction Commons, Law and Economics Commons, Law and Society Commons, Legal History, Theory and Process Commons, and the Property Law and Real Estate Commons

Recommended Citation
Ford, Laura R., "Max Weber on Property: An Effort in Interpretive Understanding" (2010). *Cornell Law School Graduate Student Papers.* Paper 23.
http://scholarship.law.cornell.edu/lps_papers/23

This Article is brought to you for free and open access by the Cornell Law Student Papers at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law School Graduate Student Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Max Weber on Property:
An Effort in Interpretive Understanding

As Published in Volume 6, Socio-Legal Review (2010)

Laura R. Ford*

I. Introduction: Property and Organized Social Relationships, in Three Phases

Throughout the academic world, renewed interest in property and "property rights" is evident. Within certain economic quarters, the writings of Ronald Coase have been responsible for something approaching a paradigm shift,[1] with a focus on property rights and "transaction costs" in their exchange at the core.[2] Although discussion of property has been fundamental to political theory since its inception, widespread application of "neo-liberal" principles in the context of international development finance – which have emphasized the importance of stable, private property rights – has motivated political scientists, development economists, and public policy theorists to direct increasing attention to property-rights regimes.[3] Within legal science, property sits at the heart of continental and common-law legal systems, as well as legal systems that these property-based systems have influenced. Within the social sciences, recent attention to property is evident in anthropology and economic sociology.[4]

---

* J.D., LL.M., M.P.A., Doctoral Candidate, Sociology, Cornell University. I wish to thank Richard Swedberg, Martin Schroeder, and Mark Vail for helpful and encouraging comments and suggestions.

1 *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) (1962).

2 *See* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW (Terry L. Anderson & Fred McChesney eds. 2003) (hereinafter "PROPERTY RIGHTS"); YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE (2002); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (2d ed. 1997) (1989); R. H. Coase, THE FIRM, THE MARKET AND THE LAW (1988); DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981).

Some readers might question the validity of characterizing these developments as a "paradigm shift" in Kuhn's sense. In response to such doubts, it is worth noting that, throughout *The Structure of Scientific Revolutions*, Kuhn repeatedly stated that paradigm shifts need not occur on a macro scale in order to be so characterized, but rather more typically appear as regularized, small-scale changes in the basic conceptual commitments within a community of scientific practitioners. *See e.g.* KUHN, *supra* note 1, at 6-7, 180-81. Indeed, it would not be difficult to describe the transition to an economic "property rights" paradigm in Kuhnian terms. Such an account would describe a crisis in the "normal science" of neoclassical economics provoked by problems of "public goods" and "externalities," and the increasing "recognition" that a conception of private property rights, or "ownership," underlies the neoclassical economics paradigm. For an exceptionally clear statement of this, see Harold Demsetz, *Ownership and the Externality Problem*, *in* PROPERTY RIGHTS, at 282-300.

3 *See, e.g.*, Jean Rogers, *Property, Power and Growth* (Center for International Private Enterprise 2003), *available at* http://www.cipe.org/pdf/publications/fs/jeanrogers.pdf; HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2000). Moreover, the ascendance of "rational choice theory" perspectives in political science has led to increasing interchange among "property rights" scholars in political science and economics. *See, e.g.*, William H. Riker & Itai Sened, *A Political Theory of the Origin of Property Rights: Airport Slots*, 35 AM. J. POL. SCI. 951 (1991).

4 *See* Neil Fligstein & Jennifer Choo, *Law and Corporate Governance*, 1 ANN. REV. L. & SOC. SCI. 61 (2005); Annelise Riles, *Property as Legal Knowledge: Means and Ends*, 10 J. ROY. ANTHROP. INST. LAW 775 (2004);

In the case of contemporary sociology, however, the subject of property has been generally neglected until quite recently, as Richard Swedberg has noted.[5] Even the recent discussions of property within economic sociology, moreover, have not focused on the sociological *nature* of property, but have rather focused on its effects, viewing it in a manner generally consistent with neo-institutional economic theory.[6] This is true despite the fact that Emile Durkheim and Max Weber both devoted considerable attention to the nature of property in their published works.[7]

The purpose of this article will be to explore Max Weber's writings on property, in an effort to trace the development of his thinking on the subject and to identify whether coherent sociological themes emerge. This is an immensely challenging task. References to property are pervasive throughout Weber's work, from his dissertation to the compilation that is *Economy and Society*.[8] Moreover, the subject of property goes to the heart of Weber's multiple areas of expertise: law, economics, public administration, and sociology. Thus the investigator is faced with Weber at the pinnacle of his precision and subtlety. For a person educated in the 21st Century, these difficulties are compounded by the

---

ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS (Alain Pottage & Martha Mundy eds. 2004); Victor Nee & Yang Cao, *Path Dependent Societal Transformation: Stratification in Hybrid Mixed Economies*, 28 THEORY & SOC'Y 799 (1999); PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION (C.M. Hann ed. 1998); Victor Nee & Peng Lian, *Sleeping With the Enemy: A Dynamic Model of Declining Political Commitment in State Socialism*, 23 THEORY & SOC'Y 253 (1994).

[5] RICHARD SWEDBERG, PRINCIPLES OF ECONOMIC SOCIOLOGY 203 (2003); *see also* ALVIN GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 304-13 (1970). One important exception is Jens Beckert, who has recently published work on the sociology of inheritance law, as well as a number of other property-related topics. *See* JENS BECKERT, INHERITED WEALTH (2008) (*originally published in German as* UNVERDIENTES VERMÖGEN: SOZIOLOGIE DES ERBRECHTS (2004)); *The Longue Durée of Inheritance Law: Discourses and Institutional Development in France, Germany, and the United States*, 48 ARCHIVES EUROPÉENNES DE SOCIOLOGIE (2007). For a recent review article, which reinforces the point that property has been generally neglected in contemporary sociology, while also formulating certain prescriptions for future sociological work, see Bruce G. Carruthers & Laura Ariovich, *The Sociology of Property Rights*, 30 ANN. SOC. REV. 23 (2004).

It is important to note that James Coleman's theoretical work has generally emphasized the importance of "resources" and "rights," and thus may constitute a significant exception to the argument that contemporary sociological theory has tended to ignore property. *See, e.g.*, JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (Harvard Paperback ed. 1994) (1990). Coleman's theoretical work has been heavily influenced by rational choice theory, especially economic theory. *See id*. Thus his emphasis on property is very likely a reflection of the overall developments in economic theory that are described *supra* in note 2. Ronald Coase and other founders of the "property rights" perspective in economic theory are cited liberally throughout his theoretical work, and the paradigmatic problems of "free ridership" and "externality" are correspondingly emphasized. *See id*. at 27-64.

[6] *See, e.g.*, THE NEW INSTITUTIONALISM IN SOCIOLOGY (Mary C. Brinton & Victor Nee eds. 1998).

[7] *See* EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 121-70 (Cornelia Brookfield trans., 2d ed., 1992) (1957); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Free Press Paperback ed. 1997) (1893). The writings of Max Weber on property will be discussed *infra*.

[8] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., University of California Press 1978) (1968). For discussions of the compilation and its contents, see RICHARD SWEDBERG, MAX WEBER AND THE IDEA OF ECONOMIC SOCIOLOGY 153-62, 197-203 (1998); *compare Overview of the Text of Economy and Society by the Editors of the Max Weber Gesamtausgabe*, 1 MAX WEBER STUDIES 104 (2000) *with* Hiroshi Orihara, *From a Torso with a Wrong Head to Five Disjointed Body-Parts Without a Head: A Critique of the Editorial Policy for Max Weber Gesamtausgabe I/22*, 3 MAX WEBER STUDIES 133 (2003). *See also infra* notes 223 to 230 and accompanying text.

challenge of understanding detailed analogies and distinctions drawn by Weber, as a late 19th-Century thinker, among (1) his contemporary German-Prussian socio-legal framework, (2) multiple medieval socio-legal frameworks, and (3) ancient socio-legal frameworks, particularly those of Greece and Rome. From a purely legal ("doctrinal") perspective, such a task seems virtually impossible, since the law in question includes property, contract, bankruptcy, corporations, public administrative law, and family law, as well as jurisprudential theory.

However, from his first dissertation, Weber was explicit in stating that his interest was ***not*** primarily doctrinal (or "dogmatic,"[9] to use his terminology), nor was it historical, in the sense of merely describing the commercial-historical developments that paralleled particular legal frameworks.[10] Thus one cannot simply rely on legal texts or commercial-historical facts in trying to understand Weber's arguments. The necessity of interpreting Weber's German, as well as his Latin and Romance legal sources, from an English-speaking perspective further complicates matters. Such difficulties demand caution from any interpreter, and create myriad opportunities for mistaken inferences and conclusions.

Yet, precisely for these reasons, there is much to be learned from Weber's writings on property. His writings spanned an enormous historical range, and took account of German jurisprudential, economic and social-historical thought at its peak. His professors and advisors included many leading figures in German jurisprudence, economics, and public administration, including Levin Goldschmidt,[11] Theodor Mommsen (1817-1903),[12] and August Meitzen (1822-1910).[13] Moreover, as will become

---

[9] In German legal literature, the term "dogmatic" generally denotes the binding nature of a legally authoritative text. *See, e.g.* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY 34 (Tony Weir trans. 1995) (originally published as PRIVATRECHTSGESCHICHTE DER NEUZEIT, rev'd ed. 1967) (1952).

[10] *See* MAX WEBER, ZUR GESCHICHTE DER HANDELSGESELLSCHAFTEN IM MITTELALTER, *as published in* MAX WEBER, GESAMMELTE AUFSÄTZE ZUR SOZIAL- UND WIRTSCHAFTS-GESCHICHTE 312 (1924) (hereinafter "*Handelsgesellschaften*"). The definitive edition of this text has recently been published in German as part of the overarching *Max Weber Gesamtausgabe* project. *See* MAX WEBER GESAMTAUSGABE, ZUR GESCHICHTE DER HANDELSGESELLSCHAFTEN IM MITTELALTER (Gerhard Dilcher & Susanne Lepsius eds.) (2008). The scholarly introductions written by the editors for each volume in the *Max Weber Gesamtausgabe* series are invaluable sources for understanding the particular texts in their historical context and in relation to Weber's other works.

[11] Goldschmidt was Weber's primary advisor and mentor in writing his first dissertation. *See infra* notes 18 to 29 and accompanying text.

[12] According to the Nobel Foundation, which in 1902 awarded him a Nobel Prize in Literature, Theodor Mommsen was "the greatest classical historian of the Nineteenth Century." *See* The Nobel Foundation, Nobel Prizes by Year, The Nobel Prize in Literature 1902, *available at* http://nobelprize.org/nobel_prizes/literature/laureates/1902/mommsen-bio.html. Mommsen's most frequently cited work is his multivolume *History of Rome*, a work which is still in print today. However, he is credited with authoring or editing over 1500 works, including a number of invaluable primary sources in Roman law and social history. His degrees were in law and history; at University of Berlin he was a member of the faculty of law. *See* ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 576-77 (1937, Volume X).

[13] Meitzen was an agrarian historian and statistician. *See* ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 302 (1937, Volume X). He had acquired distinction through his services to the Prussian state, first in conducting an exhaustive study of Prussian agriculture and land-taxes, then through his labors in the administration's statistical bureau. *See id.*

evident, much of contemporary property theory was prefigured in Weber's writing. Thus he is relevant both historically and contemporarily. For these reasons, despite the enormous challenges involved, this article will seek to draw much-deserved attention to Weber's work on property.

Weber's scholarly work pertaining to property will be presented here as proceeding in three distinct phases: (1) the legal phase of his first dissertation, in which he first defined property in socio-relational terms and articulated a number of themes to which he would return in later work; (2) the economic-historical phase, in which he articulated a narrative of fundamental historical change in proprietary social relationships, bringing into bold relief the character of agrarian property and the contrasting character of commercial property; and (3) the sociological phase, in which Weber drew on the two prior phases to articulate a sociological theory of property. The notion that Weber's property-related work proceeded in three clearly-defined phases is distortive; legal, historical, economic, and social elements are present from the beginning of his work, and blended throughout his work in interesting ways. Nevertheless, the distortion does enable a developmental understanding of the ways that Weber conceptualized and analyzed property.

This developmental image of Weber's property-related scholarly work reveals the extent to which his finally-developed, sociological theory of property built on insights from his legal and economic-historical phases. As the reader will see, Weber presented property as a phenomenon dependent on organized social relationships that are to some extent closed to outside participants. This conception was legally and historically articulated in the first dissertation. In *Economy and Society*, this conception was sociologically formulated and systematically connected to additional important concepts, particularly that of "Order." A developmental presentation reveals the extent to which Weber's property-related concepts were systematically and meticulously constructed over the course of his lifetime. The fact that he could return to insights from his early scholarship in articulating his sociological theory of property demonstrates the strength of the legal and economic-historical foundation he built. It is to that foundation that we now turn.

II. The Legal Phase: *The First Dissertation.*
Property and Organized Social Relationships

Translated literally, Weber's first dissertation has a descriptive, albeit complex, title: "*Development of the Solidary-Liability-Principle and the Separate-Property-Fund of the Public Mercantile-Association from the Household-and-Craft-Industry-Communities in the Italian Cities*"

His *History, Theory, and Technique of Statistics* (1891) has been translated by Roland P. Falkner and is currently available in a paperback reprint edition (BiblioLife). *See also infra* note 107.

(hereinafter the "Dissertation").[14] Weber successfully defended the Dissertation in 1889,[15] and in the same year published it as the third chapter in a larger work,[16] which he titled *On the History of Mercantile-Associations in the Middle Ages* (hereinafter "*The History of Mercantile-Associations*").[17] Weber's dissertation chair (*Doktorvater*), a professor whose seminar had inspired him to begin his research two years previously, was Levin Goldschmidt, a renowned commercial law scholar.[18] The significance of this fact may be more fully appreciated once Goldschmidt's scholarship is approached from a contemporary U.S. legal perspective.

Since the 1950's, U.S. commercial law has been dominated by the Uniform Commercial Code (referred to as the "UCC"). One of the core principles enshrined in the UCC – a principle that U.S. first-year law students learn as a matter of sacred doctrine – is deference to "trade usages" (*i.e*. commercial customs),[19] which are used to interpret the language of commercial agreements and to fill gaps in those agreements.[20] Although the UCC's final text is a result of legislative compromise, its foundational principles (and much of its text) were provided by Karl Llewellyn, a German-American law professor with a deep understanding of Continental-European legal thought.[21] As James Whitman has persuasively argued, Llewellyn's abiding respect for "trade usages" was likely influenced by Levin Goldschmidt, who as a participant in the drafting of the 1861 German Commercial Code (*Deutsche Handels-Gesetzbuch*) had argued that "*[u]nconditional free play for custom is a cardinal point of view for the desired new phase of commercial law*."[22]

---

[14] *Entwickelung des Solidarhaftprinzips und des Sondervermögens der offenen Handelsgesellschaft aus den Haushalts- und Gewerbegemeinschaften in den italienischen Städten*. *See* DIRK KÄSLER, MAX WEBER: AN INTRODUCTION TO HIS LIFE AND WORK 243 (Philippa Hurd trans. 1988) (*originally published as* EINFÜHRUNG IN DAS STUDIUM MAX WEBERS 1979).

[15] *See* LUTZ KÄLBER, THE HISTORY OF COMMERCIAL PARTNERSHIPS IN THE MIDDLE AGES 9-10 (2003); KÄSLER, *supra* note 14, at 6.

[16] *See* KÄLBER, *supra* note 15, at 9-10.

[17] *See supra* note 10.

[18] *See* KÄLBER, *supra* note 15, at 6-10.

[19] *See, e.g.*, UCC § 1-102(2)(b) ("Underlying purposes and policies of this Act are…to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."); § 1-205(2) ("A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.").

[20] *See, e.g.*, UCC § 1-201(3) ("Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade…"); § 1-205(3) ("A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.").

[21] *See* James Whitman, *Commercial Law and the American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L. J. 156, 166-70 (1987); Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1130-31 (1982).

[22] Whitman, *supra* note 21, at 165 (quoting and translating LEVIN GOLDSCHMIDT, KRITIK DES ENTWURFS EINES HANDELSGESETZBUCHS, 4 KRITISCHE ZEITSCHRIFT F.D. GESAMMTE RECHTSWISSENSCHAFT 113 (1857)) (emphasis in original). Goldschmidt's influence on Llewellyn's legal thought is seen in Llewellyn's approving quotation and gloss on Goldschmidt in *The Common Law Tradition*. KARL LLEWELLYN, THE COMMON LAW TRADITION 122

To Goldschmidt, commercial custom was an outgrowth and manifestation of the collective will of the people (*Volk*).[23] The beneficent law-giver was the man who enabled the "immanent," "natural law," emergent from the will of the *Volk* and the particular fact-pattern, to be applied.[24] The beauty of the "law merchant" – *lex mercatoria* – was its relative independence from rationalistic, Roman-law influenced legal systems,[25] preeminent cases of which are the Prussian Code (1761) and the French Civil Code (1804). His passionate interest in the law merchant and its relationship to *Volk* customs, led Goldschmidt to dedicate a lifetime of study to "*Handelsrecht*," which may be translated as "Commercial Law" or "Mercantile Law."[26] By 1891, this lifetime study had culminated in a *Universal History of Mercantile Law*.[27] In the language often used to categorize 19th Century German legal scholars, Goldschmidt is considered a "Germanist," albeit one who acknowledged a greater influence by Roman law on local (*i.e*. German) mercantile customs than some of his Germanist counterparts.[28] His vision of the law merchant as a body of law emergent from mercantile custom remains influential to this day.[29]

A. The Question: The Origin(s) of Modern Commercial Organization Forms, and their Connection to Property-Relationship Structures

Viewed in this light, Weber's decision to write his Dissertation under Goldschmidt takes on greater significance, and the substance of that study becomes more comprehensible. In the introduction to *The History of Mercantile-Associations*, Weber declared his work to be an investigation into medieval south-European mercantile customs (*Handelsgebrauch*, trade usages), based on an examination of available original source-materials.[30] Specifically, Weber stated that he was interested in whether medieval south-European mercantile customs resulted in completely new legal concepts – through general acceptance and development into customary law – or whether such customs were met by transformed, but

---

(1960). Channeled through Llewellyn, Goldschmidt's legacy has survived in U.S. commercial law. *See* WHITMAN, *supra* note 21; Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 Yale L.J. 805, at 811-12 (1962). Somewhat ironically, however, Goldschmidt's survival is at the cost of a mistaken attribution. *See* WHITMAN, *supra* note 21, at 158 n.16. Llewellyn mistakenly attributed his quote, not to Goldschmidt's great life's-work, the *Handbook of Commercial Law* (*see infra* note 24) from whence the quote actually comes, but rather to a less famous work. *See id*.

[23] *See id*.

[24] *See* LEVIN GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS 302 (3d ed. 1875) (1864).

[25] *See* WHITMAN, *supra* note 21, at 162-66.

[26] *See* MARY ELIZABETH BASILE ET AL., LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Introduction) 163-64 (1998).

[27] *See* LEVIN GOLDSCHMIDT, UNIVERSALGESCHICHTE DES HANDELSRECHTS (1891); BASILE ET AL, *supra* note 26, at 164 n.7.

[28] *See* WHITMAN, *supra* note 21, at 159-65 & n.55; WIEACKER, *supra* note 9, at 300-40, 366-67.

[29] *See* Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant*,' 21 AM. U. INT'L L. REV. 685 (2006); *see also supra* note 22.

[30] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 312-13.

previously existent, legal institutions.[31] In other words, consistent with the interests of his dissertation chair (Goldschmidt), Weber had undertaken a study of the relationship among mercantile customs, legal concepts and legal institutions in medieval south-Europe, specifically Italy and Spain. He was particularly interested in a subset relationship between custom and law: the organization of persons for economic production and commercial activity, and its consequences for property law (*Vermögensrecht*).

Consistent with the categories of German commercial law, embodied less than three decades previously (1861) in the German Commercial Code,[32] Weber was interested in the origins of two types of commercial organization: (1) the Public Mercantile-Association (*offene Handelsgesellschaft*) and (2) the *Commenda*-Association (*Kommanditgesellschaft*).[33] Moreover, he was interested in the relationship between these types and an ancient Roman type of commercial organization, the *societas*.[34] In distinguishing among these three types of commercial organization, his primary focus was on the distinctive property-relationships (*Vermögensbeziehungen*) – including claims and obligations with respect to non-associates, particularly creditors – that were characteristic of these forms.[35] In fact, as will be shown, Weber viewed these distinctive property-relationship structures as *constitutive of* the particular organizational forms.

Weber's historical point of departure was the *societas* of Roman law.[36] According to the Roman jurists,[37] this *association* was essentially contractual in nature: it created a relationship of reciprocal

---

[31] *See id*. at 312.

[32] *See* DAS ALLGEMEINE DEUTSCHE HANDELS-GESETZBUCH MIT ERLÄUTERUNGEN NACH DEN MATERIALIEN UND BENUTZUNG DER SÄMMTLICHEN VORARBEITEN VON BORNEMANN, BALDECK, STROHN UND BÜRGERS 78-9, 117 (Berlin 1862) (hereinafter "*1861 HGB*").

[33] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 313-44. To facilitate ready comparison with Anglo-U.S. legal categories for commercial organization, these are often (and with variations) translated as "General Commercial Partnership" and "Limited Partnership," respectively. *See, e.g*. NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 492-98 (3d ed. 2002) (1993); GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH (Charles E. Stewart trans. 2001). In the context of Weber's 19th Century historical analysis, however, such translations may disguise more than they reveal. Under contemporary Anglo-American law, partnerships are sharply contrasted with corporations, the distinguishing features of the latter being the corporation's separate legal "personality" and shareholders' limited liability. *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS (2d ed. 2003) (1995). It is generally agreed that the precursor to the modern Anglo-American corporation is the joint stock corporation, but the origins of the joint stock corporation have been a matter of debate among legal historians. *See* M. Schmitthof, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74 (1939). Nevertheless, certain historians have taken the position that "public companies" and "*commenda*" (analogues to *offene Handelsgesellschaft* and *Kommanditgesellschaft*) were intermediate stages between ancient Roman forms of business enterprise and the joint stock corporation, prefiguring in certain respects modern forms of business enterprise, *including* the corporation. *See id*, particularly at 79-92. To use the term "partnership" in translating "*Gesellschaft*" may disguise the fact that Weber was making a similarly broad kind of argument.

[34] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 313-44.

[35] *See id*. at 314-19, 335-86.

[36] *See id*. at 313-21.

[37] In the context of a discussion of Roman law, the term "jurist" designates a learned interpreter and expounder of the law, whose opinions (*responsa*) were taken to be authoritative expressions of Roman civil law after the time of Caesar Augustus (Octavian). *See* THE DIGEST OF JUSTINIAN I.2 (rev'd English ed., Alan Watson ed., 1998) (1985) (translation based on the Latin text of Theodor Mommsen, 1868) (Latin text available at The Roman Law Library,

obligations (*obligationes*, from *ob* + *ligare*, meaning to tie together, to unite) among the associates, which were enforceable between them, but virtually irrelevant as far as third parties were concerned.[38] The association endured for as long the original associates remained alive and retained a shared understanding, but might have a much shorter duration if its purpose was limited or if the associates' shared understanding disappeared.[39] For purposes of convenience, the associates might each put money into a common fund, creating a kind of "common property" (*res (arca) communis*).[40] However, from the

---

http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/index.htm) (533) (hereinafter "*The Digest*"); THE INSTITUTES OF JUSTINIAN I.2.8 (Peter Birks & Grant McLeod trans. 1987) (including the Latin text of Paul Krüger, 1867, upon which the translation is based) (533) (hereinafter "*The Institutes of Justinian*"); THE INSTITUTES OF GAIUS I.2 (W.M. Gordon & O.F. Robinson trans. 1988) (including the revised Latin text of E. Seckel & B. Kübler, 1935 (1903) upon which the translation is based) (~160-179) (hereinafter "*The Institutes of Gaius*"). *See also* ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 34-8, 43-52 (2d ed. 1997) (1994).

[38] The *societas* was an Obligation created by shared understanding (*consensus*, agreement). *See* THE INSTITUTES OF JUSTINIAN at III.22; THE INSTITUTES OF GAIUS at III.135. Roman jurists divided Roman law into three categories: the law of Persons (*Personae*), the law of Things (*Res*), and the law of Actions (*Actiones*). *See* THE INSTITUTES OF JUSTINIAN, *supra* note 37, at I.2.12; THE INSTITUTES OF GAIUS, *supra* note 37, at I.8. The law of Actions was roughly analogous to modern procedural law, and concerned the methods for pursuing a claim. *See* THE INSTITUTES OF JUSTINIAN at IV.6.1; THE INSTITUTES OF GAIUS at IV.1-IV.4. The law of Persons addressed the social status of individuals, a primary division being between slaves and free men. *See* THE INSTITUTES OF JUSTINIAN at I.3; THE INSTITUTES OF GAIUS at I.9. The law of Things related to corporeal (having a physical body, *i.e.* tangible) and incorporeal (intangible) things, and divided those things into such as were capable of being under the proprietary control of a *paterfamilias* (*patrimonium*) and such as were beyond such capacity (*extra patrimonium*). *See* THE INSTITUTES OF JUSTINIAN at II.1-II.2; THE INSTITUTES OF GAIUS at II.1-II.14.

The law of Obligations was a subcategory of the law of Things. *See* THE INSTITUTES OF JUSTINIAN at II.2; THE INSTITUTES OF GAIUS at II.12-II.14. More specifically, Obligations were viewed as one of several incorporeal Things whose essence lay in their constitution by abstract right (*ius*, including the law/right of all peoples, *ius gentium*) rather than by physical existence. *See id.* Obligations were considered to arise either from delict (*i.e.* wrong to another person, analogous to the "tort" of Anglo-American law) or from contract (*i.e.* the conclusion of business arrangements, *contractus*). *See* THE INSTITUTES OF JUSTINIAN at III.13; THE INSTITUTES OF GAIUS at III.88. Obligations arising from contract could be created by conduct, by spoken words, by written documents, or by a shared understanding (*consensus*). *See* THE INSTITUTES OF JUSTINIAN at III.13; THE INSTITUTES OF GAIUS at III.89. Actions to enforce Obligations were considered to exist between persons (*in personas*), rather than pertaining directly to a thing, unlike actions relating directly to property (*in rem*), which included certain incorporeal things related to landed property (*e.g.* rights of way). *See* THE INSTITUTES OF JUSTINIAN at IV.6.1; THE INSTITUTES OF GAIUS at IV.1-IV.4.

Although it may be obvious from their proximity and similar appearance, it is worth noting that the English word "association" is derived from the Latin "*societas*," which in turn derives from "*socius*." *See* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 842 (C.T. Onions ed. 1966). The Latin verb *sociare* means to unite, to share, or to "associate." *See, e.g.*, THE NEW COLLEGE LATIN & ENGLISH DICTIONARY (2d ed., John C. Traupman ed., 1995) (1966). In the Seventeenth and Eighteenth Centuries, the scope of *societas* expanded from being merely a designation of temporally limited associations for specific purposes to a designation of entire human communities. *See* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 842 (C.T. Onions ed. 1966). Thus was born the modern English sense of "society." *See id*. Otto Gierke's *Das deutsche Genossenschaftsrecht* provocatively connects these cultural developments to the emergence of the modern concept of the "state," as can be seen from English translations provided by Frederick William Maitland and Ernest Barker. *See* NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800 (Ernest Barker trans. 1950); POLITICAL THEORIES OF THE MIDDLE AGES (Frederick William Maitland trans. 1913) (*reprints available from* The Lawbook Exchange).

[39] *See* THE INSTITUTES OF JUSTINIAN at III.25.4-III.25.5; THE DIGEST, *supra* note 37, at 17.2.4-17.2.5; THE INSTITUTES OF GAIUS at III.151-III.152. Note that by the Sixth Century, the associates could agree that the association would endure beyond their individual lives. *See* THE INSTITUTES OF JUSTINIAN at III.25.4-III.25.5.

[40] *See, e.g.*, THE DIGEST, *supra* note 37, at 17.2.14.

perspective of third persons, neither the association nor its common fund had any real existence or legal significance. Thus, for example, if in the course of business conducted on behalf of the association, an associate entered into an agreement with someone outside the association, but failed to fulfill his obligations under the agreement, a legal action would be brought against him individually, ***not*** his associates or the association as a whole. If the legal action was successful, the associate might bring an action against his other associates to be reimbursed for his expenses.[41] Thus, the entire legal significance of the *societas* was in the legal ties formed among the contracting associates, not in the associates' relationships with third parties.[42]

However, the situation was completely different in the case of Weber's contemporary Public Mercantile-Association (*offene Handelsgesellschaft*). In this case the associates might all be sued together for action taken by one single associate, or the association itself might be sued under its registered trade-name (*Firma*).[43] The associates were *solidarily* liable for the association's obligations, meaning they were each obligated for the entire amount of any such obligation (regardless of whether they themselves were responsible for creating it), and could be forced to pay the entire amount if sued on the obligation (*e.g*. by a creditor).[44] This solidary liability was connected with the starkest difference between the Public Mercantile-Association and the *societas*: the former could acquire legal rights – including ownership (*Eigentum*) – and create obligations in its own name, whereas the latter could not.[45] In the case of the Public Mercantile-Association, the "common fund" was the *association's property*, separate and apart from the associates' individual contributions, whereas in the case of the *societas* the common fund was simply the aggregated funds of the contributing associates.[46]

In Weber's view, the essential differences between the *societas* of Roman law and the Public Mercantile-Association lay in the solidary liability and the association's separate property, which were present in the case of the latter but not in the case of the former.[47] These distinctions were based on

---

[41] For a concise discussion of the Roman law principles pertaining to *societas* (translated as "partnership"), see BORKOWSKI, *supra* note 37, at 291-95.

[42] For Weber's thorough discussion of the *societates'* legal implications, see WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 314-15. *See also* Lutz Kälber's English translation, *supra* note 15, at 54.

[43] *See* 1861 HGB, *supra* note 32, at II.111-II.112. For an English translation of the 1900 Commercial Code (which is relatively similar in the relevant passages), see THE GERMAN COMMERCIAL CODE (1900) §§ 124, 128 (A.F. Schuster trans. 1911) (hereinafter "*1900 English HGB*").

[44] *See* 1861 HGB, *supra* note 32, at II.112. *See also* 1900 English HGB, *supra* note 43, at § 128 (translating "*solidarisch*" as "jointly and severally"). The Anglo-American principle of "joint and several liability" is similar. For a general discussion of Roman, French and Louisiana solidary liability principles, compared with Anglo-American joint and several liability, see Harry Cohen, Comment, *Solidary Obligations*, 25 TUL. L. REV. 217 (1951). Under the principle of solidarity, if one associate paid the entire amount of an obligation, he or she could seek recompense from the other associates. *See id*. at 225-26.

[45] *See* 1861 HGB, *supra* note 32, at II.111. *See also* 1900 English HGB, *supra* note 43, at § 124.

[46] For Weber's much more thorough discussion of these differences, see WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 315-17. *See also* Lutz Kälber's English translation, *supra* note 15, at 55-6.

[47] WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 318.

differences in (1) the corresponding rights and obligations of associates vis-à-vis one another and third parties, and (2) the corresponding rights and obligations of associates and third parties vis-à-vis the association's common property. Stated even more simply, the essential differences between the *societas* and the Public Mercantile-Association lay in their distinctive property-relations, *i.e.* the socio-legal ties among associates, third parties, and the association's property. However, Weber was willing to simplify this even further, by defining property itself in socio-relational terms:

> Insofar as one now intends to call "property" a complex of rights, which all serve a particular purpose, which are uniformly regulated in a particular organized form, and upon which rest particular encumbrances – and the authoritativeness of this definition is subject to no reasonable doubt – then the entirety of the legal relations previously described approaches this character.[48]

Thus one may characterize the differences between forms of organization in terms of distinctive property-relations, which themselves may be viewed as distinctive complexes of rights and obligations among associates and third parties, all with reference to a particular object (in this case, the common fund).

Where there is an object of property, a natural linguistic association – embedded with enormous power into Roman law (as well as philosophy) by medieval scholars – causes one to look for a subject. To put this in somewhat contemporary 21st Century terms, if there is a thing over which rights can be exercised, there must be an entity (a "Subject") capable of exercising those rights. In terms of legal doctrine, this raises the question of "legal personality," which is essentially a question of whether the law recognizes an entity as capable of bearing rights and obligations.[49] As a matter of formal legal doctrine, the Public Mercantile-Association of Weber's day was not considered to be a legal person; this remains true today.[50] However, Weber was interested in an earlier period, before the joint-stock corporations presaging the modern business corporation (today's proto-typical legal person) had emerged.[51]

In fact, Weber was interested in the *medieval emergence of the idea of "personality," as applied to mercantile associations*.[52] Although the notion of corporate (legal) personality itself was relatively old, even under Roman law, it had been most clearly conceived as applying to entities that 21st Century minds

---

[48] *Id*. at 317.

[49] For a thorough discussion of legal personality, its conceptual emergence and its extension to various corporate entities (including cities) under Roman law, see P.W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW (Rothman Reprints 1971) (1938). For an excellent discussion of the Anglo-American corporation's institutional history, focused in part on the emergence of legal personality, see Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 149 (1888).

[50] *See* FOSTER & SULE, *supra* note 33, at 492-93, 495. Nevertheless, the contemporary law recognizes that the association's ability to acquire property and otherwise do business under its trade-name (*Firma*) does confer a kind of partial legal personality. *See id*.

[51] *See generally* WILLISTON, *supra* note 49. *See also* SCHMITTHOF, *supra* note 33.

[52] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 317-18.

would tend to imbue with a public or semi-public character: cities and towns (*civitates*, *municipia*), colonies (*colonia*), priestly bodies (*sodalitates*), and guild-like craft-worker clubs that provided meals and funding for certain needs, particularly funerary needs (*collegia*).[53] Following the rise of Christianity, the notion of corporate personality was extended to the Church, as well as to certain other charitable and monastic organizations.[54] However, except with respect to associations of tax-collectors (*societates publicanorum*/*vectigalium*), corporate personality never appears to have been broadly extended to the *societates* by Roman jurists, nor to specifically commercial enterprises, although limited, exceptional cases may be ambiguously identifiable.[55]

In all of the cases where corporate personality was deemed to extend to organizations, the endowment of this corporate personality was primarily significant in its implications for property-relations, for an entity with legal personality was an entity with the capacity to acquire distinct rights and obligations vis-à-vis property in its own name.[56] For Weber, then, the emergence of mercantile associations' *quasi*-personality paralleled the emergence of their distinctive property-relations.[57] And, based on his review of the south-European sources, he believed this emergence began with a simple mental and verbal "short-hand" method (*eine Art praktischer Breviloquenz*) of referring to these distinctive property-relations under the trade-name (*Firma*) of the association.[58] Thus, even if the mercantile associations never acquired legal personality as a matter of formal doctrine, they acquired it as a matter of customary development, which in turn emerged out of a cultural (ideational and linguistic) development.[59]

Based on his review of late-Roman (Sixth Century A.D.) legal sources, Weber saw no evidence of a shift toward the distinctive property-relations (*i.e.* solidary liability, separate associational property) and corollary quasi-corporate personality that characterized the Public Mercantile-Association of his own day.[60] Thus, the answer to his initial binary query – whether medieval south-European mercantile customs resulted in completely new legal concepts, through general acceptance and development into customary law, or whether such customs were met by transformed, but previously existent, legal institutions – was negative for the latter, and therefore positive for the former.[61]

---

[53] *See generally* DUFF, *supra* note 49.
[54] *See id*. at 168-203.
[55] *See id*. at 141-51, 159-61. As Weber noted, the Roman-law category of *societas* applied broadly to include associations with multiple purposes; associations with commercial purposes were only one large subset of *societates*. *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 314. *See also* THE DIGEST, *supra* note 37, at 17.2; BORKOWSKI, *supra* note 37, at 291.
[56] *See generally* DUFF, *supra* note 49.
[57] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 317-18.
[58] *See id*.
[59] *See id*.
[60] *See id*. at 319-21.
[61] *See supra* note 31 and accompanying text.

To put his investigation into contemporary social-scientific terms, Weber was using late-Roman legal sources to perform something analogous to a narrowly-specified cultural investigation, attempting to locate within legal texts evidence of *an ideational shift* toward viewing the *societates* as quasi-corporate entities, viewing the common fund as the *societas'* separate property, or viewing the associates as solidarily liable.[62] Seeing no evidence of this ideational shift in the legal texts, Weber concluded that it cannot have taken place through gradual modification of established late-Roman legal institutions, but must instead have emerged independently out of mercantile custom.[63] The remainder of *The History of Mercantile Associations*, including the entirety of the Dissertation, was focused on identifying the precise origins and causes of this ideational (*i.e*. cultural) and customary shift.

Why was Weber able to answer this question so definitely simply from an analysis of (a very few) Sixth-Century Byzantine legal sources,[64] and then to make what appears to be a radical shift to south-European medieval sources? In order to understand why Weber believed such conclusions were defensible it is necessary to briefly examine early-medieval European socio-legal developments.

It is generally agreed that, during the period of "Late Antiquity" (depending upon how one classifies, roughly the third through seventh centuries A.D.), transformations of broad-ranging social significance occurred throughout areas that had been administered under Roman power.[65] On the European continent, these transformations manifested themselves, among other ways, in altered socio-legal structures and institutions. As Germanic "barbarians" exercised increasing administrative power, they tended to narrow the application of Roman law to Roman citizens, while permitting native law to be applied to Germanic peoples. These peoples had gained literacy through their encounter with Roman culture, but had originally maintained an oral culture; thus their native law was oral and customary, rather than written. In narrowing the application of written Roman law, and in occasionally committing native "Germanic" law to writing, the Germanic administrators, whether they intended to or not, brought about the demise of Roman law. Even the Emperor Justinian's magnificent Roman law codification of the Sixth Century (the Code of Justinian),[66] to which Weber refers, had a very minimal European impact at

---

[62] The idea that legal doctrine can be a topic of study for ethnographers, and that legal texts can serve as sources in such studies, has been recently defended by anthropologists and science studies scholars. *See* Annelise Riles, *Property as Legal Knowledge: Means and Ends*, 10 J. ROY. ANTHROP. INST. 775, 777-78, 791n.2 (2004). *See also* Mark Suchman, *The Contract as Social Artifact*, 37 LAW AND SOC'Y REV. 91 (2003).

[63] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 319-21.

[64] All Weber's sources were from The Digest (Constantinople, 533 A.D.) except for the statute (*lex*) of the Roman (Latin) colony of Malaca, site of present-day Málaga, Spain. *See id*. at 320. *See also supra* note 37.

[65] This paragraph represents a distillation of what the author believes to be current scholarly consensus. Exemplary sources for the author's beliefs include RANDALL LESAFFER, EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE (2009); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999); MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE (1995); R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW (1988); WIEACKER, *supra* note 9.

[66] *See* THE DIGEST, *supra* note 37; THE INSTITUTES OF JUSTINIAN, *supra* note 37.

the time of its promulgation. For Europe, the social force of that Code would be held in check for another six centuries.

Because the period of "Roman law" is viewed by legal scholars as ending gloriously with Justinian's Sixth-Century Code, Weber was able to treat the lack of evidence in that Code as decisive for Roman law. Having failed to find evidence of the ideational shift in perspective (regarding the *societates*) that he was looking for in the Code, he was able to conclude that it never occurred in Roman law. Because historically the shift away from written Roman law meant a shift toward unwritten customary law – with brief interludes of written law amalgamating Roman and Germanic elements emergent from custom – a conclusion that the ideational shift didn't manifest itself in written Roman law was tantamount to a conclusion that it must have occurred through custom. Weber did not rely on this argument, however. Instead, he turned to the available sources in order to find empirical evidence of shifting south-European mercantile customs. These sources were the written south-European laws and mercantile documents (primarily contracts, which were typically prepared by trained notaries) of Late Antiquity and the subsequent "Middle Ages."

Based on his examination of these materials, Weber concluded that the south-European property-relations characteristic of the associational "firm" (the analog to the Public Mercantile-Association of his day) emerged out of the "household" (*Haushalt*) and "craft-industry" (*Handwerk*, *Gewerbe*) productive communities (*Gemeinschaften*, *Genossen*), rather than the medieval maritime successors to the Roman *societates*: the *commenda*, the *societates maris*, and the *societates terrae*.[67] Within the ancient Mediterranean and Mesopotamian world, the household and the craft-industry "guilds" were fundamentally-important socio-economic institutions.[68] For Weber, the characteristic property-relations of these productive communities were necessarily those which could give rise to the property-relations characteristic of the Public Mercantile-Association: associational (*i.e.* communal, joint) property and solidary liability.[69] It was precisely this conclusion that Weber's Dissertation defended, and that constituted the heart of his History of Mercantile-Associations.

---

[67] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 323-86; Kälber's English translation, *supra* note 15, at 63-125.

[68] *See* A. LEO OPPENHEIM, ANCIENT MESOPOTAMIA 75-83 (rev'd ed. 1977) (1964); ALISON BURFORD, CRAFTSMEN IN GREEK AND ROMAN SOCIETY 159-64 (1972); DUFF, *supra* note 49, at 103 et seq. Reflecting this potent institutional history, it is the Greek word for household (*oikos*) from whence the English "economics" derives. *See* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 300 (C.T. Onions ed. 1966). *See also* Richard Swedberg, *The Economy as a Material Household: Economic Theorizing From Xenophon to Home Economics and Beyond*, *in* TREVOR PINCH & RICHARD SWEDBERG (EDS.) LIVING IN A MATERIAL WORLD: ECONOMIC SOCIOLOGY MEETS SCIENCE AND TECHNOLOGY STUDIES (2008); M.I. FINLEY, THE ANCIENT ECONOMY (updated ed. 1999) (1973); SCOTT MEIKLE, ARISTOTLE'S ECONOMIC THOUGHT (1995).

[69] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 344-86; Kälber's English translation, *supra* note 15, at 85-125.

B. The Answer: Medieval Household and Guild Property-Relational Structures, as Interpreted by Jurists

In Weber's view, the physical and legal limitations placed on inheritance by sons of a father's estate, particularly his real property (primarily land and buildings), must necessarily have resulted in some form of communal property.[70] Whenever a male head-of-household (Latin *paterfamilias*, German *Familienvater*, *Hausvater*) died leaving more than one male heir, the question to be decided was whether the family estate would be divided between the heirs or whether the sons and their families would remain together as part of the household without dividing it. In the case of real property, unless additional land was acquired, division over the course of several generations naturally reduced the property to small plots. At some point those plots would become too small to sustain even a single family. Because land was expensive and difficult to acquire, and because it was often impossible to expand city property due to enclosure by walls, male heirs would often choose to remain, together with their families, as part of the father's household. Such households, then, might include several generations of male heirs, their wives and children, and their domestic servants. The household property, rather than being divided among the males, was controlled by the *Hausvater* for the benefit of the household.

This property-relational structure, with a male head-of-household regarded as the sole "owner" of household property, with obligations to administer that property for the benefit of all extended-household members, is ancient and archetypal, at least in Indo-European cultures. It is broadly attested in both Greek and Roman law,[71] and its residue remained through Weber's time into our own. However, by the middle ages certain limits to this absolute father-power were developing: male heirs were empowered both to use and to encumber the household property in unlimited amounts.[72] On the other hand, any property that they acquired became part of the household property.[73] Thus, as an internal matter of the household, all property was regarded as common, administered primarily by the *Hausvater*, but to an increasing degree by the sons and brothers as well.[74]

In the eyes of the legal theorists, the household was a productive community in which the results of productive labor were shared.[75] In a somewhat euphemistic phraseology, from whence we see the origins of the Anglo-French "company," the household members were said to stand as one with respect to

---

[70] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 344-47; Kälber's English translation, *supra* note 15, at 85-8.
[71] *See infra* notes 154-158 and accompanying text.
[72] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 345-46; Kälber's English translation, *supra* note 15, at 86-7.
[73] *See id*.
[74] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 345-49; Kälber's English translation, *supra* note 15, at 86-9.
[75] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 347-49; Kälber's English translation, *supra* note 15, at 88-9.

the bread and wine (*stare ad unum panem et vinum*).[76] This cultural and juristic perspective was not limited to the household, however, but also extended to the craft-industry guilds, which produced the goods that enriched so many medieval cities.[77] The common perspective was possible because the medieval jurists didn't view actual kinship as an essential element in constituting a household community; in fact, as has already been mentioned, such households included many non-kin, such as wives and servants.[78] Thus, because the property-relations among craft-workers were essentially the same as those of members within a household, the jurists regarded them as constituting the same basic type of productive community.[79]

With respect to property-relations within these productive communities, the essential change occurred when individual members came to be regarded as having an individual "share" in the common property.[80] This occurred for households because of a few limited cases in which family members, including daughters, were viewed as having property that either never became part of the household, or as individually due a portion of the household's property.[81] Although these were very limited exceptions to the basic principle of common property, their existence necessitated an accounting for the household property in terms of individual accounts or "shares."[82] As soon as individual accounts were created for the household's property, Weber argued, the tendency to view acquired property and debts as individual rather than communal became much greater.[83] The extent to which this tendency was followed differed between northern and southern Italy, according to Weber, and it was the limitation of this tendency, the maintenance of strong communal property principles, that facilitated the development of the "firm" in the Lombard north.[84] This limitation was necessary in order to enable the concept of "associational property," which was one essential element of the Public Mercantile-Association.

The other essential element of the Public Mercantile-Association, solidary liability, also emerged out of the household, according to Weber, as a result of its primordial links to kinship liability.[85] Such kinship liability systems have recurrently formed the precursors to formal legal systems, and stories of their brutality are used by legal theorists to evidence the need for established legal systems. Over time,

---

[76] *See id*.
[77] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 351-52; Kälber's English translation, *supra* note 15 at 91-93.
[78] *See id*.
[79] *See id*.
[80] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 346-51; Kälber's English translation, *supra* note 15, at 87-91.
[81] *See id*.
[82] *See id*.
[83] *See id*.
[84] *See id*.
[85] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 356-57; Kälber's English translation, *supra* note 15, at 96-7.

limitations on this collective responsibility for wrongs (*delicts*) committed by family-members came to be imposed, but with the growth of household commercial activity the concept was nevertheless extended to include an analogous situation: the collective responsibility to pay a creditor harmed by a debtor's inability to pay his debt.[86] Thus, although the legal system eliminated many aspects of familial "joint liability" in the interests of public stability, the residue that remained became particularized to commercial matters, forming the core of a productive community's "solidary liability."[87]

The power of this solidary liability lay in its ability to meld a productive community of property into a *personal* community: to satisfy an associate's unpaid debt, a creditor could either take action against the associational property (an *in rem* proceeding) or he could take action against the associates personally, demanding that they satisfy the obligation from whatever property they might happen to possess, some of which might be deemed separate and apart from the association's common property (an *in personam* proceeding).[88] This enabled associations to operate on the basis of increasing amounts of debt, and thereby permitted the scale of household and guild commerce to increase dramatically, since creditors were given greater security for their loans, in the form of personal guarantees on top of the common associational property that could be seized.[89]

On the other hand, as the commercial scale of business activity expanded, and as workshops and factories became increasingly separated from domestic household activities, such unlimited solidary liability was increasingly perceived as unjust in cases where the liability arose out of activities unrelated to the common commercial purposes.[90] So over time the city statutes regulating household and guild activities tended to limit solidary liability to obligations undertaken in relation to those common business purposes.[91] In order to clearly differentiate obligations undertaken on behalf of the business from those undertaken for other, more personal purposes, associates entered into obligations under the trade-name of the commercial enterprise, the *Firma*.[92] Hence arose that "short-hand" method (*die Art praktischer Breviloquenz*) of referring to the association's property-relations under the name of the "firm," which Weber viewed as the customary origin of corporate personality.[93]

---

[86] *See id*.
[87] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 356-74; Kälber's English translation, *supra* note 15, at 96-113.
[88] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 357-74; Kälber's English translation, *supra* note 15, at 98-113.
[89] *See id*.
[90] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 373-81; Kälber's English translation, *supra* note 15, at 113-21.
[91] *See id*.
[92] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 381-83; Kälber's English translation, *supra* note 15, at 121-23.
[93] *See id*.; *see also supra* note 58 and accompanying text. Striking manifestations of this "short-hand" method, as picked up by U.S. jurists, can be seen in several early Pennsylvania decisions compiled, together with the first

In Weber's view, these south-European medieval processes resulted in the creation of two associational "types," characterized by their distinctive property-relations.[94] The first, which corresponded to the *Commenda*-association of his day, emerged directly out of the Roman *societas* and manifested itself in the medieval south-European *commenda*, *societates maris*, and *societates terrae*.[95] The second, in which he was primarily interested, corresponded to the Public Mercantile-Association of his day.

Extrapolating slightly, it would seem that the development of this second type was more interesting to Weber because its development was more complex and had greater significance for modern capitalism, being in many ways the precursor to the modern business corporation. What emerges most clearly from Weber's text, however, is his deep interest in the complex interaction among (1) mercantile custom and material reality, (2) legal practice and regulation, and (3) juristic philosophy (jurisprudence).[96] The picture that Weber paints is one in which these three forces operated together, to a certain extent according to their own independent logics but also in constant interactional tension, shaping certain ideational and cultural developments that were critical to the emergence of the modern business organization, or "firm."

In Weber's view, the complexity of interaction between commercial law and economic reality was demonstrated by the fact that the Public Mercantile-Association did not develop out of the entities that first continued the provision of commercial goods and services following the demise of the Western Roman Empire: the medieval *societates* and *commenda*. Rather, the Public Mercantile-Association's defining property-relations developed from areas of the economy that were seemingly quite distant from mercantile exchange: the household community and craft-industry guild. As these productive communities increasingly engaged in large-scale commercial activity and mercantile exchange, the medieval jurists trained in Roman law struggled to incorporate them into a system that formally had no place for them. In the end, they placed their reliance on the very thing that the associational members relied on to delineate their solidary personal liability: operation under the "firm's" trade name.[97] In such cases the jurists were able to analogize the commercial associations to the (non-mercantile) corporations known to Roman law, and to determine the implications of their activities according to established

---

United States Supreme Court opinions, by A.J. Dallas. *See, e.g.*, Tillier v. Whitehead, 1 U.S. (Dallas) 269 (Penn. 1788); Musgrove v. Gibbs, 1 U.S. (Dallas) 216 (Penn. 1787).

[94] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 427; Kälber's English translation, *supra* note 15, at 169.

[95] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 323-44, 386-428; Kälber's English translation, *supra* note 15, at 63-83, 127-71.

[96] *See especially* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 321-22, 383-86, 427-40; Kälber's English translation, *supra* note 15 at 60-61, 123-25, 169-81.

[97] *See* WEBER, HANDELSGESELLSCHAFTEN, *supra* note 10, at 427-40; Kälber's English translation, *supra* note 15, at 169-80.

jurisprudential principles. By bringing corporate personality and its characteristic property-relations together with mercantile and commercial activity, the medieval jurists laid the jurisprudential foundations necessary to legally conceptualize *commercial corporations*, which would become so vital to modern capitalism.

C. Significance of Weber's Dissertation for a Sociological Theory of Property

In investigating the origins of modern, commercial associational forms (*Gesellschaften*), and in attributing those origins to medieval communal forms (*Gemeinschaften*), Weber articulated his own version of the transition from community to contractual association that became archetypal for early sociology through the work of Ferdinand Tönnies,[98] and that continues to resonate in contemporary sociology.[99] That he did so by means of a sophisticated legal and cultural analysis, investigating an original hypothesis concerning precursors to modern capitalism's preeminent corporate organizational form, testifies to Weber's scholarly personality.

With respect to the subject of property, Weber's Dissertation is significant for a number of reasons. To begin with, it is striking that Weber's first published definition of property was stated in terms that so strongly echo the "bundle of rights" definitions in vogue today.[100] Such definitions, as can be clearly seen in the contemporary work of the economist Yoram Barzel, often point to a relationship of dependency between property "rights" and the organizational structure of social relationships.[101] This was certainly true for Weber's treatment, which was historically and legally sophisticated in its analysis of the interdependence between property and organized social relationships. This theme was one to which Weber would repeatedly return, and it formed part of his continued project to explore the role of law in economy and society.[102]

Furthermore, Weber's utilization of primary legal texts in an effort to identify the source(s) of an "ideational" (cultural) shift toward viewing the firm as a separate legal entity with property-related rights

---

[98] COMMUNITY AND CIVIL SOCIETY (2001, Jose Harris ed.) (first published in 1887 as *Gemeinschaft und Gesellschaft*).

[99] *See, e.g.*, Bruce Keith & Morton G. Ender, *The Sociological Core: Conceptual Patterns and Idiosyncrasies in the Structure and Content of Introductory Sociology Textbooks, 1940-2000*, 32 TEACHING SOCIOLOGY 19, 27 (2004); Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOCIOLOGICAL THEORY 1 (2001); Michael Hechter and Satoshi Kanazawa, *Sociological Rational Choice Theory*, 23 ANNUAL REV. SOC. 191, 196 (1997). As these journals and titles partially indicate, references to these concepts cross a wide spectrum in sociology, from rational choice theory to sociology of religion and communications research in the tradition of Robert K. Merton and Paul Lazarsfeld.

[100] *See supra* note 48 and accompanying text. For a contemporary statement of the "bundle of rights" definition, see e.g., GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 5 (2d ed. 2002).

[101] *See generally* BARZEL, *supra* note 2.

[102] *See infra*, particularly Section IV.

and obligations is methodologically interesting, resonating with emerging themes in socio-legal and cultural studies.[103] In using primary legal texts to identify the sources of cultural change, and in briefly exploring the role of classically-trained "jurists" in formulating (through analogy to classical Roman law forms) a legal doctrine for application to emerging corporate entities, Weber indicated a process according to which legal concepts can play a causal role in social and cultural change. This early formulation would receive much deeper treatment in Weber's "sociology of law."[104]

III. The Economic-historical Phase:
A Great Transformation from Agrarian to Commercial Property-Relations

A. Agrarian Property-Relations in Antiquity: The Habilitation

Building to a certain extent off his Dissertation, Weber's Habilitation established a trajectory for his future career and a large portion of his substantive scholarly work through its focus on agrarian property-relations, particularly ownership (*Eigentum*) and possession (*Besitz*) of land. This second dissertation, published in Fall 1891, was titled "Roman Agrarian History in its Significance for Public and Private Law".[105] It was dedicated to the "Herr Privy-Counselor" August Meitzen,[106] a statesman whose scholarly contributions to statistical "state-science" (*Staatswissenschaft*) and agrarian history had earned him an "extraordinary" appointment to University of Berlin's Faculty of Philosophy.[107] Although Roman public/administrative and private law figured prominently as source-material for the Habilitation, Weber directed primary focus on the writings of the Roman land-surveyors (*agrimensores*),[108] which in 1848-

---

[103] *See* RILES, *supra* note 62; SUCHMAN, *supra* note 62; *see also* ANNE NORTON, REPUBLIC OF SIGNS 123-38 (1993).

[104] *See infra* note 304 and accompanying text.

[105] *See* MAX WEBER, DIE RÖMISCHE AGRARGESCHICHTE IN IHRER BEDEUTUNG FÜR DAS STAATS- UND PRIVATRECHT (1891), *as republished in* MAX WEBER GESAMTAUSGABE I/2 (Jürgen Deininger ed. 1986) (hereinafter "*Die Römische Agrargeschichte*"). This work was only recently translated into English by Richard I. Frank. *See* ROMAN AGRARIAN HISTORY IN ITS RELATION TO ROMAN PUBLIC AND CIVIL LAW (Richard I. Frank trans. 2008).

[106] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 92. *See also supra* note 13 and *infra* note 107.

[107] University of Berlin had been instituted upon the explicitly-formulated ideology that every individual discipline, all specialized knowledge, must be connected to the foundational discipline: philosophy, the "general knowledge." *See* WIEACKER, *supra* note 9, at 279 n.2, 293. This ideology manifested itself alongside emergent German nationalism in the organizational structure of the University, which divided the faculty into four basic categories: law, medicine, theology and philosophy. *See* Leo S. Rowe, *Instruction in Public Law and Political Economy in German Universities*, 1 ANN. AMERICAN ACAD. OF POL. & SOC. SCI. 78, 79 (1890). All specialized knowledge not falling within the categories of law, medicine or theology was classified as "philosophy," including economics and statistics. *See id*. Because his scholarly and professional work pertained to statistical science and "national-economy" (*National-Ökonomie*), Meitzen was classified as a professor within the Faculty of Philosophy. *See id*. at 84. As an "extraordinary" professor, he was not allowed to vote alongside his "ordinary" colleagues and probably received a lower salary. *See id*. at 79.

[108] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 105-6. *See also* Jürgen Deininger, *Editorischer Bericht*, *in* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 81-2.

1852 had been edited and published by Karl Lachmann, Friedrich Blüme and A. Rudorff as *Die Schriften der römischen Feldmesser*.[109] While on the one hand the Habilitation served alongside Weber's Dissertation to qualify him as a jurisprudential lecturer in "Commercial and Roman (Public and Private) Law,"[110] it also marked a shift in Weber's academic scholarship toward a focus on economics and public administration, which would be manifested in his professional appointments as well as numerous scholarly works.[111]

The Habilitation started from a simple but fundamental question: what caused Rome to be transformed from a Mediterranean-based city-state, analogous in many respects to contemporaneous Greek *poleis* and Phoenician city-states, into a continental empire built on territorial conquest?[112] Starting from a position close to that of "methodological individualism,"[113] Weber posited the further question: was this transitional-development an *intended* (*bewußt*) outcome, achieved as a result of the power and ambition of particular social strata and economic interest-groups?[114] If the intentional wielding of socio-economic power did lie at the heart of Rome's transformation, what was the object toward which this socio-economic power was directed, or in slightly different words, what objective motivated the wielding of this socio-economic power? Weber's answer to this question was as follows: the ultimate object over which social conflict took place (*das eigentliche Kampfobject*) was that which was the "prize of (military) victory" (*der Preis des Siegers*): the land of the Roman people, the "public land" (*ager publicus*).[115]

The distinction between public and private things (*res publicae*, *res privatae*) – along with a complementary third category, that of sacred things (*res sacrorum*) – appears to have been fundamental in

---

[109] *See* BRIAN CAMPBELL, THE WRITINGS OF THE ROMAN LAND SURVEYORS: INTRODUCTION, TEXT, TRANSLATION AND COMMENTARY xii, xxii (Journal of Roman Studies Monograph No. 9) (2000). Weber also relied extensively on the aristocratic Roman agrarian authors, particularly Cato, Varro and Columella, as well as Cicero and other primary Roman sources. *See generally* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, and particularly the Quellenregister and Personenregister, at 400-18.

[110] *See* Jürgen Deininger, *Editorischer Bericht*, *in* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 64-7; Käsler, *supra* note 14, at 7-8. Weber is often described (including by his wife Marianne) as qualifying in both Roman and German law (in addition to commercial law) but this is incorrect – formally, he was never "habilitated" in German law. *See* Jürgen Deininger, *Editorischer Bericht*, *in* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 65n.5; *cf.* MARIANNE WEBER, MAX WEBER: A BIOGRAPHY 115 (Harry Zohn trans. & ed., Transaction Publishers ed. 1988) (1975).

[111] *See generally* Käsler, *supra* note 14.

[112] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 101-2. *See also* MAX WEBER, AGRARVERHÄLTNISSE IM ALTERTUM, *originally published in* Handwörterbuch der Staatswissenschaften (1909), *and republished by* Marianne Weber *in* MAX WEBER, GESAMMELTE AUFSÄTZE ZUR SOZIAL-UND-WIRTSCHAFTSGESCHICHTE 190-91, 218-19 (1924) (hereinafter "AGRARVERHÄLTNISSE"); for an English translation, see THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS (R. I. Frank trans., Verso edition, 1988 (NLB edition 1976)).

[113] Weber explicitly embraced a position of methodological individualism (*i.e.* the methodological position that the basic unit of sociological explanation must be the individual person, rather than collective social entities, *e.g.* nation-states) in *Economy and Society*. *See* WEBER, *supra* note 8, at 13-19; *see also* SWEDBERG, *supra* note 8, at 23, 163-64 (1998).

[114] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 101-2.

[115] *See id*. at 102.

its cultural significance to the Roman people, and particularly to Roman lawyers.[116] Evidence for the distinction appears in the oldest written Roman laws, *The Twelve Tables*,[117] which were drafted circa 451-450 B.C.[118] Over the course of the Republican period (c. 510-27 B.C.) the distinction was formalized, so that by the time of Gaius' *Institutes* (c. 160-79 A.D.) it was possible for a Roman jurist to state definitively that:

> things which are under human law [*i.e*. not governed by divine law] are either public or private. Public things are regarded as no one's property, for they are thought of as belonging to the whole body of the people [the *universitas*]. Private things are those belonging to individuals.[119]

This distinction was applied to all things, across the categorical division between things with a physical embodiment (*res corporales*) – things capable of being touched – and things without a physical embodiment (*res incorporales*), which cannot be touched.[120]

The corporeal (tangible) thing that was arguably preeminent in both cultural and economic significance to the Romans, as well as so many of their Mediterranean contemporaries, was land (*ager*).[121] In the agriculturally-based communities of the ancient Mediterranean world, possession of land was vital to basic survival.[122] Moreover, wealth tended to be conceptualized in terms of land and agricultural improvements, particularly horses and cattle.[123] In order to obtain loans for acquisition of land and its

---

[116] Note that the word "republic" derives from *res publica*, the public thing (or property). *See* CICERO, THE REPUBLIC I.XXV. The English word "commonwealth" captures this conception very nicely.

[117] *See* Table VII, *as compiled, translated and published in* ROMAN CIVILIZATION: SELECTED READINGS, THE REPUBLIC AND THE AUGUSTAN AGE 112 (Vol. I) (Naphtali Lewis & Meyer Reinhold eds., 3d ed., 1990) (hereinafter "*ROMAN CIVILIZATION: SELECTED READINGS*"). For a Latin text, see Fontes Iuris Romani Antiqui I (Georg Bruns & Otto Gradenwitz eds. 1909), *available at* http://www.fh-augsburg.de/~harsch/a_chron.html. *See also* THE DIGEST, *supra* note 37, at 43.8.5.

[118] *See* BORKOWSKI, *supra* note 37, at 28-30. As late as the time of Cicero, Roman boys were required to memorize the Twelve Tables. *See* CICERO, THE LAWS II.xxiii.59.

[119] THE INSTITUTES OF GAIUS, *supra* note 37, at II.10-11; *see also* THE DIGEST, *supra* note 37, at 1.8; 43.1.1 (Ulpian).

[120] *See* THE INSTITUTES OF GAIUS, *supra* note 37, at II.12-14. In contemporary Anglo-American property law, a parallel distinction is drawn between "tangible" and "intangible" things. *See, e.g.*, NELSON ET AL., *supra* note 100, at 5.

[121] *See* J.A. CROOK, LAW AND LIFE OF ROME 147 (Cornell Paperbacks ed. 1984) (1967); STUDIES IN ROMAN PROPERTY (M.I. Finley ed. 1976); M. ROSTOVTZEFF, THE SOCIAL & ECONOMIC HISTORY OF THE ROMAN EMPIRE 1-21 (1926).

[122] *See* MARY T. BOATWRIGHT ET AL., THE ROMANS FROM VILLAGE TO EMPIRE 23-5 (2004); SARAH POMEROY ET AL., ANCIENT GREECE: A POLITICAL, SOCIAL AND CULTURAL HISTORY 1-9, 283-85 (1999).

[123] *See e.g.* CICERO, THE REPUBLIC II.IX; THE POLITEIA (CONSTITUTION) OF ATHENS 3. It is generally accepted that the English word "capital" is derived from the Latin noun *caput* ("head") and its related root *capit-*. *See* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 143 (C.T. Onions, ed. 1966). *See also* WILL DURANT, OUR ORIENTAL HERITAGE 16 (The Easton Press 1992) (1935). ("The Romans used kindred words – *pecus* and *pecunia* – for cattle and money, and placed an image of an ox upon their early coins. Our own words *capital*, *chattel* and *cattle* go back through the French to the Latin capitale, meaning property: and this in turn derives from *caput*, meaning head – i.e., of cattle.")

continued improvement, the poorest members of ancient society were often forced to offer their own bodies to secure the loans, with the result that debt-slavery was common.[124] As a result, the archetypal lawgiver, in the Greek and Roman conception at least, was the man who could resolve repeated and bitter conflicts over the distribution of land through allotment procedures.[125]

According to Cicero, expansion of Roman land through a combination of treaties and military conquests began at Rome's inception, initiated by the legendary founder Romulus sometime in the 8th Century B.C.[126] Cicero attributed to Romulus' successor, Numa Pompilus (late 8th to early 7th Century B.C.), the first division and allocation among Roman citizens of land acquired in this manner.[127] Although this record is the stuff of legend rather than historical fact, having been articulated long afterward by Roman authors,[128] it provides tantalizing hints at the origin of a practice that seems to have been formalized as early as the 4th Century B.C.: treating land acquired through military expansion as "public land" (*ager publicus*), that is, as land belonging to the *populus Romanus* collectively as a *universitas*.[129]

Colonist-farmers (*coloni*) were sent out to settle on the land in colonies (*colonia*), having been granted legally-protected possession by the *populus Romanus*, which during the republican period was embodied in the Senate.[130] In certain limited cases, the conquered land might pass into private ownership (*dominium*), either because it was purchased from the *populus Romanus* by an individual, or because it was allocated directly to an individual, a process sometimes referred to as "viritane assignment".[131] However, the vast majority of land acquired by conquest was regarded as belonging to the *populus*

---

[124] *See* THE POLITEIA (CONSTITUTION) OF ATHENS 2 (describing the unhappy situation of impoverished Athenians prior to the time of Draco and Solon). For an image of the ancient Roman situation, see THE TWELVE TABLES, TABLE III (describing the procedures for dealing with debts owed, which included sale into slavery across the Tiber River and an optional "cutting into parts" by the creditors, which may refer either to the debtor's body or his possessions).

[125] *See* THE POLITEIA (CONSTITUTION) OF ATHENS (describing Solon's lawgiving efforts in establishing the "constitution" of Athens); CICERO, THE REPUBLIC II.XIV (describing Numa's division of the land won by Romulus in conquest); PLUTARCH, PARALLEL LIVES (Lycurgus, lawgiver of Sparta and Numa Pompilus, lawgiver of Rome). *See also* PLATO, THE LAWS BOOK V; GLENN R. MORROW, PLATO'S CRETAN CITY 95-152 (1993 Edition) (1960) (placing Plato's elaborate land-allotment scheme in *The Laws* in historical and cultural context).

[126] THE REPUBLIC II.II – II.XIV. The dating of Romulus' life to the 8th Century B.C. (753-715) is attributable to Marcus Terentius Varro (116-27 B.C.). *See* BOATWRIGHT ET AL, *supra* note 122, at 37-40.

[127] THE REPUBLIC II.XIV. For Varro's dates, see BOATWRIGHT ET AL, *supra* note 122, at 37-40.

[128] *See* BOATWRIGHT ET AL, *supra* note 122, at 37-40.

[129] *See id*. at 81-2; ROSTOVTZEFF, *supra* note 121, at 14-16; SMITH, *supra* note 119, at 38-9. *See also* APPIAN, THE CIVIL WARS I.7 (Horace White ed.).

[130] *See* APPIAN, THE CIVIL WARS I.7 (Horace White ed.); BOATWRIGHT ET Al, *supra* note 122, at 81-82; SMITH, *supra* note 119, at 38-9, 315-20.

[131] *See* Siculus Flaccus, Categories of Land *in* CAMPBELL, *supra* note 109 at 120, 127-28; LIVY, HISTORY OF ROME 31.4; POLYBIUS, THE RISE OF THE ROMAN EMPIRE 2.21 (Ian Scott-Kilvert trans., Penguin edition 1979). *See also* BOATWRIGHT ET AL, *supra* note 122, at 81; SMITH, *supra* note 119, at 38-9; P.L. MacKendrick, *Roman Colonization*, 6 PHOENIX 139 (1952). In addition, beginning with Octavian, Caesar Augustus (c. 27 B.C.) and extending throughout the remainder of the Empire, portions of conquered land were considered to pass directly into the private ownership (*dominium*) of the emperor. *See* SMITH, *supra* note 119, at 38-9.

Romanus: "viritane assignments" were politically controversial, and the establishment of individual ownership through purchase apparently occurred infrequently.[132]

Thus the situation that developed over the course of the Roman Republican period with respect to landed property appears to have been generally as follows. Outright ownership of land by private individuals had existed at least from the time of the Twelve Tables (c 450 B.C.), but it was rare, being limited primarily to ancient wealthy families (the senatorial classes, which at first only included the patricians and later expanded to include the *equites*) and the immediate territory around Rome, with very limited patchwork additions across the wider Italian peninsula. The vast majority of the land acquired in the course of Rome's military expansion across the Italian peninsula, North Africa, Spain and southern Europe was regarded as *ager publicus*, "owned" by the *populus Romanus*, but legally under the possession of public corporate bodies (*municipia*, *colonia*, *praefecturae*) as well as private individuals.

In general, legally-protected possession of the *ager publicus* implied the legally-sanctioned ability to make use of the land and profit from its fruits (*usus* and *fructus*, often referred to together as *usufruct*).[133] It was therefore possible to profit extensively from the *ager publicus* without having legal ownership. The skilled professionals who enabled this complex system to develop through their detailed surveys of the land (establishing boundaries and separating public from private land), their records of land-assignments, and their assistance in resolving disputes relating to ownership, possession, and tax-obligations pertaining to the land, were the *agrimensores*.[134]

With this background, Weber's inquiry in the *Roman Agrarian History* comes into greater focus, and his source-materials take on added significance.

In his introduction, Weber emphasized the "sharp contrast" between a situation in which persons living on and/or making use of land are merely granted a kind of "precarious" possession of public land, and the alternative situation "bearing the stamp of consciousness and modernity on its forehead": the private, individual ownership of land and soil (*Grund und Boden*), which is consequentially attended by the "individualistic motivations" of free disposition of title by proprietors, at increasing levels of velocity, or mobility (*Beweglichkeit*).[135]

---

[132] *See* Siculus Flaccus, Categories of Land *in* CAMPBELL, *supra* note 109 at 119-20; POLYBIUS, THE RISE OF THE ROMAN EMPIRE 2.21 (Ian Scott-Kilvert trans., Penguin edition 1979) (indicating the controversial nature of "viritane assignment" by labeling it a "demogogic measure"); SMITH, *supra* note 119, at 38-9; MACKENDRICK, *supra* note 131, at 145-46.

[133] *See* THE INSTITUTES OF GAIUS, *supra* note 37, at II.7. Gaius refers only to land in the provinces, and thus excludes the Italian peninsula. The reason for this is simple: in 111 B.C. a controversial agrarian law had transformed the Italian *ager publicus* into property under the private ownership of the individuals or corporate bodies who had previously possessed it. *See* ROMAN CIVILIZATION: SELECTED READINGS, *supra* note 117, at 276-83. *See also* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 102-103.

[134] *See* CAMPBELL, *supra* note 109, at xxvii-lxi; SMITH, *supra* note 119, at 37-44.

[135] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 102.

In striking similarity to his Dissertation, Weber was interested in identifying the source of an ideational shift toward a particular property-related conception, in this case the "ownership-concept" (*Eigentumsbegriff*).[136] Moreover, also in striking similarity to his Dissertation, Weber was interested in locating the economic ideas (*wirtschaftliche Gedanken*) emergent from Roman agrarian practice, which corresponded to this essentially juristic concept of "ownership" (*Eigentum*).[137] In seeking to understand the historical processes according to which conceptions from a particular area of the economy were brought together with concepts from legal practice and theory, Weber was again seeking to understand the complex interaction between law and the economy, to which he would return so often in his later work.

One of Weber's central arguments in his Habilitation was that the legal changes corresponding to the economic changes he would investigate – the shift toward a conception of land analogous to the private-ownership-concept and the growth of an economic industry centered around the profit-oriented exchange of property-titles (*i.e*. capitalistic exchange) – were not to be sought for primarily in Roman private law and freedom of contract, but rather were located in Roman public and administrative law.[138] The chronological location of these developments, Weber argued, could be delineated by beginning with the Agrarian Law of 111 B.C., - which followed a period of intense conflict over land-allocations and transformed vast expanses of the *ager publicus* into privately owned land – and focusing particularly on the Roman Republic's final century, then following the course of developments through to the Imperial age.[139] From the soil of that Imperial age would emerge the "manorial dominion system" (*Grundherrschaft*) of the early middle ages.[140]

Weber began his Habilitation by examining in extensive detail the various forms of land-measurement utilized by the Roman land-surveyors.[141] By combining these sources with earlier Roman writings and legal sources, Weber sought to sketch out an historical account of the development of the

---

[136] *See id*.

[137] *See id*. In posing this question about the "ownership-concept" and noting its dominance of juristic thought, Weber also paused to recognize the fact that some "admire" its consequences, while others regard it as "the root of all evil in our real property law." *See id*.

[138] *See id*. at 102-4. In this thesis, the influence of Theodor Mommsen and August Meitzen is particularly evident. Theodor Mommsen had written and lectured extensively on Roman public and administrative law, and August Meitzen's entire career had been devoted to public administration. *See* Jürgen Deininger, *Einleitung*, *in* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 15-19, 22-4.

[139] WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 102-4. On the Agrarian Law of 111 B.C., see *supra* note 133.

[140] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 104, 297-352. For Weber's final description of this transition, as transcribed through the notes of his students in a course entitled "Outlines of Universal Social and Economic History," delivered in winter semester 1919-20 (*i.e*. right before his death), see MAX WEBER, GENERAL ECONOMIC HISTORY 51-73 (Frank Knight trans., Dover ed. 2003) (original English publication 1927) (1923).

[141] WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 107-40. For the Roman land-surveyors' description, see generally CAMPBELL, *supra* note 109.

measurement-forms described by the land-surveyors.[142] Such a task presented significant challenges, in particular because the Roman land-surveyors' writings date from a much later period, *i.e.* the 2d century A.D. through the 5th and 6th centuries A.D.[143] Weber's primary objective, however, was to establish a relationship between these measurement-forms and Roman public law, particularly tax-administration.[144] In taking the position that the methods and forms of Roman land-surveying and allotment resulted from the particular characteristics of Roman public administration, Weber explicitly argued against an alternative perspective, which was that these forms and methods originated from particular ethnic or cultural characteristics of the Roman people and their neighbors.[145]

The bulk of Weber's Habilitation was devoted to an examination of the status of various types of land under Roman public and private law.[146] The complexity of the underlying materials and the technicality of Weber's arguments render a detailed treatment beyond the scope of this article. Moreover, certain of the arguments relied on categorizations of land developed by August Meitzen in the course of his research, which Weber later viewed as being somewhat inappropriate for application to ancient Rome.[147] Nevertheless, even if he later expressed a reluctance to use the same conceptual categories in describing the Roman developments, Weber seems to have continued to adhere to the position expressed in his dissertation concerning the fundamental nature and implications of the developments.

The basic course of development can be summarized as follows: through a combination of (1) detailed delineation of land-boundaries by the land-surveyors, (2) the Agrarian Laws, (3) the operation of *occupatio* under Roman private law (which transformed public land into privately owned land through active possession and use of the land over a period of years), and (4) the practice (developed by Julius Caesar then carried to its extreme by Augustus and his successors) of assigning land-ownership to veteran soldiers as a reward for their service, the Roman *ager publicus* was transformed into privately-owned land, or its equivalent in the form of long-term, inheritable leaseholds.[148] The combination of certain, enforceable boundaries across such a vast expanse of land, along with the long-term property interests provided by formal ownership or long-term, inheritable and transferable possession under leaseholds of various kinds, enabled an extensive commerce in land-titles to emerge, with the result that Rome became

---

142 *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 107-40.
143 *See id*. *See also* CAMPBELL, *supra* note 109, at xxvii-xliv.
144 *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 107-40.
145 *See id*. at 122-23, 135, 139-40.
146 *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 141-296.
147 *See id*; Jürgen Deininger, *Einleitung*, *in* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 17-19.
148 *See* THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 329.

a center for profit-oriented (capitalistic) exchange in landed property and related tax-farming opportunities.[149]

B. Agrarian Property-Relations in Antiquity: Later Works

Many of the themes emerging from Weber's Habilitation would emerge in later work as well. In 1896-1898, Weber published works on the demise of ancient culture and agrarian relations in antiquity, followed in 1909 by a final essay on agrarian relations in antiquity.[150] The works on agrarian relations in antiquity and the demise of ancient culture were collected together and published posthumously by Marianne Weber in 1924.[151] Judging by the book-length essay on agrarian relations in antiquity, Weber continued to believe that the emergence of extensive land-ownership and long-term leaseholds in the late Roman Republic, which was enabled to a great extent by the Roman land-surveyors, was a deeply significant event in Roman socio-economic history, both for the Romans themselves and for the medieval Europe that would follow.[152]

As for the origin of the "abstract ownership-concept" itself, which Weber had identified as a vitally important object of investigation in his Habilitation,[153] he argued in his later work that its "seed" (*Keim*) was to be found in the absolute "father-power" (*patria potestas*) that was so distinctive and characteristic of ancient Rome.[154]

Weber's primary point of comparison in articulating this thesis was ancient Greek socio-legal culture,[155] which scholars continue to believe contained a property-conception analogous to "possession" (*possessio*, *Besitz*), a concept of "ownership" (*dominium*, *Eigentum*) never having developed.[156] Although father-power (the power of a male head-of-extended-household over the household's members

---

[149] *See* WEBER, DIE RÖMISCHE AGRARGESCHICHTE, *supra* note 105, at 187-206. *See also* JOHN R. LOVE, ANTIQUITY AND CAPITALISM: MAX WEBER AND THE SOCIOLOGICAL FOUNDATIONS OF ROMAN CIVILIZATION 13-22 (1991); KÄSLER, *supra* note 14, at 28-31.

[150] *See* KÄSLER, *supra* note 14, at 243-55.

[151] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, supra note 112.

[152] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 190-288; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 260-386.

[153] *See supra* note 136 and accompanying text.

[154] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 201-2; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 274. On the power of the *paterfamilias* in ancient Rome, see THE TWELVE TABLES, TABLE IV; THE INSTITUTES OF GAIUS, *supra* note 37, at I.51, I.55; THE INSTITUTES OF JUSTINIAN I.9; THE DIGEST, *supra* note 37, at I.6. *See also* BORKOWSKI, *supra* note 37, at 111-19.

[155] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 201-2; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 274.

[156] *See* A.R.W. HARRISON, THE LAW OF ATHENS Vol. I 200-5 (Bristol Press ed. 1998) (1968). On the early Roman distinction between *dominium* and *possessio*, as these applied to land, see WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 224; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 301-302.

and possessions) seems to have been characteristic of Indo-European socio-legal culture in general,[157] the distinctive aspect of Roman socio-legal culture was the degree to which collective public ("state") jurisdictional power stopped "on the threshold of the House" (*an der Schwelle des Hauses*) and "Household-law" (*Hausrecht*), which Weber equated to *dominium*, was applied to "wives, children, slaves and livestock" (*familia pecuniaque*).[158]

From this historical vantage-point, one can immediately see why Weber continued to view the concept of ownership – with its connections to power, domination, and legal jurisdiction – as being so significant when extended to vast expanses of land: here is the source of territorial jurisdiction, combined with jurisdiction over persons in a dependent relationship, which was characteristic of medieval socio-legal culture, particularly the "manorial dominion system."[159] Such power-laden social relationships among owners of vast land-expanses, workers who labored on their estates, and emerging political organizations continued to excite Weber's interests throughout his lifetime.

C. Agrarian Property-Relations in the Early-Modern Transformation of Central Europe

Although much of his work relating to agrarian economies focused on antiquity, Weber also showed great interest in the fading agrarian economies of his own day.[160] His 1904 presentation to an international scholarly congress in St. Louis provides insights with particular relevance to contemporary North Americans, in part because it included explicit comparisons with the U.S. agricultural situation, and also because it was intentionally crafted to acquaint Americans with the "peculiar" characteristics of

---

[157] *See* BENJAMIN W. FORTSON IV, INDO-EUROPEAN LANGUAGE AND CULTURE 17-19 (2004); J.P. MALLORY, IN SEARCH OF THE INDO-EUROPEANS: LANGUAGE, ARCHAEOLOGY AND MYTH 122-26 (1989). The entire storyline of Homer's *Odyssey* centers around Odysseus' attempts to return to the household (comprised of wife, son, slaves, other material "possessions," and political/jurisdictional power) of which he is head, while the suitors are meanwhile attempting to take it from him. *See* THE ODYSSEY Book I.

[158] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 201-2; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 274. *See also* BORKOWSKI, *supra* note 37, at 111-19.

[159] *See* WEBER, AGRARVERHÄLTNISSE, *supra* note 112, at 223-88; THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS, *supra* note 112, at 301-66. *See also supra* note 140 and accompanying text.

[160] One of Weber's few forays into survey research was conducted in an effort to understand the conditions of agricultural labor in East Germany. In 1891, Weber was given a commission by the *Verein für Sozialpolitik* (Social Policy Association) to study the condition of agricultural workers in East Germany. *See* Keith Tribe, *Prussian Agriculture – German Politics: Max Weber 1892-7*, *in* KEITH TRIBE, READING WEBER (1989), at 98-9; KÄSLER, *supra* note 14, at 6-7; MARIANNE WEBER, *supra* 110, at 128-30. His report was to be based on two successive surveys sent by the *Verein* to East-German landowners, the first of which was directed to 4,000 such landowners inquiring into the "local conditions" of agricultural labor, and the second of which followed up with more "impressionistic" questions directed to 562 landowners. *See* TRIBE, READING WEBER, at 98-99. Apparently, 2,277 landowners responded to the first survey, and 291 to the second. *See id*. at 99, 125-26 n.26, 29, 31. Between 1892 and 1894 Weber published a series of analyses of the survey results, including his final report to the *Verein*, as well as additional expositions on the issue of agricultural workers. *See id*. at 101-16.

Nineteenth Century Continental European agrarian social relationships.[161] In this essay, Weber provided an especially cogent theory as to the economic and cultural processes according to which Central Europe made the transition from static agrarian societies to dynamic market-based economies. The transition was not complete at the time he was writing, and thus his observations – while tinged at times with an unpleasant German nationalism – are invaluable in deciphering certain stages in that transition that may no longer be visible from a contemporary vantage-point.

In Weber's time, German agricultural workers were placed in the inferior social class of "peasants" (*Bäuerin*), in sharp contrast to the U.S. "farmers," who were viewed as entrepreneurial agricultural workers.[162] Nevertheless, Weber was quick to point out to his U.S. audience that the economic and legal situation of peasants differed greatly between East and West Germany, and had changed substantially over the course of Germany's history.[163] The East-German peasant, whose type had evolved to a limited extent with the emergence of capitalist agriculture, was the *Instmann*.[164] The *Instleute* were dependents of manorial landowners: the *Grundherren* of the *Grundherrschaft* (manorial-dominion) system.[165] This *Grundherrschaft* system had existed throughout Germany into the Sixteenth Century, and it was the manner in which it dissolved that determined the differences between East and West German agricultural-conditions.[166]

In order to conceptualize the property-relations characterizing the medieval manorial system, it is necessary to clear one's mind of characteristically modern notions of "property rights," and instead to imagine property-relations that involve complex, corresponding *rights-and-obligations* among persons with respect to things, especially land.[167] Although the "lord of the manor" (*Grundherr*) was the only true "owner" (*Eigentümer*) of the land, the peasants possessed parcels of land under long-term (effectively

---

[161] *See* Max Weber, *Capitalism and Rural Society in Germany*, *in* H.H. GERTH & C. WRIGHT MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 363-85 (Oxford University Press Paperback ed. 1958) (1946) (adapted from the translation of C.W. Seidenadel, published in 1906 along with other presentations given at the Congress in a volume titled Congress of Arts and Science, Universal Exposition, St. Louis, under the title "The Relations of the Rural Community to other Branches of Social Science"). For Marianne Weber's description of their trip to America, see Marianne Weber, *supra* note 110, at 279-304.

[162] *See id*. at 365.

[163] *See id*. at 365-85.

[164] *See* TRIBE, *supra* note 160, at 102-3; WEBER, *supra* note 161, at 374-5 (unfortunately the English does not provide any indication of Weber's German terminology, and thus it must be inferred that Weber is describing the *Instleute* here). *See also* ECONOMY AND SOCIETY, *supra* note 113, at 125.

[165] *See* Weber, *supra* note 161, at 374-5.

[166] *See id*.

[167] Although a description of the *Grundherrschaft* system is implicit throughout Weber's agricultural writings, he mostly assumes that his readers are familiar with that system, and allocates his time to describing the transitions that had occurred and were still occurring in his time. An excellent description of the system, which links it to the Roman Imperial period and describes its evolution in great detail, with particular discussion of the German case, is provided by Marc Bloch in *Feudal Society*. *See* MARC BLOCH, FEUDAL SOCIETY 173, 241-54, 266-70 (L.A. Manyon trans. 1961). An influential legal conception of property that includes both obligations and rights is found in Samuel Pufendorf. *See, e.g.*, SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 84-104 (Michael Silverthorne trans., James Tully ed., Cambridge University Press 1991) (1673).

perpetual), inheritable leaseholds (*tenures*); these leaseholds ideally provided sufficient acreage for a home and farmland for sustenance, and were in some cases freely transferable upon payment of an investiture fee.[168] In addition to the peasants' tenures and the landowner's home, the overall territorial estate was divided into subcategories, based on the varying rights and obligations attached to the type of land.[169] Although the *demesne* was exclusively the manorial lord's cultivatable land, other types of land (*e.g*. "arable," "meadow") could be cultivated by the peasant as well, subject to the preemptive right of the lord.[170] The tenured peasants owed certain labor duties to the lord, such as working his *demesne* for a set number of days in the year, as well as rents (sometimes also described as "taxes"), but the lord was also subject to obligations with respect to the peasants: in addition to recognizing their tenure on his estate, the lord was considered their protector, a role that was perhaps typically exercised through the lord's manorial courts.[171]

Despite its inequalities, this *Grundherrschaft* system had the benefit of producing a relative unity of material-economic interest among the landlord and his tenured peasants: both benefited when the manor was productive.[172] Nevertheless, "maximization of production" was not the overriding goal: in Weber's words, the question asked according to this form of social order was "How can I give, on this piece of land, work and sustenance to the greatest possible number of men?"[173] This socio-economic and legal order would begin to collapse around the Sixteenth Century, but according to very different processes in East versus West Germany.[174]

The decisive difference between East and West Germany, according to Weber, lay in the landowners' response to capitalism's driving force: the individual motivation to maximize profit.[175] In southern and western Germany, the landowners responded to this motivating force by requiring increased payments from the peasants, but they did not appropriate the peasants' tenures.[176] In Germany's northeast,

---

[168] *See* BLOCH, *supra* note 167, at 173, 241-54.
[169] *See id*.
[170] *See id*.
[171] *See id*.
[172] *See* Max Weber, *Privatenqueten über die Lage der Landarbeiter*, 4 Mitteilungen des Evangelisch-sozialen Kongresses 3 (1892), *as quoted in* TRIBE, *supra* note 160. This insight can be readily translated into the modern economic language of the "property-rights" literature by noting that this structure combined fixed rents with a form of share-cropping, the latter of which has been argued to produce the smallest deadweight losses in production. *See, e.g*. YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS, *supra* note 2, at 33-54.
[173] *See* WEBER, *supra* note 161, at 367.
[174] *See id*. at 373-85.
[175] *See* WEBER, *supra* note 161, at 374-5. In the year following this presentation, 1904-1905, Weber published *The Protestant Ethic and the Spirit of Capitalism* in the *Archiv für Sozialwissenschaft und Sozialpolitik*. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Richard Swedberg ed. 2009); s*ee also* KÄSLER, *supra* note 14, at 251. For Weber's later elaboration on a conception of "capitalism" as acquisition motivated by the desire for profit, see ECONOMY AND SOCIETY, *supra* note 8, at 90-100.
[176] *See* WEBER, *supra* note 161, at 374-6.

however, the landowners appropriated ("enclosed") the peasants' tenures and began to cultivate the land themselves, hiring certain of the dispossessed peasants as laborers to work the soil for wages.[177]

The reasons for differing landowner responses to agricultural capitalism in the Northeast versus the South and West were varied, but could be distilled into certain common cultural, legal, and economic factors.[178] From the perspective of culture, Germany's northeast had been characteristically affected by a combination of west-German colonization and Slavic patriarchy, which was distinctive in its idealization of the feudal knight (approximated most closely by the aristocratic *Junkers*) and its lack of legal customs protecting the peasantry.[179] Furthermore, from a legal perspective, the Northeast was distinctive in the degree to which jurisdictional boundaries aligned with proprietary and territorial boundaries, a condition that enabled manorial lords to exercise exclusive jurisdiction over their peasants.[180]

In Weber's view, however, it was the economic differences that were most important in determining the landowners' response to agricultural capitalism.[181] In the South and West, population was much denser, and there were many more market centers in the form of towns and cities.[182] The communication and financial exchange that occurred in these market centers was culturally significant, as well as economically, because it inculcated the knowledge and desire necessary to enable peasants to increase their agricultural yields.[183] Moreover, the geography was much more differentiated in the South and West, which enabled a greater variety of agricultural cultivation.[184] All of these conditions enabled local trade to flourish in the South and West, which meant that the peasants had local markets in which to sell their wares in exchange for money to pay rents and taxes to the landowners.[185]

Thus, in southern and western Germany, the economic conditions were such that landowners did not need to appropriate the peasants' tenures; the landowners could simply require higher taxes and rents from the peasants, and the presence of local trade meant that the peasants had the knowledge and capacity to raise the funds needed to make the increased payments.[186] In the Northeast, however, conditions were entirely different: the geography was relatively undifferentiated, land-holdings were much more extensive, and market-centers in the form of cities and towns were few and far between.[187] For these reasons, it

---

[177] *See id*.
[178] *See id*. at 376.
[179] *See id*.
[180] *See id*. at 376-77. In contrast, in the South and West, proprietary-territorial boundaries and jurisdictional boundaries were all mixed up, with the result that peasants interacted with many different manorial lords, and thus no single lord was able to exercise the same degree of power over peasants. *See id*.
[181] *See id*. at 377.
[182] *See id*.
[183] *See id*. at 377-79.
[184] *See id*. at 377-78.
[185] *See id*.
[186] *See id*.
[187] *See id*. at 378-80.

would have been impossible for the peasants to increase their payments, and the landowners' only option was to raise the agricultural yield by cultivating the land themselves.[188] In order to do so, it was necessary to appropriate the land entirely, and thus to dispossess the peasants, thereby transforming the Eastern peasantry into property-less laborers.[189]

In Weber's view, these cultural, legal, and economic factors determined the shape of capitalist agricultural-transformation in Germany, so that by the time of the French and German Revolutions (1789-99 and 1848, after which peasants were formally regarded as being "free"), the shape of this transformation had already been determined.[190] From the perspective of public administration, and because he believed passionately that Germany should be a strong nation-state, Weber found the Eastern agricultural situation untenable.[191] Although he argued that additional empirical study was needed in order to accurately assess the impact of this capitalistic agricultural transformation on peasant social-psychological motivations, he believed it was driving the German peasantry to emigrate from the Northeast, either into German cities or to America, in alarming numbers.[192] This meant that migrant workers, in particular Polish workers, were being brought onto the Northeastern estates during the labor-intensive periods of the agricultural cycle.[193] Weber saw this regular influx of non-German workers as being extremely harmful to German national self-interest, both defensively and culturally.[194]

Although he did not cast the East-German landowners (the *Junkers*) as villains for their response to capitalistic forces in agriculture, he did see their cultural and economic interests as working against the German nation's interests.[195] With respect to distribution of Northeastern landed property, he believed that the German nation had a responsibility to expropriate portions of the *Junkers*' land in order to establish smaller agricultural holdings in the form of leases from the state.[196] This put Weber in direct opposition to the *Junkers*, an opposition consistent with his advocacy for free exchanges (*Börsen*) for agricultural commodities, securities, and derivatives (including commodity futures).[197]

---

[188] *See id*.
[189] *See id*.
[190] *See id*. at 365, 374.
[191] *See id*. at 381-85; TRIBE, *supra* note 160, at 101-22.
[192] *See* TRIBE, *supra* note 160, at 101-22.
[193] *See id*.
[194] *See id*. *See also* Max Weber, *Developmental Tendencies in the Situation of East Elbian Rural Labourers* (Keith Tribe trans., as published in TRIBE, *supra* note 160, at 158-84).
[195] *See* WEBER, *supra* note 161, at 368-69, 373-74, 381-85; TRIBE, *supra* note 160, at 101-22. *See also* Max Weber, *Wahlrecht und Demokratie in Deutschland* (1917), *as published in* GESAMMELTE POLITISCHE SCHRIFTEN (1921), at 277-322, *translated and republished in* H.H. GERTH & C. WRIGHT MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 386-95 (Oxford University Press Paperback ed. 1958) (1946).
[196] *See* Max Weber, *Developmental Tendencies in the Situation of East Elbian Rural Labourers*, *supra* note 194, at 184.
[197] *See* Knut Borchardt, *Max Weber's Writings on the Bourse: Puzzling Out a Forgotten Corpus*, 2 MAX WEBER STUDIES 139 (2002); Keith Tribe, *Review: Max Weber Börsenwesen*, 2 MAX WEBER STUDIES 242 (2002).

D. Commercial Property-Relations in the Modern World: The *Bourse* Writings

Weber's writings on the Bourse were extensive, as is evidenced by the fact that they fill two volumes of the *Max Weber Gesamtausgabe*.[198] That these articles were written in the 1890s is no coincidence, for it was during this period that securities and commodities exchanges were becoming an issue of great socio-legal and economic significance, not only in Germany but also in North America.[199] In Germany, commissions were established to study the exchanges, the primary question being how and whether such exchanges should be regulated at a national level.[200]

Utilizing data gathered by the *Börsenenquetekommission*, Weber took the position that the exchanges would be beneficial to German agriculture and agriculturally-related industry.[201] Nevertheless, he noted that the forms of commercial property being established through these exchanges were characterized by vastly-different social relationships, relationships that were distinctive in their impersonality, and in the degree to which they posed financial danger to the unwary.

Weber addressed both major types of exchange: securities (*Effekten*, *Fonds*) and commodities (*Produkten*, *Waren*) exchanges.[202] However, it was the latter that seem to have presented the greatest difficulties politically.[203] In particular, the issue of "grain futures" was a matter of deep controversy, and by taking sides on this issue Weber set himself up in opposition to the politically-powerful *Junkers*.[204]

As Weber had noted in his address to the international scholars assembled in St. Louis, the *Junkers* had become powerful voices for agricultural protectionism.[205] Because they perceived grain futures markets as threatening their ability to control grain prices, and as potentially introducing great instability into grain markets, they preferred that such financial instruments be prohibited altogether.[206] The *Junkers* were supported in this objective by the fact that jurists were embroiled in controversy over

---

198 *See* MAX WEBER GESAMTAUSGABE I/5 (Knut Borchardt & Cornelia Meyer-Stoll eds. 1999) (hereinafter "*Collected Bourse-Writings*").

199 *See generally Einleitung*, COLLECTED BOURSE-WRITINGS, *supra* note 198. For the U.S. history, see JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., A HISTORY OF CORPORATE FINANCE 127-66 (1997); CHARLES R. GEIST, WALL STREET: A HISTORY 124-51 (1997). For more specific discussions of commodities markets, see Armando T. Belly, *The Derivative Market in Foreign Currencies and the Commodity Exchange Act: The Status of Over-the-Counter Futures Contracts*, 71 TUL. L. REV. 1455, 1460-63 (1997); William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 VAN. L. REV. 473, 474-78 (1988). For a representation of the way U.S. lawyers perceived futures markets in the late 1800's, see 3 The Central Law Journal 121, 134-35 (Seymour D. Thompson ed., February 25, 1876).

200 *See Einleitung*, COLLECTED BOURSE-WRITINGS, *supra* note 198, at 3-5, 25-91.

201 *See id*. at 66-74, 91-108; *see also* BORCHARDT, *supra* note 197, at 141-42.

202 *See, e.g.*, *Die Börse I, Zweck und äußere Organisation der Börsen*, *in* COLLECTED BOURSE-WRITINGS, *supra* note 198, at 141-43 (*English translation available in* 29 THEORY & SOC. 305 (Steven Lestition trans. 2000)).

203 *See* BORCHARDT, *supra* note 197, at 159-62; TRIBE, *supra* note 197, at 242-45.

204 *See id*.

205 *See* Weber, *supra* note 161, at 382; *supra* note 161 and accompanying text.

206 *See* BORCHARDT, *supra* note 197, at 159-62; TRIBE, *supra* note 197, at 242-45.

how futures contracts should be legally categorized; because such trades are most often completed without exchange of the underlying commodity and involve a certain degree of speculation regarding the direction of future commodity prices, a dominant legal perspective of the time was that such contracts were a form of gambling, and thus void (*i.e.* unenforceable).[207]

In retrospect, Weber seems extraordinarily far ahead of his time in arguing that, rather than destabilizing grain prices, grain futures would have the opposite effect: that through the "arbitrage" of professional futures traders, the cyclical rise and fall in grain prices resultant from seasonal gluts and dearths would be stabilized, and the cash price for grain would reflect general information about the grain market as opposed to merely cyclical or local conditions of supply-and-demand.[208]

From the perspective of this article, however, Weber's technical arguments concerning the functioning and effects of the Bourse are less significant than his discussion of the overall impact that the growing financial markets were having, and would continue to have, on property-relations. These developments were particularly emphasized in Weber's *Börse I* essay.[209]

Weber began that essay by stating that "[t]he Bourse is an institution (*Einrichtung*) of modern, high-volume, commercial trade (*Großhandelsverkehr*)."[210] After outlining the basic forms and functions of the Bourse, he then turned to a discussion of bond markets, which were historically the first "securities" to emerge.[211] He discussed the fact that these markets enabled the possessory-classes "to invest their property" (*ihr Vermögen anlegen*) and the state, in turn, to raise funds needed for public projects.[212] The implications of this development for property-relations, the relationship between the owner of the security (the bond) and the obligor (the state or a corporation), are extremely significant: it is

---

[207] *See* BORCHARDT, *supra* note 197, at 152-53. A similar debate took place in America. *See, e.g.*, The Central Law Journal 121, 134-35 (Seymour D. Thompson ed., February 25, 1876) (reporting on the case of Lehman Bros. v. Strassberger, United States Circuit Court for the District of Alabama 1875).

[208] *See* Max Weber, *Die Börse II, Der Börsenverkehr*, in COLLECTED BOURSE-WRITINGS, *supra* note 198, at 651-55 (*English translation available in* 29 THEORY & SOC. 339 (Steven Lestition trans. 2000)). This is the contemporary argument for the benefit of futures markets generally. For a statement of the contemporary argument, which provides more technical detail but tracks Weber's argument conceptually, see FRANK J. FABOZZI & FRANCO MODIGLIANI, CAPITAL MARKETS: INSTITUTIONS AND INSTRUMENTS 163-87 (3d ed. 2003).

[209] *Die Börse I, Zweck und äußere Organisation der Börsen*, in COLLECTED BOURSE-WRITINGS, *supra* note 198, at 135-74 (*English translation available in* 29 THEORY & SOC. 305 (Steven Lestition trans. 2000)). For a discussion of this essay in relation to Weber's other works pertaining to the Bourse, see BORCHARDT, *supra* note 197; TRIBE, *supra* note 197.

[210] *See Die Börse I, Zweck und äußere Organisation der Börsen, in* COLLECTED BOURSE-WRITINGS, *supra* note 198, at 135 (*English translation available in* 29 THEORY & SOC. 305 (Steven Lestition trans. 2000)).

[211] *See id.* at 143-55. On the history of Anglo-American finance and securities markets, see BASKIN & MIRANTI, *supra* note 199, at 55-124.

[212] *See Die Börse I, Zweck und äußere Organisation der Börsen, in* COLLECTED BOURSE-WRITINGS, *supra* note 198, at 147 (*English translation available in* 29 THEORY & SOC. 305 (Steven Lestition trans. 2000)).

the *impersonality* (*Unpersönlichkeit*) of these relations that is their most important (sociological) characteristic.[213]

Weber uses the term *Herrschaft* in this context, which is significant for two reasons: first because he is describing a transition from an older form of *Herrschaft*, that of the *Grundherr*,[214] and second because he seems to be simultaneously evoking a legal sense (as a translation for *dominium*, *i.e.* "ownership") and a more sociological sense, that of "domination" (or authority).[215] In describing the transition from *Grundherrschaft* to "*Herrschaft 'des Kapitals'*" Weber describes a transition from a hierarchical and personal property-relation, characteristic of a by-gone era, to a property-relation that is impersonal and less hierarchical, characteristic of the capitalistic era.[216]

The transition from agrarian property-relations to commercial property-relations parallels the transition from patriarchy and patrimony to bureaucracy and modern, rational capitalism.[217] Indeed, the point may very well be that these are the same transition, viewed through different conceptual frameworks. Remembering that *dominium* is the Latin word for ownership, as well as mastership/lordship (comparable to the German *Herrschaft*), we may be struck anew by the overlap between property and domination that Weber and his classically-trained contemporaries would have intuited immediately through the evocations of language.

Weber's exploration of domination (authority) as a sociological type concept would come later, in his sociological phase.

E. Significance of Weber's Economic-Historical Phase for a Sociological Theory of Property

In Weber's economic-historical phase, strictly economic and material aspects of property-relations receive an especially vivid presentation. Agrarian property – property connected to land and its profits – forms the base of a conceptual framework, with commercial property (financial instruments, business "goodwill," trade secrets) comprising a transitional development that is sketched to illuminate contrasts or to hint at future implications. Land is an embodied (corporeal) and tangible object of property, as are the beings (animal and human) who work it and the improvements placed upon it. Weber's agrarian property-relations are personal, hierarchical, and materially-rooted social relationships.

Out from the richly-portrayed material and economic details, however, Weber abstracted a number of interesting cultural theses. Firstly, that it was an "ideational shift" that produced the

---

213 *See id*. at 148.
214 *See supra* notes 140, 165-173 and accompanying text.
215 *See Die Börse I, Zweck und äußere Organisation der Börsen*, *in* COLLECTED BOURSE-WRITINGS, supra note 198, at 148 (*English translation available in* 29 THEORY & SOC. 305 (Steven Lestition trans. 2000)).
216 *See id*.
217 *See* WEBER, *supra* note 8, at 941-1110.

motivational force for Rome's vast land-acquisitions on the European continent, and that this was due to incentives created by Roman public and administrative law. Secondly, that the "abstract ownership concept" is to be credited to Roman legal culture, with its distinctively-potent, patriarchal, "private" sphere of unfettered personal power over dependent persons and objects. Thirdly, that the ability to communicate knowledge and ideas to one another in local markets helped West German peasants increase their production capacities significantly enough to pay increased taxes on their small plots of land, thereby mitigating the perceived necessity for appropriation by capitalistically-driven manorial lords.

Continuing a theme from his legal phase, Weber's economic-historical phase presents property as a social phenomenon, a phenomenon characterized by social relationships organized around specified "rights" and "duties" vis-à-vis valued things. In his economic-historical phase, however, Weber added a richness of detail concerning a concrete manifestation of property that has been common and economically-important throughout history, namely agrarian property.

In pointing to significant contrasts with commercial property, which was rapidly becoming more important in his own day, Weber revealed the contours of a "great transformation,"[218] one that can be viewed as paralleling and complementing those revealed by his sociological contemporaries.[219] As with Karl Marx and Friedrich Engels,[220] Weber's great transformation accords causal force to property in society. However, with Weber the concept of property is given fuller treatment, both analytically and empirically. Compared to Weber, Marx's theoretical conceptualization of property is exogenous (*i.e.*, it is taken as given) and monolithic (private property in the form of ownership is all that is contemplated). Weber's theory of property brings property into the theory of social relationships (the theory "endogenizes" property), and it allows for much more concrete detail in the diversity of rights (use, ability to profit, possession, and ownership) and obligations comprising property.

To more fully glimpse the wealth of insight in Weber's sociological theory of property, we now turn to the final phase of his development, the sociological phase. Here we see the final, sociological articulation of his theory of property, namely that property is dependent on organized social relationships *that have been closed to "outsiders."* And here we see the extent to which Weber's final development as a sociological thinker built on his earlier phases of development, the legal and the economic-historical.

---

[218] The phrase "great transformation" is borrowed from Karl Polanyi's work of that title. *See* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Second Beacon Paperback edition 2001) (1944).

[219] *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Free Press paperback edition 1997) (1893); KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (Prometheus Books 1988) (English edition of 1888); KARL MARX, CAPITAL VOLUME 1 (Frederick Engels ed., International Publishers New World Paperbacks edition 1967) (English edition of 1887); KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (Martin Milligan trans., Prometheus Books 1988) (1844).

[220] *See supra* note 219; *see also* FREDERICK ENGELS, OUTLINES OF A CRITIQUE OF POLITICAL ECONOMY (Prometheus Books 1988) (1844).

IV. The Sociological Phase:
Property and Organized Social Closure

As the first decade of the Twentieth Century ended, Weber directed his attention to sociology. In 1904, he had joined Edger Jaffé and Werner Sombart in assuming editorial control of the *Archiv für Sozialwissenschaft und Sozialpolitik* (Archive for Social Science and Social Policy), and in the same year his essay on the "Objectivity of Social-scientific and Socio-political Knowledge" had appeared in that periodical.[221] In 1909 Weber co-founded the German Sociological Association (*Deutsche Gesellschaft für Soziologie*), and began to occasionally refer to himself as a "sociologist."[222]

Early in that same year, he accepted an invitation to serve as editor for a project to assemble a compendium of foundational concepts and principles for "social economics" (*Grundriss der Sozialökonomik*, hereinafter the "*Outline of Social Economics*").[223] This work was conceived as a replacement for a previous Handbook of Political Economy (*Handbuch der Politischen Ökonomie*), which the publisher viewed as being somewhat out of date in relation to contemporary developments in German and Austrian economics.[224]

Between 1910 and 1914, Weber expended considerable effort in assembling contributions by German and Austrian economists to the *Outline of Social Economics*,[225] and in composing his own contributions to the *Outline*.[226] In his correspondence and in his manuscript footnotes, Weber referred to his contributions as *Wirtschaft und Gesellschaft – Economy and Society* – and this is the title under which Weber's manuscripts written for the *Outline* during this period were posthumously published.[227] The early manuscripts (written between 1910 and 1914) include what is now published as "Part Two: The

---

[221] *See* KÄSLER, *supra* note 14, at 13.

[222] *See id*. at 15. Weber did express ambivalence about the emerging discipline of sociology, however, and finally withdrew in frustration from the German Sociological Association. *See* SWEDBERG, *supra* note 8, at 173; *see also* MARIANNE WEBER, *supra* note 110, at 420-25.

[223] *See* SWEDBERG, *supra* note 8, at 199; *see also* RICHARD SWEDBERG, THE MAX WEBER DICTIONARY 109-11 (2005). The term "social economics" was apparently suggested by the publisher in an effort to avoid litigation that might be initiated by the heirs of Gustav Schönberg, author of the famous *Handbook of Political Economy* that Weber's *Outline of Social Economics* was to replace. *See* SWEDBERG, *supra* note 8, at 199-201. Weber liked the term "social economics," nevertheless, writing in a letter dated March 22, 1912 that it is "the best name for the discipline [of economics]." *Id*. at 297 n. 122.

[224] *See* SWEDBERG, *supra* note 8, at 199-201. Despite his increasing interest in sociology, however, Weber's scholarly engagement continued to be primarily that of an economist, albeit an economist who (consistent with the nature of the German economic discipline of his time) conceived of the economic sphere as situated within – and, therefore, analytically and causally connected to – broader social and cultural contexts, including those of politics, law, and religion. *See id*. at 173-206.

[225] Weber saw a need to incorporate both the historical perspective (then dominant in German economics) and the analytical perspective (then identified with Austrian economic theory) in the understanding and explanation of socio-economic phenomena. *See* Swedberg, *supra* note 8, at 173-206.

[226] *See* WOLFGANG SCHLUCHTER, RATIONALISM, RELIGION, AND DOMINATION: A WEBERIAN PERSPECTIVE 433-63 (1989); *see also* Swedberg, *supra* note 8, at 199-203.

[227] *See* Schluchter, *supra* note 226, at 459-60; Swedberg, *supra* note 8, at 298 n.126.

Economy and the Arena of Normative and De Facto Powers" (hereinafter referred to as the "1914 Manuscripts") in the English edition of *Economy and Society*, edited by Guenther Roth and Claus Wittich.[228]

Weber's work from this period also includes a 1913 publication in *Logos* (the *International Journal for the Philosophy of Culture*).[229] This 1913 piece (hereinafter the "*Logos* Essay") was titled "*On Some Categories of Interpretive Sociology*." According to Weber, it served as a counterpart and supplement to the conceptual exposition written in 1919-1920, posthumously published as Chapter 1 of the finalized manuscripts submitted for publication shortly before Weber's death in 1920 (hereinafter the "1920 Manuscripts").[230]

Weber's *Logos* Essay articulates precise definitions for sociological categories used throughout the 1914 Manuscripts.[231] These categories were developed from Rudolf Stammler's jurisprudential exposition on the relationship between law and economics.[232] Nevertheless, although Weber acknowledged the extent to which Stammler's analytical categories served as the starting-point for his own exposition, he positioned his contribution in direct opposition to Stammler.[233] Objecting to "historical materialism" as an influence on Stammler's "disastrous" social theory, Weber characterized his own "construction of sociological concepts" as an exposition of what Stammler "should have meant."[234]

A. Sociological Categories for Understanding and Explaining Property-Relations

Weber began the *Logos* Essay with the foundational declaration that human behavior (*Verhalten*), like all empirical occurrences, exhibits two types of observable patterns: (1) regularities of successive development (*i.e.*, causal regularities) and (2) relational structures ("complexes" or "compounds,"

---

[228] *See* Weber, *supra* note 8, at 309 et seq.; MAX WEBER GESAMTAUSGABE I/22; GUENTHER ROTH, INTRODUCTION, *in* Weber, *supra* note 8, at LXVI et seq. For an argument that the 1914 Manuscripts were nearly complete and therefore a relatively reliable source, see Orihara, *supra* note 8.

[229] Weber, GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE 403-50 (1922); originally published in Band IV *Logos*, Heft 3; *see* KÄSLER, *supra* note 14, at 258; an English translation was prepared by Edith E. Graber and published in 22 THE SOCIOLOGICAL QUARTERLY 151-80 (1981) (hereinafter referred to as "THE LOGOS ESSAY").

[230] Weber referred to Chapter 1 of the 1920 Manuscripts as a "simplified" version of the *Logos* Essay, which he evidently still considered the more precise conceptual exposition. *See* WEBER, *supra* note 8, at 3.

[231] *See* ORIHARA, *supra* note 8.

[232] WIRTSCHAFT UND RECHT: NACH MATERIALISTISCHER GESCHICHTSAUFFASSUNG (Eilbron Classics 2006) (1906). For Weber's discussion of his use of Stammler, see WEBER, *supra* note 229, at n.1. For a discussion of Stammler's (as well as a number of other legal theorists') influence on Weber, see STEPHEN P. TURNER & REGIS A. FACTOR, MAX WEBER: THE LAWYER AS SOCIAL THINKER (1994).

[233] *See* WEBER, *supra* note 229, at n.1; THE LOGOS ESSAY, *supra* note 229, at n.1.

[234] *See id*.

Zussamenhänge).[235] What makes human behavior unique, however, is the fact that it has meaning (*Sinn*) to the actors who engage in the behavior.[236] For this reason, these empirical patterns can be *interpretively* explained on the basis of certain types of *inferred intentional orientation* that cause actions by individuals to exhibit regularities in relational structure and course of development.[237]

These types of intentional orientation can be understood as patterns of directedness in consciousness, cognition, and thought, *i.e.* in the formation of meaning and intention. They do not include all the unique content of a particular individual's thoughts, emotions, or motivations.[238] Rather, they are general forms of thought, ways of conceptualizing choices, possibilities of action, and probabilities of success.[239] These types of intentional orientation are inferentially interpretable by sociologists when their patterns of directedness are (1) social (oriented to others in meaning and action) and (2) purposive (goal-oriented).[240]

The type of intentionally-oriented social behavior that can be interpreted (inferred) with the greatest degree of validity and certainty by sociologists is behavior that is rational *in the sense that* the individual instrumentally and calculatingly uses scarce means to achieve a valued end.[241] In order to arrive at a valid interpretation, a sociologist can use this type of social action as a starting-point for analysis, explaining deviations on the basis of external causal factors and/or differences in meaningful intention that led to the deviational empirical pattern.[242]

Although he had some interest in isolated instances of social action, Weber's primary interest was in patterns of ongoing socio-relational structures: social groupings and their course of development over time. This is particularly evident in the *Logos* Essay and the 1914 Manuscripts, where Weber refers to social action as "communal action" (*Gemeinschaftshandeln*) and organizes his discussion on the basis of differing types of social grouping: household, family, kinship, and neighborhood communities, ethnic and racial communities, religious, political and hierocratic communities, class-based-associations, status-communities, and the market.[243] According to Weber, these distinctive types of social grouping are

---

[235] *See* WEBER, *supra* note 229, at 403-4; THE LOGOS ESSAY, *supra* note 229, at 151.
[236] *See id.*
[237] WEBER, *supra* note 229, at 403-17; THE LOGOS ESSAY, *supra* note 229, at 151-9.
[238] *See id*.
[239] *See id*.
[240] *See id*.
[241] *See id*.
[242] *See id*. In Chapter 1 of the 1920 Manuscripts, Weber defined this kind of meaningful, other-oriented behavior as "social action." *See* WEBER, *supra* note 8, at 4-22.
[243] *See* WEBER, *supra* note 229; THE LOGOS ESSAY, *supra* note 229; WEBER, *supra* note 8, at 339 et seq.; MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 181 et seq. (1925). In both the 1920 Manuscripts and the 1914 Manuscripts, Weber was careful to state that a shared "class situation," and especially a common situation in relation to possession of property, is not sufficient to produce the conscious, mutual social orientation that characterizes a communal or associative social relationship. However, under certain circumstances a conscious, mutual social orientation might arise out of a common possessory situation, in which case a class-based communal or associative

characterized by their distinctive relationship-structures, courses of development, and by the patterns of directedness in meaning that condition these relationship-structures and courses of development.[244]

Later, in Chapter 1 of the 1920 Manuscripts, Weber refined his categories of social grouping, moving to a more abstract level in distinguishing two types of "social relationships": "associative" (*Vergesellschaftung*) and "communal" (*Vergemeinschaftung*).[245] The difference between these two rests on the meaning that social actors impute to the social relationship. In the case of communal social relationships, actors subjectively regard the members of the community as "belonging together," whereas in the case of associative social relationships, actors regard the social relationship as a necessary means for achieving a shared goal.[246]

Viewing social relationships from this clearly-delineated and abstracted perspective, Weber continued to view such relationships as being characterized by their distinctive relationship-structures, while also emphasizing patterns in the directedness in meaning that condition these relationship-structures and their courses of development.

One of the most important patterns of directedness in meaning emerges out of the shared orientation to an "Order" (*Ordnung*) by the members of a social relationship.[247] In his 1913 *Logos* Essay, Weber distinguished two types of "Foundational Order".[248] The first type is both fundamentally and formally hierarchical, in the sense that it results from unilateral demands issued by some person(s) and complied with by others.[249] The second type is formally egalitarian, in the sense that it results from a mutual declaration issuing from all persons to one another.[250]

Only in the most purely rational, limiting cases will these Foundational Orders – their concepts, principles, and rules (*Ordnungen*) – be explicitly articulated in written documents formally constituting the social relationship, *i.e.* in a constitution or charter, and/or in other bylaws, regulations and contractual documents.[251] Moreover, the ways that particular individuals orient themselves to an Order (with its

---

social relationship could arise. *See* WEBER, *supra* note 8, at 302 et seq. and 927 et seq. For further discussion of classes and status-communities, see *infra* notes 332 to 341 and accompanying text.

[244] *See id*.

[245] *See* WEBER, *supra* note 8, at 40-43.

[246] *See id*. Weber referred to Ferdinand Tönnies' "pioneering work" *Gemeinschaft und Gesellschaft* (2d ed. 1912) in explaining his shift to using these conceptual categories. *See id*. at 41; *see also supra* note 98 and accompanying text.

[247] In the 1920 Manuscripts, Weber shifted his terminology slightly, adding categories for "types of action orientation" (Usage, Custom, and Interest-Conditioned), and discussing the bases upon which actors attribute "legitimacy" to an Order. *See id*. at 29-38. Despite this slight shift in terminology, Weber's discussion of Order in the 1920 Manuscripts reveals fundamental continuity with his discussion in the *Logos* Essay and the 1914 Manuscripts. *See also infra* note 293 and accompanying text.

[248] *See* THE LOGOS ESSAY, *supra* note 229, at 160-66.

[249] *See id*.

[250] *See id*.

[251] *See id*.

associated concepts, principles, and rules) may be by refusing to comply with it, or by covertly deviating from it (*e.g.* cheating in a game of cards).[252]

Nevertheless, an Order should be treated as being empirically "in force" (*Geltung*) to the extent that individuals expect other individuals to behave in accordance with the Order.[253] This concept of the degree to which an Order is empirically "in force" was carried over to the 1920 Manuscripts, where Weber defined it as the "probability" (*Chance*) that social action will be conditioned by the Order.[254]

Mutual orientation to an Order is vitally-important to social action because it helps individuals to form reasoned expectations as to what their social "others" will do, thereby enabling them to calculate their own probabilities of success in achieving a particular goal, [255] or to deliberately conform to a command they view as binding on them. To the extent that an Order is believed to exist and is empirically in force, therefore, it plays a causal role in the social action of individuals, contributing to patterns of directedness in meaning and in the formation of socio-relational structures.[256]

Having drawn on Weber's *Logos* Essay and the 1920 Manuscripts to elaborate certain key concepts in Weber's sociology, we can now turn to his sociological theory of property.

B. Weber's Sociological Theory of Property

Weber discussed property-related concepts in two sections of the *Logos* Essay. The first discussion is provided in the section of the essay addressing "Associational Action",[257] while the second discussion is provided in the section of the essay addressing "Consensus" (*Einverständnis*).[258] These are

---

[252] *See id*.

[253] *See id*. Cheating, for example, is most effective when the other players are following the rules; on the other hand, cheating becomes logically impossible when there are no rules. *See id*.

[254] *See* WEBER, *supra* note 8, at 31. In the 1920 Manuscripts, Weber complemented focus on the degree to which an Order is empirically "in force" (*Geltung*, often translated as "valid") with focus on the Order's bases for "legitimacy." *See id*. at 31-8.

[255] *See* THE LOGOS ESSAY, *supra* note 229, at 160-66; WEBER, *supra* note 8, at 31-8.

[256] *See* THE LOGOS ESSAY, *supra* note 229, at 160-66; WEBER, *supra* note 8, at 31-8. There is a complex convergence in Weber's scholarship between the concepts of meaning and Order. One way to disentangle these may be to emphasize the notion that an Order is a *pattern of directedness in meaning*. On the one hand, from this perspective, an Order is a composite in which individual concepts and principles are viewed as being in systematic relation to one another; it therefore has the characteristics of a *system* of meanings. Indeed the German *Ordnung* was commonly used in legal literature (sometimes as a substitute for the Latin *ius*) to evoke "the legal system." *See, e.g.*, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 592n.12 (1911). On the other hand, from this perspective, the Order manifests itself *empirically* in *ordered patterns of behavior*. *See id*. Jurists have tended to see these two elements – an ordered system of legal concepts and rules, and the ordered behaviors of flesh-and-blood human beings – as being connected, indeed have sometimes assumed that they are *necessarily* connected. *See id*.; *see also* WIEACKER, *supra* note 8. Very likely, Weber's complex uses of the term *Ordnung* reflect these multivalent evocations in the legal tradition that he absorbed as part of his legal training.

[257] *See* THE LOGOS ESSAY, *supra* note 229, at 160-66.

[258] *See id*. at 166-73.

two basic types of socio-relational structure, formed through patterns of communal social action and corresponding to two basic types of Order.

Associational Action is a socio-relational structure formed as a result of relatively-explicitly *shared purposes*; the members agree upon a Foundational Order and related rules that are rationally designed to achieve the association's shared purposes.[259] Consensus, on the other hand, characterizes a socio-relational structure formed through patterns of communal action oriented to an Order that does not arise out of agreement on shared purposes.[260] Individuals orient themselves to an Order "*as if*" it had emerged through their agreement on concepts and rules, even though they haven't actually agreed to anything.[261]

The archetypal form ("ideal type") of Associational Action, according to Weber, is characterized by deliberate ("rational") agreement on an Order that explicitly defines the substantive capacities and means for the collective action of the associates in seeking to achieve the specified purposes.[262] The resulting association is a *Zweckverein*, an "intentional-association" ("goal-oriented-association") or "voluntary association."[263] In this ideal-typical form of Associational Action, the foundational agreement recording the agreed-upon Order – the "Charter" and By-Laws, or "Constitution" (*Satzung*) – will specify which "tangible goods" (*Sachgüter*) and "funds" (*Leistungen*) shall be administered and made available for the stipulated purposes of the association.[264] These goods and funds comprise the association's "special purpose fund," its "designated property" (*Zweckvermögen*).[265]

This is the purest, archetypal case of Associational Action, according to Weber.[266] His description clearly fits a modern corporation, and this may very well be the example that he had in mind. However, he went on to describe certain variations that cases of Associational Action might exemplify. For example, the agreed-upon Order (the decisive criterion, according to Weber) might be comprised merely of ad hoc rules, or there may be no designated staff for authorized action and enforcement.[267] An

---

[259] *See id*. at 160-66.
[260] *See id*. at 166-73.
[261] *See id*.
[262] *See id*. at 163-65.
[263] *See id*. at 163. *See also* WEBER, *supra* note 8, at 41.
[264] *See* THE LOGOS ESSAY, *supra* note 229, at 163.
[265] *See id*. In addition to designating the association's property, the enacted Order will specify: the types of action that the association shall be authorized to execute, the persons ("Executive Bodies," *Vereinsorgane*) to whom such action shall be attributed, and the consequences that such action shall have for the association; the Executive Bodies with responsibility for managing the association's property, and the way in which such management is to be conducted; which services the parties to the association shall provide; which actions by associates are permitted, prohibited, and permitted; and the "gains" (*Vorteile*) that associates might anticipate as a result of their participatory investment in the association. Finally, the enacted Order will specify which Executive Bodies shall be given the capacity to enforce the stipulated Order, under which conditions, and by which means (the "Enforcement Instruments," *Zwangsapparat*). *See id*.
[266] *See id.*
[267] *See id*. at 163-65.

example of such a variant on Associational Action is the monopolistic "cartel," which is an association of independent business entities.[268]

As an association of independent entities, the cartel has no staff.[269] Moreover, its common Order may be relatively limited, merely specifying a litany of prescribed or proscribed actions (*e.g.* prohibiting the lowering of prices).[270] Nevertheless, because its monopoly power depends on a limitation of the number of participants, thereby ensuring exclusivity in relation to valued resource(s) and keeping prices high, the "cartel" is an example of a "closed" association.[271]

Closure against additional participants can occur in associations characterized by mutual orientation to an explicitly agreed-upon Order, and in associations characterized by Consensus (action oriented "as if" there were an agreed-upon Order).[272] What matters is the fact that in both cases there is closure against additional participants, thereby creating a *de facto* monopoly vis-à-vis valued resources.[273]

In the case of a "syndicate," there is some degree of ongoing association among otherwise-independent business entities, thereby creating an ongoing monopoly, *i.e.* an ongoing closure against additional participants vis-à-vis valued resources.[274] It is this continued existence in time that distinguishes the syndicate from the cartel, according to Weber.[275]

An ongoing monopoly, enabled by ongoing associational closure against outsiders vis-à-vis valued resources, will involve some minimal delineation of rules as to what is prescribed, permitted, or prohibited for participants. Therefore, an Order will be to some degree articulated, and an organizational structure will be to some degree created, but this may remain ad hoc rather than being systematized. Wherever this ongoing closure against additional participants persists, accompanied as this is by an ad hoc Order, the resulting syndicate association will have *de facto* property (*Vermögen*), often quite extensive.[276]

The syndicate is a variant of Associational Action characterized by a lack of staff and an ad hoc Order. An even more extreme variant is an isolated, rational exchange (*Tausch*) of goods.[277]

The exchange is isolated in the sense that it occurs only one time, and in the absence of any explicit or implicit agreed-upon Order, let alone a staff to enforce the Order. There is thus no ongoing "Associational Action" at all. Nevertheless, even in this extreme case, Weber argued that, at a minimum,

---

[268] *See id*.
[269] *See id*.
[270] *See id*.
[271] *See id*. at 163-65, 172.
[272] *See id*. at 172.
[273] *See id*. at 172.
[274] *See id*. at 163-5, 172.
[275] *See id*. at 165.
[276] *See id*. at 163-5, 172.
[277] *See id*. at 164-5.

the parties to the exchange will be making an implicit agreement as to what is prescribed, prohibited, and what is permitted.[278] Thus, to a very limited extent, an Order will be emergent from the exchange.[279] What is prescribed is the transfer of the exchanged goods, and possibly also the obligation to guarantee the continued possession of the transferee(s) against interference by third parties. What is prohibited is the taking-back of possession by the transferor. What is permitted is the complete and discretionary exercise of powers of control (*Verfügung*) over the goods exchanged.[280]

The isolated exchange does not create an ongoing association between the parties. An exchange of goods does not result in the emergence of an "enduring structural entity" and therefore it is neither "autocephalous" nor "heterocephalous": there is no structural entity, and therefore there can be no organizational "head" (*cephal*, from the Greek word for head).[281] The exchange may occur within the context of a broader associational Order, and thus be "heteronomously ordered," as in the case of the "Market" (*Markt*).[282] Or in an extreme case it may be exclusively ordered by the bi-lateral expectations of the parties, based on each party's "trust" (*Vertrauen*) that the other party will behave in accordance with the limited Order emergent from their agreement (autonomously ordered).[283]

The important point, however, is that in both cases (heteronomous and autonomous exchange), the exchange is characterized by an implicit orientation to the action of third parties, parties external to the parties' explicit orientation to one another.[284] This renders the exchange a case of Consensus: while there is at least an implicit agreed-upon Order between the parties to the exchange, there is no such agreed-upon Order in relation to third parties, at least in the case of the autonomously ordered exchange.[285]

In the case of the autonomously ordered exchange, the parties to the exchange assume an "as if" Order in relation to third parties. In other words, their social action is a case of Consensual Action.[286] At a minimum, the "as if" Order enables the parties to the exchange to orient themselves to the expectation that third parties will respect the transfer of possession (*Besitzwechsel*) that comprises the heart of the exchange.[287] In most known historical cases, however, the exchange is heteronomously ordered by some

---

278 *See id*.
279 *See id*.
280 *See id*.
281 *See id*. at 165. *See also* WEBER, *supra* note 8, at 48-50.
282 *See* THE LOGOS ESSAY, *supra* note 229, at 165.
283 *See id*.
284 *See id*.
285 *See id*.
286 *See id*. This is a category to which Weber didn't refer in the 1920 Manuscripts.
287 *See id*.

type of organized social relationship, the enforcement apparatus of which provides an external guarantee against interference by third parties with stable possession of the goods exchanged.[288]

Stable possession of goods, then, is necessary to exchange of goods. This stable and reliable possession is enabled by the existence of Consensual or Associational Action, corresponding to an "as if" or actual Order, which is "in force" by virtue of the enforcement apparatus of some type of social community, or at a minimum is assumed by the parties to an isolated exchange.

From this brief exposition in the 1913 Logos Essay, we already see the basic outlines of Weber's sociological theory of property. Property – here addressed primarily in terms of stable possession of goods in exchange and the designated property of an intentional association (*Zweckverein*) – depends upon "Ordered" social closure, *that is*, closure of a social relationship against additional participants vis-à-vis valued resources, which occurs as a result of shared orientation to an explicit or implicit Order. Significantly, Weber argued that this theory holds true even in the case of isolated exchange. Either the exchange is heteronomously ordered (in which case there is an Order imposed from outside the exchange) or the exchange is autonomously ordered (in which case there is an "as if" Order). But either way the parties exhibit patterns of directedness in meaning through patterns in the formation, maintenance, and closure of social relationships vis-à-vis one another, third parties, and valued resources.

An Order is an (inferred) pattern of directedness in meaning that organizes the formation and maintenance of communal and associative social relationships, and that directs their closure vis-à-vis valued resources. An Order therefore guides and legitimizes the "organized social closure" that enables the formation and persistence of exclusive "rights and obligations" vis-à-vis things, which is characteristic of property. Property and organized social closure are two sides of the same phenomenon.[289] And both are enabled by mutual orientation to an Order.

C. Refining the Theory: The Role of an Order in Organized Social Closure

In a manuscript titled "*The Economy and the Orders*," Weber expanded on the relationship between social action and Order, and on the distinction between two types of "Order": (1) that which is legally correct according to the principles and logic of jurisprudence (the "Formally-Correct Legal Order"), versus (2) that which individuals acting in relation to one another vis-à-vis valued goods and

[288] *See id*. at 172.

[289] The implication is striking: everywhere organized social closure exists, property will exist. The property may not be individual, and it may not be analogous to "ownership," but there will at least be stable possession of objects.

services subjectively regard as being in force and therefore orient themselves to (the "Empirically-Valid Legal Order"), with the result that patterns of stable possession and exchange emerge.[290]

Weber defined the "Economic Order" (*Wirtschaftsordnung*) as the empirically-observable Order that emerges from (*i.e.* is conditioned by) two distinct factors: (1) the Consensus-based distribution of *de facto* "powers of control and disposal" (*Verfügungsgewalt*, hereinafter "Dispositional Powers") over goods and economic services, and (2) the ways in which such goods and services are used as a result of these *de facto* Dispositional Powers.[291]

Weber's primary goal in this manuscript was to show how, and to what extent, the Empirically-Valid Legal Order impacts the Economic Order.[292] He also discussed various sources for the principles, rules, and concepts (*Normen*) that comprise and supplement the Empirically-Valid Legal Order in a particular community, including Conventions, Customs, and Usages, as well as ethics and religion.[293] Whatever these sources might be, the crucial attribute of all principles, rules, and concepts comprising the Empirically-Valid Legal Order is the existence of some type of enforcement mechanism, whether this be a formally-designated staff or the threat of kinship-vengeance.[294]

According to Weber, the Empirically-Valid Legal Order may impact an individual's "interests" (*Interessen*) in a number of ways.[295] Of particular importance to the economy, however, is the way in which the Empirically-Valid Legal Order impacts the individual's calculation of his chances of stably keeping economic goods under his possession and control (*Verfügung*), or of acquiring such possession and control under given conditions in the future, *i.e.* of maintaining and/or acquiring Dispositional

---

[290] *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY 11-40 (edited and translated in part by Max Rheinstein 1967) (hereinafter "WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION)"); Weber, *supra* note 8, at 311-38.

[291] *See* WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION), at 11-16. This concept of Dispositional Powers is crucial to Weber's economic sociology, and to the connection that he drew between law and the economy. This comes through with striking clarity in Chapter 2 of the 1920 Manuscripts, where Weber wrote as follows:

> It is essential to include the criterion of [Dispositional Powers, *Verfügungsgewalt*] in the sociological concept of economic action, if for no other reason than that at least a modern market economy (*Erwerbswirtschaft*) essentially consists in a complete network of exchange contracts, that is, in deliberate planned acquisitions of [Dispositional Powers]. *This, in such an economy, is the principal source of the relation of economic action to the law.* But any other type of organization of economic activities would involve some kind of *de facto* distribution of [Dispositional Powers], however different its underlying principles might be from those of the modern private enterprise economy with its legal protection of such powers held by autonomous and autocephalous economic units.

WEBER, *supra* note 8, at 67 (emphasis added, endnote removed).

[292] *See* WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION), *supra* note 290, at 11-40.

[293] *See id*; *see also supra* note 247.

[294] *See especially* WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION), *supra* note 290, at 25, 39.

[295] *See id*. at 15 et seq.

Powers.[296] Indeed, Weber argued, the manipulation of such calculable chances is often what lawmakers have in mind when they manipulate the Formally-Correct Legal Order.

When the Formally-Correct Legal Order is manipulated and therefore changed, to the extent that it is Empirically-Valid by virtue of enforcement, Weber argued that it can impact individual calculations as to chances of maintaining and/or acquiring Dispositional Powers in two possible ways: (1) as an unintended-effect (*Reflexwirkung*) of the principle created or manipulated (the articulation of "Objective Law"), or (2) as a result of the intentional creation of "Subjective Rights."[297] The existence of these Subjective Rights means that the individual has certain calculable chances of invoking the enforcement powers provided by the relevant social community – *e.g.*, the political community – in order to protect and enforce her Dispositional Powers.[298]

For Weber, it was very important that social science (sociology and economics) focus on the empirical validity of law, especially the way that this validity impacts the individual through his calculation of chances of protecting or acquiring Dispositional Powers.[299] He sharply criticized Stammler for confusing the Formally-Correct Legal Order with the Empirically-Valid Legal Order.[300] In order to facilitate the disentanglement of the Formally-Correct Legal Order from the Empirically-Valid Legal Order, Weber redefined certain crucial legal categories – possession and obligation – into their "economic" forms. "Possession" (*Besitz*) in this narrow "economic" sense means simply that the possessor can count on a lack of interference with his control (*Verfügung*) over the thing possessed.[301] An "exchange" of goods means that this control has been transferred, with the expectation that a roughly equivalent control over a different good will be provided in return.[302]

Weber nonetheless continued to argue that the Formally-Correct Legal Order significantly, if indirectly, impacts the Empirically-Valid Legal Order. In the 1920 Manuscripts he stated flatly that the importance of a legal order enforced by the "state" for the modern Economic Order, including the enforcement of proprietary possession (*Besitz*) and contractual exchange, cannot be overestimated.[303] He was also insistent, however, that the Formally-Correct Legal Order not be treated as exogenous; the

---

[296] *See id*.
[297] *See id*. at 15-16. Weber significantly elaborated on this and related points in later sections of his sociology of law. *See id*. at 44, 98-197; *see also* WEBER, *supra* note 8, at 644, 666-752.
[298] *See* WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION), *supra* note 290, at 15-16.
[299] *See id*. at 28-9.
[300] *See id*.
[301] *See id*.
[302] *See id*.
[303] *See* WEBER, *supra* note 8, at 65, 67-8.

Formally-Correct Legal Order is impacted by economic and cultural changes, albeit through processes mediated by the culture of the legal profession and the political community.[304]

Beginning with the 1914 Manuscripts, Weber focused special attention on the processes according to which different types of social groupings tend to become closed against additional participants.[305] In the progression of this closure, Weber argued, the tendency is almost always to create some type of Legal Order to govern allocation and use of valued resource(s) that are monopolized by means of the closure against outsiders.[306] When this happens, the social grouping becomes a "Community of Legal Rights" (*Rechtgemeinschaft*), and the participants become "right-bearing associates" (*Rechtgenossen*).[307]

Weber viewed this "enclosure process" as a type of ever-recurring sequence, and as the basis for "Ownership" (*Eigentum*) of land, as well as all types of economically-important monopolies.[308] He granted that the objects monopolized can vary widely – from occupational privileges to natural resources – depending on the technical nature of the objects and the group's opportunities for monopolization.[309] In all such cases, however, group closure results in monopolization vis-à-vis valued resources. By creating monopolized "rights" to valued resources, possessed either by the group as a whole or allocated to individuals within the group, this process results in the "Appropriation" of the valued resources;[310] it is the source of the creation of "property rights," including those characteristic of Ownership.

In the 1920 Manuscripts, Weber clarified his discussion of enclosure processes by contrasting "open" (or "public", *offen*) social relationships with "closed" (*geschlossen*) social relationships.[311] A social relationship may become closed for varying reasons, he argued, ranging from tradition (arising from ingrained habits) to intentional social action (that is, action in which a social actor's use of particular means is explicitly directed to achieving a particular end, which may be either a moral value or a consequentialist-materialist goal).[312] Regardless of how the social relationship becomes closed, however, the key outcome from a closed social relationship is the "monopolistic" control of "appropriated opportunities" (*appropriierte Chancen*), and these appropriated opportunities are defined as "rights" (*Rechte*).[313] "Ownership" (*Eigentum*) emerges where these appropriated rights are transmitted through

---

[304] *See id*. at 29-38, 654-8, 784-808; WEBER, SOCIOLOGY OF LAW (RHEINSTEIN'S EDITION), *supra* note 290, at 61-4, 198-223.
[305] *See* WEBER, *supra* note 8, at 341-43.
[306] *See id*.
[307] *See id*.
[308] *See id*.
[309] *See id*.
[310] *See id*.
[311] *See id*. at 43-46.
[312] *See id*. For Weber's discussion of rational, affectual and traditional forms of social action, see *id*. at 24-6.
[313] *See id*. at 44. In Chapter II, Section 2 of the 1920 Manuscripts, Weber substantially refined the notion of what comprises appropriated opportunities (*Chancen*). He argued that these appropriated opportunities cannot be equated

inheritance, either to individuals or to kinship groups.[314] If the appropriated rights are freely transferable, "free ownership" (*freies Eigentum*) is present.[315]

D. Further Refining the Theory: Different Modes of Appropriation

In both the 1914 and 1920 Manuscripts, Weber argued that the *nature* of the goods or useful services appropriated through monopolization may have extremely important implications for the patterned course of development taken by social-relational groupings, or for a "society" in general. The nature of appropriated goods and services is closely connected to particular "Types of Demand-Satisfaction".[316]

In the 1914 Manuscripts, Weber had emphasized the extent to which the "moveability" of appropriated goods conditions the course of development within political communities.[317] In his final analysis of the processes according to which Appropriation takes place (a discussion that consumes approximately 40 pages in Chapter 2 of *Economy and Society*), Weber focused instead on historical differences in the degree to which the services of particular offices are appropriated, *i.e.* the extent to which an individual might have property-related "rights" to a particular job-related position in society, or the extent to which he and his labor services might be the property of another person.[318] What is appropriated here is a labor position, or labor services, and therefore this type of Appropriation is closely connected to the division of labor in society.[319] Corresponding to this type of Appropriation, Weber argued is a second type, characterized by the ways in which the "material means of production" are appropriated within a socio-relational grouping.[320]

The ways in which both types of Appropriation (Appropriation of labor services and Appropriation of the material means of production) are conducted and proceed in their course of development have enormously significant implications for an economy, and the society within which it is ordered and structured.[321] To use Weber's earlier terminology, particular modes of Appropriation produce characteristic types of Economic Order, *i.e.* characteristic types of Dispositional Power allocations within a society.

---

to the tangible or intangible "things" from whence they arise. Rather, it is the specific ways in which these things are (or can be) put to use, their "useful services" (*Nutzleistungen*) that are the "opportunities" they present. *See id*. at 68-9.

[314] *See id*.
[315] *See id*.
[316] *See id*. at 351-54.
[317] *See id*.
[318] *See id*. at 114-50.
[319] *See id*.
[320] *See id*.
[321] *See id*.

Moreover, through their influence on Dispositional Power allocations within a society, distinctive types of Appropriation differentially impact the ways in which valued goods and services may be used to achieve particular economic goals. In other words, differing types of Appropriation result in (1) differing types of Dispositional Power allocations, and (2) differing Types of Demand-Satisfaction within a society.

In the 1920 Manuscripts, Weber drew a distinction between two economic purposes for which appropriated Dispositional Powers over goods and services might be acquired and used: (1) administration and consumptive sustenance of a "budgetary unit" (Householding, *Haushalt*), and (2) acquisition of additional Dispositional Powers (Profit-Earning, *Erwerben*). These correspond to differing methods of valuing the Dispositional Powers available, and differing ways of regarding the total value available for use over a given period of time. For the budgetary unit, this total value is its "property" (*Vermögen*).[322] For purposes of Profit-Earning activity, this total value is the available "capital" (*Kapital*).[323] These differing conceptions of the total value of Dispositional Powers over goods and services correspond to differing types of economic action, according to Weber.[324]

To summarize, then, there are multiple distinct modes of Appropriation, modes that are influenced by the material nature of what is appropriated at the same time that they are influenced by the Order to which the appropriating members of a social relationship orient themselves in structuring their relationship. Culture, social structure, and materiality are all in play in this complex story of Appropriation. Distinct modes of Appropriation, in turn, have vastly differing economic effects within society, effects that manifest themselves in differing allocations of Dispositional Power and differing modes of Demand-Satisfaction. Furthermore, distinct modes of *valuing* appropriated goods and services (as household "property" or as profit-earning "capital") contribute to economic effects by influencing the way these goods and services are used.

This is a rich and nuanced theory of the economy and of social relationships, a theory that addresses these social phenomena in each of their three crucial dimensions: structural, material, and symbolic. It is a sociological theory of property, one that enables explanations of structural states *and* dynamic processes, a theory that is capable of addressing property-relations and their implications in a moment of time, and across time.

---

[322] In this section of the 1920 Manuscripts, Weber references legal distinctions between "ownership" (*Eigentum*), possession (*Bestiz*), and the broader category of "property," while imputing to these distinctions his own economic-sociological content. This is hard to see in the English translation, however. In a note, Weber clarified the distinction between ownership and property: although both involve appropriated opportunities with respect to tangible and intangible things, the key to "ownership" is the existence of a legal order that guarantees stable possession and transfer across generations through inheritance. *See id*. at 87, 89.

[323] *See id*. at 86-100.

[324] *See id*.

E. Topics for Further Research: The Relationship to Domination and Class

A question that has already been foreshadowed in this article concerns the relationship between Weber's theory of property, on the one hand, and his theories of Domination and class, on the other. Before concluding, I will briefly survey Weber's discussions pertaining to this question, leaving fuller treatment to a later date.

In both the 1914 and 1920 Manuscripts, Weber drew a clear distinction between Appropriation and Dispositional Powers, on the one hand, and Domination (*Herrschaft*) on the other hand.[325] He nevertheless repeatedly noted that these may be closely connected in concrete reality. In his manuscript addressing the relationship of *Domination and Legitimacy*, Weber stated that "control (*Verfügung*) over economic goods, *i.e.* economic power (*Macht*), is a frequent, often fully-intended consequence of Domination, as well as one of its [Domination's] most important means."[326] Nevertheless, he went on to state that, while the uneven distribution of economic power rooted in Appropriation may contribute to Domination and result from Domination, such economic power should be analytically distinguished from Domination.[327]

In the 1920 Manuscripts, Weber defined Domination as "the probability that a command with a given specific content will be obeyed by a given group of persons."[328] Domination is thus connected to the giving of rules for action, and therefore to a hierarchically-structured Order in the sense described in the *Logos* Essay.[329] Logically, it would seem that in any case where a closed social relationship has resulted in an Order that is enforced by a person or persons in authority, *i.e.* in any case where an "Organization" in Weber's sense has emerged,[330] both Domination and Appropriation will be present, at least to some extent.

This logical implication is borne out by Weber's multiple discussions of Domination. An Organization can embrace everything from the patriarchal household (with the *pater* as owner and authority) to the patrimonial "manor," feudal "fiefs" and "benefices" – distinctive types of Domination rooted in a *Grundherr's* Appropriation and distribution of both land *and* authority – and on to modern bureaucratic "states" and corporations, with their characteristic patterns of Appropriation and Domination.

---

[325] "Domination" is the conventional translation for Weber's *Herrschaft*. However, it is interesting to note that Weber's teacher Theodor Mommsen approved the English "sovereignty" as the translation for that term. *See* THE HISTORY OF ROME, BOOK I: THE PERIOD ANTERIOR TO THE ABOLITION OF THE MONARCHY, Chapter 1 (William Purdie Dickson translation 1894). This translation, especially Book 1, is particularly valuable because Mommsen reviewed it, made comments on it, and approved its final version. *See id., Translator's Preface*.

[326] *See id*. at 942.

[327] *See id*. at 942-46.

[328] *Id.* at 53; *see also id*. at 212-301, 941 et seq.

[329] *See supra* note 249 and accompanying text.

[330] *See* Weber, *supra* note 8, at 48-50.

Thus, while ownership of another's labor and person (*i.e.* slavery) may be the most intuitive area of overlap between Appropriation and Domination, this overlap is bound to occur in a much wider variety of cases, as Weber's explications reveal.[331]

Turning finally to Weber's concepts of "class" and "status," we see that he draws a direct connection between these phenomena and property. Property is frequently discussed in the outline concerning "Status Groups and Classes" in the 1920 Manuscripts,[332] and it is a dominant theme in the "Class, Status, Party" essay of the 1914 Manuscripts.[333] Indeed, one of Weber's three ideal types of class is defined by the possession of valued goods and services: it is labeled a "possessory-class" (*Besitzklasse*).[334]

Weber's "classes" are not communities, social relationships, or groups; rather, they are defined by a shared "class situation."[335] A shared class situation is a common set of conditions that is, in whole or at least in part, determined by shared rights and privileges with respect to the use, possession or ownership of property; this shared set of property-related conditions, in turn, produces a shared set of limitations on the possibilities for social action.[336] "Possession and lack of possession (*Besitzlosigkeit*) are, therefore, the basic categories of all class situations," Weber bluntly stated.[337]

Even status – a claim to social esteem based on education or inheritance – can rest on the "monopolistic Appropriation" of opportunities for acquisition; ironically, however, status can also rest on the abhorrence of such opportunities.[338] Status groups may arise out of shared possessory-classes.[339] More importantly, however, because it is a basis for communal identification, status can be a motivating-force for the organized closure of a social relationship.[340] In such a case, status is a causal factor in the emergence of property. The "goods and services" around which a status group might close ranks would include such personal attributes as "honor" and "cultural prestige," or certain privileged activities (*e.g.*

---

[331] The overlap comes into striking focus when one compares Weber's discussions of Appropriation and Domination. *See id*. at 114-50, 212-301, 941 et seq. These logical and empirical areas of overlap between Appropriation and Domination are further reinforced by the intriguing semantic connection noted previously (see note 217 and accompanying text): the Latin word for "ownership" (*dominium*) is the same as that used for mastership or lordship. The "lord and master" (*dominus, Herr*) is he who possesses both ownership and authority (*dominium, Herrschaft*) over the household and its members.

[332] *See* WEBER, *supra* note 8, at 302-7.

[333] *See id*. at 926-39.

[334] *See id*. at 302-7.

[335] *See id*. at 302, 927-32; *see also supra* note 243.

[336] *See id*. at 927-8.

[337] *Id*. at 927.

[338] *See id*. at 305-7, 935-6

[339] *See id*. at 305-7, 932-9. In his outline in the 1920 Manuscripts, Weber stated that "[s]tatus groups are often created by possessory-classes." *Id*. at 307.

[340] *See id*. at 305-7, 932-9; *see generally* 941-1110. Where status privilege is tied to rulership "rights," as in the case of *honoratiores*, we again see the overlap between property and Domination in Weber's theoretical framework. *See, e.g.*, 948-52.

wearing special clothes or performing an occupation). These are historical cases that Weber actually describes.[341]

While some may find the concept of property stretched too far by considering "honor" or "prestige" in such terms, it is worth remembering that "rights" to honor and reputation still exist in enforceable forms in contemporary society. Cases relating to defamation and libel, and to other personal intangibles like privacy, are regularly countenanced in U.S. courts. And even if they aren't treated exactly like property, astute commentators have noted intriguing parallels to property.[342]

Having now surveyed Weber's sociological theory of property, and having briefly explored its close connections to his theories of Domination and class, it is appropriate to conclude.

V. Conclusion

Max Weber died on June 14, 1920. "The earth had changed," his wife Marianne wrote in the last line of her husband's biography.[343] And it is true that the political, social, and academic worlds have dramatically changed in the 90 years since Max Weber's death. The academic fields to which Weber directed his attention (sociology, economics, law, political science, public administration, history, and religious studies) are far more divided now than they were in his time. The German nation-state that Weber so passionately defended has only recently begun to fully recover from the moral and political depths to which it sank after his death. And technological innovations have wrought enormous changes in communication and social interaction. In short, the social, economic, and political "life-worlds" of today are vastly different from those that Weber experienced.[344]

And yet, I hope to have persuaded the reader that Max Weber's sociological theory of property has much to offer to the sociology, law and economics of today. Richard Swedberg has drawn recent attention to Weber's "economic sociology of law."[345] I wish to complement that project by drawing attention to Weber's sociological theory of property, a theory that is richly-informed by Weber's knowledge of law and his economic-historical research.

---

[341] *See id*. at 305-7, 932-9;

[342] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 5 HARV. L. REV. 193 (1890). Weber considered status-based Appropriation of honor and privilege to be generally hostile to the "hard bargaining" that characterizes a free market. *See* WEBER, *supra* note 8, at 937. We can see the parallels in today's privacy and reputation "rights": in most cases, these are not rights that people are interested in exchanging. The case of celebrity endorsements is a clear exception.

[343] *See* MARIANNE WEBER, *supra* note 110, at 698.

[344] The concept of a "life-world" is borrowed from Alfred Schutz, who in turn borrowed it from Edmund Husserl. *See, e.g.*, ALFRED SCHUTZ, ON PHENOMENOLOGY AND SOCIAL RELATIONS (Helmut R. Wagner ed. 1970).

[345] *Max Weber's Contribution to the Economic Sociology of Law*, 2 ANN. REV. L. & SOC. SCI. 61 (2006); *The Case for an Economic Sociology of Law*, 32 THEORY & SOC. 1 (2003).

In tracing the developments of Weber's thought in relation to property, I hope to have contributed to an "interpretive understanding" of his sociological theory of property. By the time of his death, that theory was fully developed in a form that includes dynamic and structural elements, accounting for both materiality and "ideality" in economy and society. I believe that Weber's sociological theory of property stands ready to be utilized in understanding and explaining contemporary developments in property, particularly the phenomenon that may be the "great transformation" of our time: the emergence and expansion of "intellectual property."

Weber began his scholarly work with a definition of property that is strikingly similar to the "bundle of rights" definitions so commonly used by contemporary law and economics scholars.[346] Passing through the phases described in this article as "legal" and "economic-historical," and borrowing richly from them, Weber completed his investigations of property in his sociological phase. By the end of his life, he had articulated a sociological theory of property, one that "endogenizes" property as a social phenomenon by explaining its social conditions and its social effects.

According to this theory, property's social conditions are minimal and pervasive, while varying enormously in their concrete manifestations and courses of development. These social conditions are (1) the organized social closure of social relationships, which is (2) enabled by a valid Order. Property's social effects depend on a greater number of conditions, which again vary significantly in their concrete manifestations. These conditions include: (1) the modes of enforcement and the inferred content of the Order (the concepts, rules, and principles comprising the Order), (2) the organized structure(s) of social relationship(s), (3) the number of co-existing organized social relationship and their modes of interaction, (3) the nature of the goods and services appropriated, and (4) the modes according to which appropriated goods and services are valued (household property or profit-earning capital).

Organized social closure is a necessary, social condition for the existence of property, according to this theory. Preeminent historical examples of this Weberian organized social closure are corporations, cities, guilds, and nation-states. In describing the distinctive social-relationship patterns characteristic of these organizations, as well as their distinctive patterns of development, Weber laid a foundation for his work in *Economy and Society*. That foundation began with his dissertation and ended with his lectures on *General Economic History*. That *Economy and Society* is riddled with references to property-related concepts is therefore no accident: from beginning to end, property rested at the heart of Weber's scholarly work in law, economic history, and sociology.

Weber viewed the economy as being "embedded" within society, *in the sense that* economic action is influenced by the patterns of directedness in meaning (*i.e.* culture), the relationship-structures,

[346] *See supra* notes 48 and 100 and accompanying text.

and the material realities comprising the broader society within which that economic action takes place.[347] Occupying its position as part of the Formally-Correct Order – and thereby impacting the Empirically-Valid Order – law influences patterns of directedness in meaning, social relationship structures, and their courses of development through history. Property – which is, from this perspective, an indirect creature of law, but which can exist in *de facto* forms without law (or in spite of it) as a result of organized social closure oriented to an "as if" Order – connects meaning and structure to material reality. Valued objects, most of which have come from the material world, are used, possessed, and/or "owned," and this is enabled by socio-relational structures and patterns of directedness in meaning. This use, possession or ownership, in turn, both enables and is enabled by, patterns of power and hierarchy that emerge and expand in socio-relational structures.

Economists and sociologists are reawakening to the importance of law. Jurists have sophisticated theories of property, but these are not typically based in social science. As a jurist and socio-economic theorist whose lifework continually returned to the theme of property, Weber stands poised to help answer the need for a theory of property that can address that phenomenon in all of its dimensions: social, economic-historical, and legal; structural, material, and symbolic.

[347] *See and compare* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985); Greta R. Krippner & Anthony S. Alvarez, *Embeddedness and the Intellectual Projects of Economic Sociology*, 33 ANN. REV. SOC. 219 (2007). Mark Granovetter's influential use of the term "embeddedness" drew inspiration from Karl Polanyi's *Great Transformation*. *See supra* note 218.