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FORMALITY, NEUTRALITY, AND GOAL-RATIONALITY: THE LEGACY OF WEBER IN ANALYZING LEGAL THOUGHT*

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ABSTRACT

This paper takes issue with Chambliss and Seidman's thesis that the process of appellate decision-making is primarily value-laden.*** Using Weber's typology of legal thought and his distinction between value and goal-rationality, a theoretical framework is advanced to analyze judicial reasoning. The viability of this framework is demonstrated when it is applied to a particularly strategic capital punishment case. Personal values are not nearly so important as judicial perceptions of formal rules about how to proceed. Legal analysis seeks to separate the challenged legal means designed to achieve governmental objectives from those governmental ends in a goal-rational way. For the most part, this avoids imbuing argumentation with the value questions inherent in the objectives. Empirical data are not used as readily as Chambliss and Seidman suggest, and when they are, means/ends distinctions are maintained. The problem of legitimation and some of Chambliss and Seidman's extra-legal inputs are then examined to see why judges are constrained to follow formal, neutral, and goal-rational lines of argumentation where law remains the polestar for decision-making.

I. INTRODUCTION

In their now classic analysis of appellate courts, Chambliss and

* Special thanks to Charles W. Thomas, Marcia Radosevich, and Ronald L. Akers for useful suggestions and criticisms of earlier drafts of this manuscript. Their comments are appreciated and, hopefully, accurately reflected in this manuscript. The flaws remaining are of my own making and should not be attributed to them.

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Seidman argue that courts are engaged in rule-making activities, especially when presented with so-called "trouble cases."[1] Trouble cases reflect disputes about which legal norms should be applied and represent instances where the purported self-contained logical system of law fails to provide a clear rule to guide decision-making. Judges, therefore, are forced to go outside the law for direction. Chambliss and Seidman adopt a conflict orientation to appellate decision-making and argue that considerations or inputs in addition to permissible rules of law—such as the wealth or status of interested parties, socialization and attributes of judges, organizational pressures and concerns, and informal political and situational factors—operate to determine new rules that favor certain outcomes and groups over others.[2] They conclude that decision-making is necessarily value-laden despite official pronouncements of value-neutrality.

The present purpose is not to challenge the validity of Chambliss and Seidman's conclusion. One need only to examine the doctrine of standing to litigate to appreciate how rules that are completely judge-made serve to restrict potential inputs, thereby limiting potential outcomes in ways that favor some interests and values over others.[3] Yet the Chambliss and Seidman conclusion is almost a truism: the courts deal with normative phenomena so any dispute settlement will favor one position over others. Their more significant formulation of the problem

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[1] W. CHAMBLISS & R. SEIDMAN, LAW, ORDER AND POWER 85-89 (1971).

[2] *Id.* at 89-113.

[3] In an unpublished, and now somewhat dated manuscript, applying Chambliss and Seidman's specific propositions, *see* CHAMBLISS & SEIDMAN, *supra* note 1, at 113, to the law of standing, I argued that standing is a judge-made rule that "becomes an integral part of the decision-making structure itself." Lanza-Kaduce, The Footing of Standing: The Historical Development and the Functional Relevance of the Federal Standing Doctrine 65 (July, 1976) (unpublished manuscript). Standing serves to limit the range of issues and inputs in appellate decision-making. For example, standing to secure judicial review is usually denied litigants whose interests are common to all citizens, U.S. v. Raines, 362 U.S. 17 (1960), and is severely restricted in taxpayer lawsuits regarding federal expenditures; Degee v. Hitchcock, 229 U.S. 162 (1913); Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); U.S. v. Richardson, 418 U.S. 166 (1974); Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1922). Yet some areas are granted judicial preference; federal taxpayer suits seeking to vindicate the Establishment Clause of the First Amendment are permitted. Flast v. Cohen, 392 U.S. 83 (1968). The federal standing doctrine may be more restrictive than its counterparts adopted by the states precluding decisions on the merits of some constitutional controversies. *See* Doremus v. Board of Education, 342 U.S. 429 (1952). These kinds of limitations, in turn, predetermine the range of outputs as can be seen in its extreme form in *Richardson* where standing was used to preclude review and rule-defining in the entire area of C.I.A. accountability. I concluded that the standing doctrine, by allowing the court to avoid the merits of controversial constitutional issues which frequently involved other levels or branches of government, contributed to maintaining the organizational position and general legitimacy enjoyed by the Court.

was not to examine the outcomes—which are inevitably value-laden—but the process by which they are decided upon.

Chambliss and Seidman maintain that the formal style of law finding—using law and its internal logical to find and apply law—is only possible for clear-cut (i.e., nontrouble) cases. For trouble cases,[4] they conclude that the system of justification for announcing new rules currently dominant in appellate courts consists of pragmatic legal realism where empirical evidence about the means by which desired ends could be obtained would result in some means being valued over others.[5] Those means thought to be better—like school integration over separate-but-equal institutions to obtain equal protection[6]—are adopted. Thus, legitimation for decision-making in trouble cases is realized through empiricism rather than self-contained legal logic. In the process, however, Chambliss and Seidman argue that the choice of means becomes blurred with legal ends and infused with value considerations. As such, they likened legal thought to what Weber might call "value-rationality:" reasoning where the specification of means is in terms of acting in accord with some absolute value.[7] In the above example, they would argue that both integration (the means) and equality (the legal end) were given moral value.[8]

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[4] "Trouble cases arise because either . . . [there is] disagreement about the formulation of the rule of law . . . [or] the content of the applicable rule is subject to doubt." CHAMBLISS & SEIDMAN, *supra* note 1, at 87.

[5] *Id.* at 135-45.

[6] *Id.* at 137-38.

[7] M. RHEINSTEIN, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 1 (E. Shils & M. Rheinstein trans. 1954).

[8] As it turned out, Chambliss and Seidman selected an unusually complex example to illustrate their claim—one that has not worked out consistently with predictions derivable from their position. It seems incongruous that integration has meant busing which has led both to more (albeit de facto) school segregation through white flight and to disputes about gains in educational achievement. *See* J. COLEMAN, S. KELLY, & J. MOORE, TRENDS IN SCHOOL SEGREGATION 1968-1973 (1975); Coleman, *Liberty and Equality in School Desegregation*, 6 SOC. POL. 9 (1976); Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROB., Summer 1978, at 17; Rossell, *School Desegregation and Community Social Change*, 42 LAW & CONTEMP. PROB., Summer 1978 at 133. If Chambliss and Seidman's emphasis on pragmatic legal realism were generally correct, the court could have already reversed itself about forced busing based on new findings. The Weberian analysis outlined in the following pages may suggest why the Court has been reluctant to do so. At the risk of getting the cart ahead of the horse, let me try to explicate briefly.

Integration (implemented by forced busing after Swan v. Charlotte-Mecklenburg County Board of Education, 402 U.S. 1 (1971)) became the means selected to achieve equal protection of the law. Separate-but-equal schools were shown to be inadequate to achieve this end. Brown v. Board of Education, 347 U.S. 483 (1954). To this extent, Chambliss and Seidman's emphasis on empirical information was accurate. But as will be developed, the use of social science information is the exception rather than the rule in legal argumentation. *See also* Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. LIT. CRIM. 1667 (1981). Importantly, busing was imposed by the courts only upon a finding of de jure discrimination—de facto educa-

The purpose of this paper is to explore further the process of judicial reasoning and to argue, contrary to Chambliss and Seidman, (1) that empiricism and the formal style of reasoning with its heavier emphasis on Weber's "goal" or "purposive rationality" (clear specification of means so that values are only linked to ends) can coexist,[9] (2) that pragmatic legal realism is not necessarily the dominant mode of legal thought,[10] and (3) that legal argumentation may be more goal-rational and value-neutral and less value-laden than is commonly believed even if legal outcomes are not.[11] To do so, a "trouble case" on capital punishment will be analyzed to illustrate how judges present remarkably value-free and formal rationales for their decisions.

Before beginning, it is important to state explicitly a limitation inherent in using case analysis to infer about decision-making processess. Formal court opinions may or may not reflect how the decisions were

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tional inequalities have never been actionable under the fourteenth amendment. Milliken v. Bradley, 418 U.S. 717 (1974), confirmed this when the Court refused to order inter-district busing that included white suburban districts because de jure discrimination had not been established in these outlying districts. Busing, then, is a means to remedy a vary narrowly defined equal protection problem—de jure school segregation. The nearly complete closure in legal thinking does not permit busing to be linked to de facto or institutionalized discrimination or to the general quality of education where de jure segregation had not occured. A precise Weberian specification of means and legally established goals would anticipate this constraint and would not recognize the centrality of white flight *see* United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972), or unimproved academic performance in combating any de jure segregation of schools found to exist. The blurring of means with ends to which Chambliss and Seidman referred has occured more often off the bench as on it. *Cf.* Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEM. PROB. Autumn 1978, at 86. Academicians, politicians, and social scientists have infused the policy debate with these substantive but largely extra-legal concerns—perhaps because they do not appreciate the unique character of legal thought.

9 M. RHEINSTEIN, *supra* note 7, at 1.

10 *See also* Dorin, *supra* note 8, who reviews what appears to be deliberate judicial avoidance of social science information about discrimination in executions for rape.

11 My intent is not to engage in the multifaceted debate about what Weber or others precisely mean by value neutrality. Following Chambliss and Seidman's lead, CHAMBLISS & SEIDMAN, *supra* note 1, at 2-4, I adopt a very loose approach when I use relatively "value-neutral" or "value-free" (as opposed to "value-loaded" or "value-laden"). Readers should not equate my comments with any highly specialized formulation of this elusive term of art. I basically adopt the counterpoint to Chambliss and Seidman's claim of value-loaded court structures. I mean that legal concerns are paramount to appellate decision-making and that the argumentation of appellate judges is mostly impartial, neutral, and unbiased by personal considerations. Chambliss and Seidman, of course, stress the opposite view: appellate decision-making is laden with normative considerations over and above the legalities involved. We are all concerned with analyzing the process and form of legal decision-making and our differing approaches reflect only relative differences in emphasis. I argue that court opinions are relatively more goal (as opposed to value) rational and therefore more free from personal value orientations. I argue that empirical information is relied on to a lesser extent and that the most important sources of legitimacy derive from tradition (precedent) and goal rationality (formal rationality) rather than science, although science is occasionally used.

actually made or how the inquiry proceeded. As windows opening on to the decision-making process, they may distort as much as reveal. Indeed, the opinions offered in the cases may be nothing more than after-the-fact rationalizations. Yet it is safe to assume that value neutral and goal rational opinion-writing is a necessary concommitant of more open and neutral inquiry and decision-making. It is unlikely that a justice who decides cases in a highly disinterested, detached, and analytical way would revert to argumentation grounded in personal values in his/her opinion-writing. Therefore, case analysis provides opportunity for a "weak" test of Weber's position. If opinions do not reveal goal rationality, Weber's notions would be challenged in part. However, finding goal rationality does not prove his ultimate accuracy. In other words, goal rationality in legal opinions would be a necessary but not a sufficient condition for value-neutrality in decision-making.

But even if court opinions do not always reflect the actual inquiry and decision-making process but merely package dispute settlement in a more palatable form, case analysis is worthwhile. Court opinions are symbolic statements of law and authority. They provide the *ratio decidendi* and precedent that constrain and influence subsequent legal thinking and decisions about the contested subject matter both in and out of court. In Weberian terms, conduct is "meaningfully oriented" and conforming when actors are cognizant of the rational means to achieve the desired end.[12] Thus, the issue of why judicial argumentation takes the form it does remains of academic interest even if court opinions do not always accurately mirror the decision-making process that produced them. Opinions provide the building blocks and structure from which and within which later decisions are made.[13]

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12 Beirne, *Ideology and Rationality in Max Weber's Sociology of Law*, in MARXISM AND LAW 63 (P. Beirne & R. Quinney eds. 1982). Other modern students of methods of inquiry have noted how past work in learned disciplines shapes future accomplishments. For example, A. KAPLAN, A CONDUCT OF INQUIRY 3-11 (1964) distinguishes a discipline's reconstructive logic (the accounts of how the inquiry proceeded) from the logic-in-use (the actual inquiry employed in the disciplinary advance). Significantly, he notes that "a reconstruction may become, or at any rate influence, the logic-in-use." *Id.* at 9.

13 My inclination is to emphasize this approach to the significance of the ensuing analysis. My earlier review of the standing doctrine, *see supra* note 3, revealed that while precedent and legal argumentation constrained the legal development of standing, its modern scope and utilization were explained better by the latent functions it fulfilled than by the official rationales provided by the Court. Importantly, the resulting doctrine could be related to the Court's organizational interests and its need for legitimacy, another reason to examine the court opinions. The standing study, however, did not look at the form of argumentation but focused only on the outcomes of court opinions.

I also take issue with the detractors of case analysis methodology. I view the alternatives available for examining appellate decision-making as being severely restricted. If we do not use the opinions themselves, we are left with investigative journalism to uncover the "true" reasons for decision-making. While journalistic accounts can bring important information to

Moreover, the form of the argumentation may also be related to other concerns and processes. That is why the last section of this paper will examine such factors or inputs as judicial and legal socialization and organizational interests of the Court, especially its quest for legitimacy, in an attempt to understand why modern legal thought takes the form it does.

It is for this reason that my approach does not refute conflict interpretations of law-making and application; it only requires more sophisticated analysis. No other than Frederick Engels recognized that when

> professional lawyers become necessary, [law] is opened up which for all its general dependence on production and trade, still has its own capacity for reacting upon those spheres as well. In a modern state, law must not only correspond to the general economic position and be its expression, but also be an expression which is consistent in itself, and which does not . . . look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon.[14]

Weber, also, would primarily adopt a conflict orientation although of a more pluralistic nature.[15] Part of the significance of my effort to recast the orientation toward appellate decision-making lies in the shift of focus from looking for malevolent or ignorant judges (who either blatantly seek to oppress the powerless or are too stupid to understand the consequences of their decisions) to examining why reasonably competent and decent people write opinions as they do. Let us turn then, to Weber's theoretical framework.

Weber's distinction between value-rationality and goal-rationality has already been made. There are several other important themes in Weber's work that converge on the problem at hand. First, Weber maintained that ideas and thought at least as much as material conditions provided the important impetus for meaningful behavior or social action.[16] Second, he saw modern societies moving toward increased rationality—more reliance on means/ends thinking resulting in systematic, general abstract rules designed to guide social action.[17] Third,

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light, the scientific weaknesses associated with such a research methodology are at least as great as with case analysis. Ultimately, those who would pierce the official opinions to locate the "real" causes of judicial decisions can never be refuted. Since we cannot get into the judges' minds, we can infer about appellate decision-making only from what we know through their actions and deeds. Their opinions remain an important, even if imperfect, source of data.

[14] K. MARX & F. ENGELS, *Letter to Conrad Schmidt, October 27, 1890*, in LITERATURE AND ART 3 (1947). *See generally* M. CAIN & A. HUNT, MARX AND ENGELS ON LAW (1979).

[15] See Beirne, *supra* note 12, for a Marxian critique of Weber's epistemology and sociology of law.

[16] *See generally* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM, (1948); Beirne, *supra* note 12.

[17] *See* A. GIDDENS, CAPITALISM AND MODERN SOCIAL THEORY 178-84 (1971); J. EL-

Weber was concerned with how rationality as well as charisma and tradition served to legitimate authority.[18] Fourth, he envisioned modern social action as being carried out increasingly in organizations based on rational-legal principles.[19] Fifth, among other things, the rational-legal organization emphasized training and expertise, procedural rules, and impersonal, disinterested fulfillment of the duties of the office.[20] Finally, Weber noted that the legalism of the West was unique, and he offered a typology of legal thought by which to analyze the course of the social actions courts take.[21]

II. WEBER'S TYPOLOGY

Weber's typology of legal thought is based on two major analytic dimensions: rationality versus irrationality and substantiveness versus formality. Rational types of thought are characterized by reliance on abstract rules for finding and applying laws that are reasonably related to case situations. Irrationality indicates a lack of such rules or a lack of reasonable relationship between rules and situations. Substantive legal thought emphasizes legal contents and outcome whereas formal approaches stress process.[22] Figure 1 depicts the basic types of legal thought advanced by Weber and gives an example of the kind of legal system in which the respective types of thought predominate.

An example of substantive irrationality is the Khadi dispute settlement of the desert marketplace where the nomadic lifestyles prevented general legal rules and procedures from being institutionalized. Consequently, litigants from different nomadic bands would bring their dispute to whichever third party leader was presently available. The arbiter of the moment would decide an outcome, guided mostly by reaction to the immediate case, and then return with his people to the desert. If the exact same issue were to come into dispute shortly thereafter, litigants would have to take it to a second judge-for-a-day who was free to decide the case on any grounds he thought meritorious having neither awareness of precedent nor explicit substantive rules to apply. Hence

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DRIDGE, MAX WEBER: THE INTERPRETATION OF SOCIAL REALITY 53-70 (1971); M. RHEINSTEIN, *supra* note 7, at 301-21.

18 *See* M. RHEINSTEIN, *supra* note 7, at xxxi-xxxii, 8-9, 322-37; A. GIDDENS, *supra* note 17, at 156-57; M. WEBER, ECONOMY AND SOCIETY 226 (1968).

19 A. GIDDENS, *supra* note 17, at 178-84.

20 *See* 3 M. WEBER, ECONOMY AND SOCIETY 956-63 (1968); A. GIDDENS, *supra* note 17, at 158.

21 M. RHEINSTEIN, *supra* note 7, at xxxix-lv, 61-64; Beirne, *supra* note 12, at 56-57.

22 *See also* Davis, *Law as a Type of Social Control*, in LAW AND CONTROL IN SOCIETY, 17, 27-28 (R. Akers & R. Hawkins, eds. 1975).

FIGURE 1

WEBER'S TYPOLOGY OF LEGAL THOUGHT

	Irrational (general abstract rules absent)	Rational (general abstract rules present)
Substantive (outcome and rule content emphasis)	Khadi Justice	Marxist States Theocracies
Formal (emphasis on process to analyze the cases)	Ordeals and Oracles	Logical Variant (law as a closed system) Western Liberal Democracies
		Extrinsic Variant (law depends on observable events given legal significance) No clear example

the emphasis was on the justice of case outcomes with no extant rule of law to guide it—substantive irrationality according to Weber.

Case determination via ordeal or oracle represents the formal irrational mode of legal thought. In this instance, stress is placed on adopting the prescribed means, but these means are not realistically related to any abstract end the law is designed to serve. To be sure, the means do produce outcomes but ordeals are not logically or empirically related to general abstract notions of law or justice. Hence, ordeals exemplify irrationality in Weber's scheme.

Substantive rationality in legal thought predominates in those systems where the law is subordinated to a greater ideology or value system so that the contents of legal rules and the outcomes of cases are derived from the dictates of these larger abstract rules or principles. For example, what matters in Marxist states is that legal rules and case outcomes comport with Marxist ideology—procedures are far less important than ideologically correct results. Similarly, in theocracies, judicial decisions stress rules and outcomes that reflect religious dogma. In this type of legal thought, judges find and interpret law by referring to extra-legal ideology so law, while guided by general rules (i.e., rational), would be intentionally value-laden; law nested in a larger value system. Even the

choice of means or procedures would be linked to some absolute value and so it would also be infused with normative meaning.

It is the final form of legalism that Weber saw characterizing the West. Western legal thought was viewed as being rational (guided by general rules) and formal (emphasizing process). By adopting a carefully selected general, abstract process of factual analysis to draw out pertinent unambiguous properties of the facts to guide law application, rule contents and case outcomes would be largely nonproblematic for the courts. Weber conceived of two variants of this formal rationality in legal thought. First, there is the *logical* form where the the rules and procedures of law finding and application are contained within the abstract system of law itself. Here law is viewed as a closed system of logic. Second, there is the *extrinsic* variant where legal thinking still proceeds by emphasizing general procedures designed to attain the ends of law, but there is a reliance on sense data or external observable information to inform the application of law. Law is not seen as a closed system of logic.

Weber saw the logical variant of formal rationality as typifying law in advanced Western nations. Upon closer examination, we can identify three different ways in which modern Western systems find and interpret law in these ideally closed systems of logic. One takes an inductive approach and arrives at the general principle of law to be applied to the case at hand by examining how law was applied in past cases presenting similar issues. The *stare decisis* method emphasizes case precedent and is exemplified by the English Common Law tradition. The second method of law finding is deductive in nature and derives from the Civil Law tradition of the European Continent. Elaborate codes contain nearly exhaustive statutory provisions from which the law is deduced to apply to a particular case. The third approach to logically formal and rational law finding is the constitutional method utilized in the American jurisdiction. Here a few very general rules are contained in a constitution but their application, indeed much of their substance, is determined to a large extent by case precedent. Accordingly, it is a hybrid solution. Regardless of the method, the Western ideal is to look to the law to find and apply the law. Hence, the role of extra-legal value considerations can be minimized.

It is difficult to find a society where legal thought based on extrinsically formal rationality has dominated. The emphasis of this variant is on a rational process to guide legal decision-making, but dispositive features of the process are external to the law. What is emphasized in this extrinsic variant is reliance on "sense data" where readily observable

events are given legal significance.[23] Weber provides examples of extrinsically formal rationality by using things like the legal significance attached to official seals or the execution of a signature. Chambliss and Seidman's recognition of empiricism in judicial argumentation raises the possibility of extending Weber's analysis to all empirical data.[24] Since science can be viewed (as it was by Weber) as being a value-neutral process to collect and analyze sense information to find general, unambiguous characteristics of relevant facts,[25] it provides a formal process extrinsic to law for dealing with trouble cases. Weber anticipated that science would provide knowledge for policy-makers to act upon.[26] This extension of Weber's extrinsic formal rationality is distinguished from Chambliss and Seidman's pragmatic legal realism by the role of goal-rationality. Where science is viewed as value neutral, reliance on formal process would not require the introduction of value considerations into decision-making because means could be separated from value-laden legal goals and the efficacy of means in attaining ends could be evaluated scientifically.[27] This offers the prospect of using science to provide information about how to achieve legal ends. What we would have if this were adopted, would not be a legal realism[28] where legal decisions are understood in terms of social science but a "scientific jurisprudence" where an empirical methodology would provide information to guide legal policy-making.[29]

Ostensibly, extrinsic formal rationality could be invoked in two ways. Either empirical science may be relied on to locate a means by which to attain the legal goal (goal-rationality) only when law's own logical system for finding the applicable rule is incomplete, or empirical data could be employed to review the effectiveness of means already provided for in the law relative to alternatives. For present purposes,

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23 M. RHEINSTEIN, *supra* note 7, at 63.

24 W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 89-113.

25 M. WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 1-47 (1949).

26 *Id.* at 18-19.

27 M. RHEINSTEIN, *supra* note 7, at n.2, explicitly recognized the parallel in Weber between goal-rationality and formal rational legal thought.

28 *See, e.g.*, Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897); Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

29 Beutel, *The Essence of Experimental Jurisprudence*, in R. SIMON, THE SOCIOLOGY OF LAW INTERDISCIPLINARY READINGS, 163-77 (1968); *Cf.* Nonet, *For Jurisprudential Sociology*, 10 LAW & SOCIETY REVIEW 525 (1976); R. POSNER, ECONOMIC ANALYSIS OF LAW 17-19 (2d ed. 1977).

Recently there have been a number of debates on the role of social science in law, including special journal issues dedicated to the problem. *See, School Desegregation: Lessons for the First Twenty-five Years*, (pt. 1), 42 LAW & CONTEMP. PROB., Summer 1978 at 1; *School Desegregation: Lessons of the First Twenty-five Years*, (pt. 2), 42 LAW & CONTEMP. PROB., Autumn 1978 at 1; *Symposium on Empirical Research in Administrative Law*, (pt. 1), 31 AD. LAW REV. 443 (1979); *Symposium on Empirical Research in Administrative Law*, (pt. 2), 32 AD. LAW REV. 1 (1980).

what is important is that extrinsic formal rationality or scientific jurisprudence provides a relatively value-free means of finding and applying law even in those "trouble cases" where Chambliss and Seidman would argue that value considerations are most likely to be interjected. Consequently, Weber provides a scheme by which we can analyze court opinions to see whether they offer relatively value-free (either extrinsic or logical formal legal thought where goal-rationality reigns) or value-laden (substantively rational legal thought with its openness to value-rationality) means for finding and applying the law.

III. LEGAL THOUGHT ON CAPITAL PUNISHMENT

To illustrate the utility of Weber's typology as an aid in understanding legal thought, a capital punishment case was purposively selected for several reasons. First, capital punishment has been and remains a strongly felt, highly controversial subject where the legal battle might very well be waged on the plane of value disagreement. Therefore, it should be particularly difficult for value-free (logically or extrinsically formal) forms of reasoning to dominate in deciding this issue. The clash between values is further exacerbated by whether values are accepted as posited or whether they, too, are objects of rational scrutiny.[30] Second, deciding the constitutionality of capital punishment directly presents the court with the dilemma of whether to stress process (formality) or legal outcome and content (substantiveness). Consequently, issues primarily of formality/substantiveness but also of rationality/irrationality interface in the problem of capital punishment.

The pivotal cases in the official development of legal thought about capital punishment were *Furman v. Georgia* and its companion cases, *Jackson v. Georgia* and *Branch v. Texas*.[31] For the first time, the Supreme Court was willing to review whether the substance of capital punishment statutes was unconstitutional because the outcomes were cruel and unusual punishment in violation of the eighth amendment either in a category of cases like the ones at bar or per se—across the board. The previous eighth amendment attacks before the high court only challenged the methods employed to execute capital felons.[32] Be-

30 See the discussion of positive versus normative approaches to the death penalty in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PENN. L. REV. 989, 1034-42.

31 408 U.S. 238 (1972). The Furman case resulted from a litigation campaign supported by the NAACP Legal Defense Fund, *see* M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

32 Wilkerson v. Utah, 99 U.S. 130 (1878) upheld death by firing squads and *In re* Kemmler, 136 U.S. 436 (1890) found electrocution a permissible method. However, certain methods of punishment (like corporal punishment) have been found to be barbaric and hence unconstitutional in lower courts. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Morales v.

cause the language of the Constitution explicitly stated that no one will be deprived of life without due process of law, it is safe to conclude that the framers of the Constitution accepted capital punishment. However, non-capital cases involving the cruel and unusual punishment clause had at an early time indicated that "evolving standards of decency" was the rule for interpreting the eighth amendment.[33] In *Weems v. United States*, the Supreme Court found that a twelve- to twenty-year prison term previously authorized for falsifying a minor document had become so disproportionate when balanced against evolving standards of decency that it was violative of the eighth amendment. It was also clearly established before *Furman* that eighth amendment protections applied to the states via the fourteenth amendment[34] so the states were not free to exact more severe punishment than the federal constitution would allow.

With this background the nature of the legal thought presented in nine separate opinions issued in *Furman* can be examined. *Furman* provides one of the rare occasions to analyze concurrently the independent reasoning of all nine justices, although each dissenting opinion (except for Justice Blackmun's) was supported by all of the dissenters. Basically, what was successfully challenged in *Furman* was that states permitting complete discretion in sentencing convicted felons to death violated the

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Turman, 364 F. Supp. 166 (E.D. Tex. 1973). Barbarism remains the test for determining the constitutionality of the method of punishment. Coker v. Georgia, 433 U.S. 584 (1977).

[33] Weems v. United States, 217 U.S. 349 (1910).

In *Furman* all of the justices concurred or endorsed opinions that saw the eighth amendment prohibition of cruel and unusual punishment as being flexible or variable—evolving in meaning over time. However, Justice Rehnquist in Woodson v. North Carolina 428 U.S. 280, 308 (1976) (Rehnquist J., dissenting), subsequently adopted the fixed position formerly announced by Black in McGautha v. California 402 U.S. 183, 225 (1971) (Black, J., separate opinion), and also advanced by others that would have the eighth amendment substantively interpreted only in light of its historical dimensions. The logical consequence of this fixed view is that the eighth amendment would never present any future "trouble cases" and formal legal closure would be achieved in this regard. This, in some ways, represents formal rationality in its extreme form but also illustrates one of its shortcomings. Weber was alert to the prospect that instituting increasingly logical and rational procedures would ultimately result in a closed system of reasoning to guide social action thereby erecting an "iron cage" that could prevent adaptation and adjustment to changing circumstances or idiographic situations. Even though there is movement toward this type of rational system of justice, *see* Davis, *supra* note 22, other systems also exist. In fact, the inductive method of the Anglo-American system was seen as having both logically and empirically rational components. Arguably, the empirical components of relying on the observable facts of each case helps to retard logical closure and avoid the spectre of the iron cage of rationality. Although left undeveloped, an advantage for *stare decisis* systems implicit in a Weberian analysis is that courts can rely on two different vehicles to legitimate their decisions. Authoritativeness can rest either on tradition or rationality. It remains unlikely in systems that emphasize formality and position over personality that legitimation through charisma would be very important.

[34] *See* Robinson v. California, 370 U.S. 660 (1962); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

constitutional protection against cruel and unusual punishment.[35] In *Furman*, the relevant legal ends were the permissible goals of punishment (such as retribution and deterrence). The means for achieving these legitimate government ends were alternatively defined as either capital

[35] It is especially important, and difficult, to distinguish McGautha v. California, 402 U.S. 183 (1971), where unbridled jury discretion in capital sentencing was challenged on the *procedural* due process grounds of the fourteenth amendment. There, the defendants claimed that the absolute discretion allowed by the statutes was "fundamentally lawless" and so did not provide due proces of law. *Id.* at 196. The court reviewed the instructions given the juries and previous efforts to implement standards and concluded that standards would be of such minimal utility in enhancing procedural fairness that they were not mandated by the requirements of the due process clause. In view of *Furman*, the *McGautha* holding is very narrow indeed, at least for Justices White and Stewart who joined both majority opinions allowing *Furman* to accomplish what they were reluctant for *McGautha* to do. In fairness to them, and in rebuttal of Chief Justice Burger's view that *McGautha* decided *Furman*, the issue raised by *Furman* probably has a somewhat more substantive rather than purely procedural basis. Although the distinction is in no way a clean one (as any student studying substantive versus procedural due process appreciates), the following trichotomy is proposed to help clarify the matter. Some matters are purely procedural and the issue is whether the procedures for applying the content of the law are fair. *McGautha* concluded that, by itself, the procedure allowing unguided discretion to apply the death penalty could not be found unfair. Other issues raise questions about the content of law itself. For example, is capital punishment itself impermissible no matter what the procedures used to invoke it? As we shall see, this is the issue tackled by Justices Brennan and Marshall in *Furman*. A third, and intermediary way of framing the legal issue is to focus on the outcome(s) of applying legal contents via certain procedures. This, too, is customarily viewed as substantive in current legal usage although the accuracy of the label could be questioned. Significantly, an outcome focus recognizes that even if the procedures by themselves have been found acceptable and the content in isolation could be permissible, the result or pattern of outcomes may be objectionably arbitrary or discriminatory. As we shall see, this middle ground is the way Justices White, Stewart, and Douglas saw the *Furman* case. There is, then, a major difference between how the issues arising from an eighth amendment challenge can be framed as opposed to the fourteenth amendment procedural due process attack even if the decision in *Furman* ultimately resulted in the same kind of guided discretion sought but rejected in *McGautha*. Notice the need to clearly separate means from ends in understanding the cases. The significance of the source of the challenge can also be seen in comparing the nature of appropriate remedies. Had *McGautha* been successful, the court itself would have had to fashion procedural guidelines to impose on *all* jury mandated punishments out of nothing but the general words of due process. Arguably, judges who had not used the same guidelines would also be overturned because the particular guidelines would have had a constitutional basis. The successful challenge in *Furman*, on the other hand, allowed the court merely to prohibit capital punishment where discretion was unguided. The states were then free to legislate their own secondary rules on these matters. Guided discretion provisions have been subsequently reviewed and upheld beginning with Gregg v. Georgia, 428 U.S. 153 (1976). That the source of the constitutional challenge should have so much import in decision-making and opinion-writing itself attests to the formal rationality underlying our legal system. If judges wanted to decide issues on the basis of values, they would not be so inclined to make such fine distinctions. As one of the anonymous reviewers of this manuscript noted, drawing such fine distinctions may help justices avoid head-on collisions of the sort that would preclude further collective efforts to maintain formal rationality. Thus the nature of legal argumentation may well serve the function of masking value conflicts (for the justices as well as the public) in order to enhance the authoritativeness of judicial declarations and dispute resolution.

punishment itself or unguided and complete discretion in capital sentencing.

A. THE DISSENTING OPINIONS

The clearest example of goal rationality in legal analysis was contained in Justice Blackmun's dissenting opinion, which explicitly indicated his personal "abhorrence" of the death penalty[36] as a means of punishment even while refusing to find it unconstitutional because it was sufficiently related to permissible goals of punishment to pass constitutional muster. Blackmun's argumentation relied on procedural rules of interpretation he thought were mandated by prior cases to urge judicial restraint[37] and deference to legislative pronouncements[38] on the matter. He scolded the majority for invoking their values about the propriety of capital punishment and criticized them for transforming capital punishment into an end in and of itself that was either good or bad. He concluded: "I fear the Court has over-stepped. It has sought and has achieved an end."[39] It would have been easy for Blackmun to follow personal inclinations and to adopt a line of reasoning to reject the death penalty, but it would have been professionally "deviant." He resisted because he tacitly severed the means of punishment from the values the goals were supposed to serve and refused to allow what he thought were nonlegal considerations to enter his analysis. This goal rationality and the logic of judicial procedures in analysis would not permit him to indulge his personal beliefs and values. His legal reasoning was bluntly value-free and of the logically formal rational type. He relied on abstract rules logically located in legal doctrine that emphasized the process of decision-making and not the outcome. The only other dissenter who went on record as personally opposing almost all capital punishment was Chief Justice Burger.[40]

Burger and the remaining dissenters (Powell and Rehnquist) also decried what they considered to be the substantive thrust of the majority opinions. They saw procedural doctrine as having been shattered and refused to ban capital punishment judicially by relying on such procedural and structural rationales as "*stare decisis*, federalism, judicial restraint and, most importantly, separation of powers."[41] These argu-

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36 Furman v. Georgia, 408 U.S. at 405.

37 *Id.* at 407-09.

38 *Id.* at 410-13.

39 *Id.* at 414.

40 *Id.* at 375.

41 *Id.* at 417 (Powell, J., dissenting). Chief Justice Burger also voiced reservations about Furman's seeming contradiction of precedent, *id.* at 399-401, about judicial restraint, *id.* at 405, and about separation of powers, *id.* at 403-05. Justice Rehnquist had concerns and doubts about the wisdom of Furman in light of federalism, *id.* at 468-69, judicial restraint, *id.*

ments were offered without keying on the ultimate morality of the substance or outcomes of death penalty statutes. Basically, the dissenters applied principles that maintained the closure of the legal system to decide the matter. Their reasoning exemplified logically formal rationality, and the dissenters flaunted its formal emphasis in an effort to detract from majority opinions they considered to be too outcome-oriented and therefore less authoritative. Many of the more specific arguments in the dissents were to rebut particular points made in the majority opinions and are assessed elsewhere in this paper. The crux of their position, however, was that *Furman* really did not present much of a "trouble case" that required going beyond law previously established by legal logic to find the rule to apply to this case.

B. THE MAJORITY OPINIONS

The majority opinions that overturned the death penalty in *Furman* and its companion cases are most central in analyzing legal thought because these are the arguments advanced to break with tradition. These justices recognized *Furman* as a "trouble case" that required announcing new law. Because the issue was framed in terms of the substance or outcomes of death penalty statutes rather than the procedures or means by which the particular sentence was determined or executed, it might be expected that the justices would have to engage in substantive rational analysis where the law would be informed by a higher order ideology external to the legal system. In fact, only one justice was openly willing to engage in such a value-laden exercise and even he couched his analysis in logically located precedent.

Justice Brennan unbashedly stated that the eighth amendment should be read to serve the higher philosophical values of "human dignity."[42] His test: "A punishment is 'cruel and unusual' . . . if it does not comport with human dignity."[43] His conclusion: "death is today a

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at 470, and the separation of powers, *id.* at 466-70. A sampling of their language may be instructive.

> The "hydraulic pressure" that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power . . . *Id.* at 405 (Burger, J., dissenting).
>
> It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. . . . [I]mpatience with . . . legislatures is no justification for judicial intrusion upon their historic powers. *Id.* at 464-65 (Powell, J., dissenting).
>
> I conclude that this decision . . . is not an act of judgment, but rather an act of will. *Id.* at 468 (Rehnquist, J., dissenting).

[42] Remarkably, Weber predicted that legal formalism would invite "demands for a 'social law' to be based upon such . . . [substantive] postulates as . . . 'human dignity' . . ." 2 M. WEBER, ECONOMY AND SOCIETY 886 (1968).

[43] Furman v. Georgia, 408 U.S. at 269-70.

'cruel and unusual' punishment."[44] The thrust of this line of argument reflects what Weber types as substantive rationality in legal thought although the language itself was borrowed from *Trop v. Dulles*.[45] Moreover, Brennan relied on several previously established criteria to arrive at his conclusion. He tacitly borrowed from substantive due process/fundamental interest analysis where the concerns are with the arbitrariness of rules and outcomes regarding highly protected rights or interests like life and liberty.[46] Brennan found capital punishment per se to be "offensive to human dignity"[47] because of (1) the fundamental interest in life that makes execution extremely severe,[48] (2) the strong probability of arbitrary application,[49] (3) the rejection of capital punishment by contemporary society,[50] and (4) the existence of less severe

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[44] *Id.* at 286.

[45] 356 U.S. 86, 100 (1958).

[46] The reasonableness of the substance of legislation first became grounds for judicial review of economic legislation, *see* Lochner v. New York, 198 U.S. 45 (1905); but then was abandoned in this area, *see* Nebbia v. New York, 291 U.S. 502 (1934); Williamson v. Lee Optical Company, 348 U.S. 483 (1955). Even while "substantive due process" reasoning was being abandoned in economic matters, it was resurrected in cases involving interests more fundamental to liberty (such as speech, religion, and marital and procreative privacy). As Justice Brandeis observed in his concurrence in the free speech case of Whitney v. California, 274 U.S. 357, 372 (Brandeis, J., concurring) (1927):

> Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. . . .

For other free speech cases involving fundamental interest/substantive due proces analysis, *see, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Schneider v. State, 308 U.S. 147 (1939). This kind of analysis has also been applied to freedom of association, *see, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952), and establishment and freedom of religion *see, e.g.*, Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitalle, 370 U.S. 421 (1962); Cantwell v. Connecticut, 310 U.S. 296 (1940). A more recent application of fundamental interest/substantive due process analysis has been in the area of marital and reproductive privacy. *Cf.* Roe v. Wade, 410 U.S. 113 (1973). Justice White offered a clear summary of the analysis in his concurrence in Griswold v. Connecticut, 381 U.S. 479, 502 (1965) which overturned a ban on the distribution of birth control devices:

> The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this court, require "strict scrutiny," . . . and "must be viewed in light of less drastic means for achieving the same basic purpose." . . . But statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause . . . .

Compare this language with that used as one of the resulting tests for cruel and unusual punishment as most succinctly stated in Coker v. Georgia, 433 U.S. at 592: ". . . punishment is "excessive" and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment. . . ." Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964) was one of the first to see the substantive due process themes in the eighth amendment.

[47] Furman v. Georgia, 408 U.S. at 305.

[48] *Id.* at 286-90.

[49] *Id.* at 291-95.

[50] *Id.* at 295-300.

alternatives to achieve legitimate penal ends.[51] Such constitutional considerations certainly were not new to the court even if their linkage to overriding values about human dignity was. This merging of the means of punishment with the larger goal of human dignity represents the value rationality of Weber where values become an integral part of the reasoning itself. This is the kind of reasoning Chambliss and Seidman thought characterized trouble cases, although there is less reliance by Brennan on empirical information than Chambliss and Seidman would expect in pragmatic legal realism.

Two other justices, White and Stewart, also tacitly took their lead from the arbitrariness standard of substantive due process/fundamental interest precedents. A test for such cases bears striking correspondence to Weber's views on goal rationality as can be seen from its most succinct statement in a subsequent capital punishment case: "punishment is 'excessive' and unconstitutional if it makes no measurable contribution to acceptable goals of punishment . . ."[52] There is clear separation of the means of punishment from the ends contemplated, and the value question is attached only to the legal ends: is the objective permissible or legitimate?

Both Justices White and Stewart were concerned with the capricious nature of death penalty outcomes under the challenged statutes[53] rather than the ultimate morality of this means of punishment so they moved only part way in the direction of deciding on the substance of capital punishment. They were unwilling to declare it unconstitutional per se but were able to void its application in the kind of cases being challenged. Justice White declared that the unguided discretion statutes provided "no meaningful basis for distinguishing the few cases in which [the death penalty] . . . is imposed from the many cases in which it is not."[54] Justice Stewart could not "tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[55] Their focus, then, remained on unguided discretion in the procedures that produce unevenness in

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[51] *Id.* at 300-05.

[52] Coker v. Georgia, 433 U.S. at 592. *See also* Furman v. Georgia, 408 U.S. at 312 (White, J., concurring):

> . . . the penalty . . . was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.

[53] Furman v. Georgia, 408 U.S. at 309-10 (Stuart, J., concurring), 312 (White, J., concurring).

[54] *Id.* at 313.

[55] *Id.* at 310.

death sentence outcomes—an administrative focus that retained much of the procedural emphasis expected in Weber's conceptualization of formality. This procedural emphasis combined with reliance on substantive due process/fundamental interest analysis to find the applicable law warrants typing their opinions as predominately logically formal rationality. Their processes of reasoning painstakingly avoided value considerations except those contained in the previously established legal goals of punishment. The ultimate value of capital punishment was not the grounds for objection. Its discretionary application, which bore too little relationship to accepted notions of due process fairness, was. The analysis did not allow normative orientations about the means of punishment (discretionary executions) to blur with acknowledged views about the goals of punishment even while deciding that some substantive statutes authorizing the death penalty were unconstitutional. This separation of means from ends is the sort of goal rationality expected in formal reasoning and is something that minimizes the apparent role of extra-legal values in decision-making.

Perhaps the craftiest argument against capital punishment was presented by Justice Douglas. As one of the strongest proponents of limiting the court's role in making substantive due process determinations,[56] he would have been hard pressed to take up the White and Stewart analyses. Nor was Douglas comfortable with Brennan's drift into value-rationality and substantive analysis of capital punishment. Noting that the defendants were black[57] and that juries (or judges, as the case may be) have complete discretion to determine the death penalty,[58] Douglas raised the objection of unequal application of the law permitted by discretionary statutes.[59] He insisted that if, rather than capricious application of the death sentence, a systematic discrimination in its use existed, then statutorily authorized discretionary death sentences would be "cruel and unusual."[60] Douglas argued that equal protection was necessarily implied in the cruel and unusual punishment clause; it was part of the values incorporated in the legal goals.[61] To establish discrimination Douglas relied on statistical data,[62] the sort of empirical sense information contemplated by Weber's extrinsic formality and Chambliss and Seidman's pragmatic legal realism. His view of the data—while not scientifically sophisticated—led him to conclude

56 *See* Williamson v. Lee Optical Company, 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

57 Furman v. Georgia, 408 U.S. at 252-53.

58 *Id.* at 248.

59 *Id.* at 249.

60 *Id.* at 245.

61 *Id.* at 242, 245.

62 *Id.* at 249-52. *See generally*, Dorin, *supra* note 8.

that there was, in fact, discrimination—a conclusion consistent with findings of more rigorous research.[63] Blacks were disproportionately more likely to receive the death penalty. This analysis allowed Douglas to avoid criticisms of over-reaching and of indulging in value-laden arguments. He used law's own logical system to analyze the underlying procedural dimension of discretionary applications of capital punishment to formulate the issue so it could be objectively informed by extrinsic data rather than values. His was a mix of logical and extrinsic formal rationality—a process of legal reasoning that is presented basically free of value considerations except for that clearly contained in the legal end—equality in punishment.[64]

Although deciding the case on other grounds, Justice Powell's dissent specifically rejected the discrimination analysis.[65] Noting that blacks are disproportionately represented in official statistics for violent crimes, Powell thought that adopting the discrimination interpretation would lead to a demise of punishment.[66] In so doing, he confused the significance of the argument and misunderstood the relevance of empirical procedure and data. An extrinsically formal line of reasoning would still emphasize process, except the process used to locate relevant information for decision-making is not the logical system of law but the rational pursuit of sense data. That would mean applying accepted standards of scientific methodology. A scientific analysis of racial discrimination in capital dispositions would require adequate controls for legally relevant variables like the heinousness of the offense. Accord-

63 For recent reviews, see Bowers & Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME AND DELINQUENCY 562 (1980); Kleck, *Racial Discrimination in Criminal Sentencing*, 46 AM. SOC. REV. 783 (1981). Kleck concluded that discrimination occurred only in Southern states. He noted that studies done outside of the South finding discrimination failed to include sufficient statistical controls. Ironically, in his additional data about discrimination and the death penalty, he also neglected to utilize controls. Moreover, his measurement of execution risk excluded inter-racial homicides—a potentially critical omission for capital cases, *see* Garfinkle, *Research Note on Inter- and Intra-racial Homicides*, 27 SOC. FORCES 396 (1949); *cf.* Radelet, *Racial Characteristics and the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

64 Statutes making the death penalty mandatory for some kinds of felony convictions have subsequently been declared unconstitutional. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Interestingly, had Douglas' *Furman* analysis been adopted, the ultimate result may have been the complete abolishment of the death penalty because of continued discrimination even under guided discretion statutes. *See* Bowers & Pierce, *supra* note 63; Radelet, *supra* note 63. This would have resulted not from substantive considerations about its morality but purely due to application shortcomings—a relatively value free approach to deciding a very basic substantive and value-laden issue. Capital punishment may be acceptable only if we have fair ways by which execution can achieve equitable outcomes and its intended goals.

65 Furman v. Georgia, 408 U.S. at 443-50.

66 *Id.* at 447.

ingly, voiding the death penalty due to demonstrated discrimination in its application would not necessitate nullifying sanctions for other violent crimes. However, if it could be shown empirically that imprisonment is also disproportionately meted out to blacks after all relevant legal variables are controlled for, then the Douglas argument would have relevance to this punishment too. To date, however, most of the empirical research using such controls indicates minimal racial discrimination in sentencing where capital punishment is not involved.[67]

From a Weberian perspective the most detailed and intriguing opinion was that of Justice Marshall which ruled capital punishment to be unconstitutional per se. However, Justice Marshall refused to join Justice Brennan in reasoning substantively and agreed that judges should not act on the grounds of finding the penalty "personally offensive."[68] Consequently, his search for law attempted to rely on formal rationality employing both the logic of law and extrinsic evidence.[69]

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67 For reviews, see Hagan, *Extra-legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW AND SOCIETY REVIEW 357 (1974); Kleck, *supra* note 63.

68 Furman v. Georgia, 408 U.S. at 369 n.163.

69 Others are less convinced that Marshall is a formalist. Indeed, the present examination of his reasoning is limited to one case and it adopts a highly specialized approach to formalism which centers on goal rationality—a clear specification and separation of means from ends so that the means are chosen, not on the basis of value preference, but because they are either logically or empirically related to the legal ends. It is this Weberian perspective on formalism that I will seek to illustrate from Marshall's *Furman* opinion.

In anticipation of criticism of my highlighting the formalist features in Marshall's argumentation, let me note that capital punishment is not the only area where Marshall's reasoning comports with a Weberian perspective on goal-rational formalism. One needs only to look at his development of the "sliding scales" test in equal protection law to see another major example of reasoning where a means/ends analysis was pursued by Justice Marshall. *See* Dandridge v. Williams, 397 U.S. 508 (1970) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 88 (1971) (Marshall, J., dissenting); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 70 (1973) (Marshall, J., dissenting).

The "sliding scales" approach and its application can be clearly seen in *Rodriguez*, 411 U.S. at 124-25:

> We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake . . . . Beyond the question of the adequacy of the state's purpose for classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance.

Given the importance of education to free speech and political participation, Marshall was persuaded to strike down how Texas financed public education in the Rodriguez case because "the operation of the Texas financing scheme reveal[ed] that the State ha[d] selected means wholly inappropriate to secure its purported interest in assuring its school districts local control." *Id.* at 129. This conclusion was premised both on a logical analysis of Texas law where it was "difficult to find any evidence of . . . dedication [to local control] with respect to fiscal matters" and on a reference to an empirical study which "showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property poor districts making the highest tax effort obtained the lowest per pupil yield." *Id.* at 127-28. Because Marshall rejected the overly simplistic formalism of applying either

In one line of argument Marshall advanced a substantive due process/fundamental interest analysis similar to that used by Stewart and White.[70] Marshall interpreted the eighth amendment as prohibiting punishment from being more severe than is necessary to serve legitimate interests of the state.[71] From his "logical" review of the legal history of the eighth amendment, he concluded that retribution could not be the sole end to which capital punishment was linked because the eighth amendment was "adopted to prevent punishment from becoming synonymous with vengeance."[72] In so doing Marshall rejected Justice Stewart's[73] novel utilitarian reformulation of retribution which argued that the death penalty is necessary to avoid anarchy and vigilanteeism.[74]

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the rational basis or the strict scrutiny test to all classificatory government action, it does not mean that he rejected goal-rationality and formalism in the Weberian sense.

Marshall recognized the complexity inherent in his sliding scales approach and confronted the elusiveness imputed to means/ends distinctions. He explicitly rejected criticisms that "a variable standard of review would give this Court the appearance of a 'super-legislature' " and insisted that "open debate of the bases for the Court's action is essential to the rationality and consistency of our decision-making process." *Id.* at 109-10. Marshall's approach required explicitness about which state interest would be served and how the classification would adversely affect the interests of individuals. It would require that the relationships between the classificatory means and any legitimate state objective be more substantially demonstrated as the interest of the affected individual became more constitutionally significant.

Marshall also recognized that the proces of determining which interests required more rigorous review of the means/ends relationships was difficult, but not impossible. "And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective 'picking and choosing' . . ." *Id.* at 102. He would use principles of constitutional interpretation to examine the nexus between a specific constitutional guarantee and the individual's interests involved to determine how substantial the relationship between the classificatory means and the governmental objective had to be to pass constitutional muster. In Rodriguez, Marshall found a close nexus between education and free speech and political participation. *Id.* at 110-17. Therefore, classificatory schemes involving education deserved more demanding means/ends analysis than would those addressing commercial activity. This sliding scale approach requires careful separation of means from ends, first to determine the balance between individual and state interests, and second to inform about the extent to which the logical and empirical relationship between classificatory means and governmental ends had to be demonstrated.

A similarly explicit and complex means/ends analysis is what Marshall displays in *Furman*. While reasonable people may disagree on the relative importance of competing ends or on the nature of the "true" relationship between means and ends, the approach is more open, consistent, and goal-rational than are alternatives. As a matter of emphasis, Marshall demonstrates a formalistic process of specifying ends and means so that any analysis of the relationship between them can be open and less subject to the personal whims and value judgments of the justices.

70 *Id.* at 359 n.141. *See also supra* text accompanying note 52.

71 *Id.* at 331-32.

72 *Id.* at 343.

73 *Id.* at 308.

74 Radin, *supra* note 30, at 1054, refers to Stewart's view, later adopted in *Gregg v. Georgia*, 428 U.S. 153, as "revenge-utilitarianism" and notes how the philosophical "just deserts" rationale of retribution that sees punishment as an end gets unwittingly translated into a

According to Marshall's fundamental interest analysis, capital punishment had to be reasonably linked to something other than retribution if it were to stand—the crack in the constitutional footing of capital punishment lies not in the death penalty but in retribution. There was separation of the means of punishment from its goal; he pursued a goal rational analysis.

That something-more-than-retribution to which capital punishment had to be related according to this fundamental interest approach was deterrence.[75] Other punishment objectives were quickly dismissed as either inappropriate and/or only marginally secured by executions.[76] Unless it could be shown that alternatives less burdensome to one's fundamental interest in life (like imprisonment) were less effective than the death penalty in deterring homicide, the substantial relationship between capital punishment and a permissible government end constitutionally required would not exist. To determine this question (which is one of relationship and not of values), Marshall conducted a sophisticated review of social science research.[77] This extrinsic evidence did not establish the required relationship, and so he ruled against capital punishment. The line of analysis separated the means (execution) from the penal ends (deterrence), utilized goal-rationality, and combined logical and extrinsic formal rational legal thought.

Marshall also adopted another line of analysis because precedent contained a second way in which the death penalty might be cruel and unusual over and above its not bearing a substantial relationship to permissable goals of punishment.[78] According to eighth amendment dicta and precedent, modes of punishment like torture or banishment or capital punishment may become cruel and unusual if evolving standards of decency cause them to shock the conscience or be abhorrant to current societal values. This logically located legal rule calls for judges to examine the legitimacy of the kind of punishment itself and so *appears*

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means/end argument more akin to deterrence than retribution. Empirically, it would be hard to support the proposition that failure to execute would lead to anarchy. Certainly vigilante justice was more common in an era when capital punishment also was more common. *Cf.* Bedeau, *Testimony before the Subcommittee on Administrative Practices and Procedure of the Senate Judiciary Committee, May 11, 1978*, IN TO ESTABLISH RATIONAL CRITERIA FOR THE IMPOSITION OF CAPITAL PUNISHMENT 35-36 (1978). States that have long been abolitionist are not more murderous than other jurisdictions, *see* Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, 1976 SUP. CT. REV. 317; nor are abolitionist states in great danger of anarchy. Perhaps this is why Marshall said Stewart and Powell's line of reasoning "defies belief." Gregg v. Georgia, 428 U.S. at 238.

[75] Furman v. Georgia, 408 U.S. at 345-54.

[76] *Id.* at 355-58.

[77] *Id.* at 345-54, 372, 373. *See also* Gregg v. Georgia, 428 U.S. at 231 (Marshall, J., dissenting).

[78] Furman v. Georgia, 408 U.S. at 360-69.

to merge value considerations with the means of punishment (value-rationality) and invites value-laden opinions; judges have to discover what the societal values are. To do this, Marshall performed a goal-rational analysis where the values were separated from the means by which they were assessed. He disavowed the legitimacy of judges substituting their own values as reflections of societal standards.[79] Moreover, unlike Justice Burger,[80] he refused to rely on public opinion polls.[81] "Rather than focusing on the surface perceptions of the populace's views . . ., Marshall . . . attempted to assess the deeply held principles of the public . . . [W]hether or not a punishment is cruel and unusual depends . . . on whether people who are fully informed . . . find the penalty shocking, unjust, and unacceptable."[82] As Radin goes on to suggest, Marshall imposed a minimal requirement of rationality on the data base. To rely on procedures that assess people's gut reactions—moral positions not necessarily guided by abstract principles—would be to create a new cell in Weber's typology (see Figure 1): extrinsic formal *ir*rationality. Arguably, reliance on jury behavior or legislative enactments to learn about evolving standards would also introduce irrational elements. Rather than accept values as posited, they too, must be objects of rational scrutiny according to Marshall.[83]

Because Marshall needed to proceed from informed opinion, the appropriate data did not exist forcing him to speculate about what an informed public would accept about capital punishment.[84] He concluded that it would not tolerate "purposeless vengeance."[85] Marshall also reviewed a series of empirical findings that had to be considered if opinion were to be truly informed on capital punishment: capital punishment is neither a more effective deterrent nor cheaper than life im-

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79 *Id.* at 369 n.163.

80 *Id.* at 385-86.

81 Justice White also views public opinion polls as grounds for upholding capital punishment, at least in cases involving mandatory statutes. *See* Roberts v. Louisiana, 428 U.S. at 352-53 nn.5-6.

82 Radin, *supra* note 30, at 1031.

83 CHAMBLISS & SEIDMAN, *supra* note 1, might argue that this choice of the appropriate data source infuses the selection of means to guide decision-making with values. To the extent that the desirability of rationality in legal thought is a value consideration, they would be correct. Weber, however, may have been little concerned with such an objection as is indicated by his efforts to distinguish between value-and goal-rationality (the latter being the purer form). From his perspective, rationality which specified means that were linked to the absolute value of rationality would be required by that value to clearly separate means from the ends. To the extent that this is tantamount to goal-rationality, it diminishes the role of all other values in examining the means used to serve legal ends. Accordingly, a Weberian analysis would consider extrinsic formal rationality in assessing the appropriate data base to be value free for the most part.

84 Furman v. Georgia, 408 U.S. at 369 n.163.

85 *Id.* at 363.

prisonment; convicted murderers are seldom executed and are model prisoners who have comparatively high success rates upon release; innocents are occasionally executed; etc.[86] His review on research on deterrence was a sophisticated extrinsically formal rational analysis. He concluded that people's reaction after considering such evidence would be to oppose the death penalty and so he declared it unconstitutional. A subsequent test of his hypothesis tended to confirm his speculations.[87]

Overall, then, despite a per se ruling against capital punishment, Marshall's reasoning reflects complex extrinsically and logically formal rationality. To analyze this thought illustrates the difficulty but suggests the possibility that even the most troublesome of substantive rulings can be thought through in a relatively value free manner. Marshall's reasoning illustrates the difference between the substantive rationality of Brennan's value-rational approach where the analysis was commingled with the values inherent in "human dignity" and the formal goal-rationality of his own analysis which severed questions of values from the means of analysis even when societal standards were systematically and rationally explored. His opinion was sufficiently intricate to insist on maintaining rationality when trouble cases force judges to look beyond the logic of law in case determination. The tension exhibited between extrinsic procedures that are rational (like informed opinion) and those that are frequently irrational (like public opinion) is perhaps inherent in the high court's position to have to interpret a Constitution that calls on it to protect minority rights from the potential tyranny of the majority. Of course, this issue of what "facts" to apply if extrinsic analysis is used requires increased scientific and methodological sophistication on the part of appellate judges.

C. IN REVIEW

From this review of official legal thought on capital punishment, one is struck by how justices announce their decisions using the moral goal-rational (and less value laden) arguments which typify formal rationality. Eight of the nine judges sought to apply law based on reasoning guided by abstract principles that separated the means of analysis from the values inherent in the legal ends reached. The four dissenters and two from the majority (Stewart and White) relied on traditional arguments to find and interpret the law. Two court members (Douglas and Marshall) adroitly turned to evidence extrinsic to the logical formality of law and were willing to supplement logical procedures for

86 *Id.* at 362-69.

87 Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WISC. L. REV. 171, 190 (1976).

finding law with reasoning premised on data gathered in part by scientific procedures. Procedure and formality were mostly emphasized, but the nature of rationality, too, was drawn into consideration especially by Justice Marshall. Weber's basic contention that Western legal thought is characterized by formal rationality was supported; Chambliss and Seidman's assertion that there is extensive reliance on empirical data was not.[88] Moreover, when empirical data were used, they were not clearly imbued with value considerations and better fit the goal-rationality of extrinsic formal reasoning than the value-rationality of pragmatic legal realism or substantive rationality. The usefulness of Weber's typology of legal thought was basically demonstrated.

Just a cursory examination of some of the other controversial decisions in the past years also reveals reliance on formal reasoning through both legal logic and extrinsic evidence. In *Roe v. Wade*,[89] the majority used precedent to determine that life (as legally defined) did not begin at conception. Consequently, state regulations including abortion at early stages of pregnancy could be offset by countervailing considerations of privacy over reproductive matters—an area highly protected by previous court decisions.[90] It then turned to medical evidence about when fetal life became viable to establish when the state's interest became nonspeculative enough to begin to regulate the woman's behavior concerning that new viable life. The ends, protection of human life and reproductive privacy, were as clearly separated from the challenged means, laws against abortion, as legal logic and medical science would allow.

In *Miranda v. Arizona*[91] the majority was confronted with how to assure the voluntariness and reliability of confessions—already established legal ends. Empirically, they examined interrogation methods advanced in police manuals and found them to run counter to these ends so they introduced the Miranda warning and extended the right to counsel so that means would be less obstructive to ends.

In *In re Gault*[92] the Court noted that the existing juvenile justice procedures were not obtaining the stated goal of treatment—that the operative goals of the system were tantamount to punishment. If punishment was the actual end, then due process was the traditional means by which it had to be pursued.

In all of these cases there was ends/means analysis with the ends

88 The findings reported here comport with what Dorin, *supra* note 8, also indicated.

89 410 U.S. 113 (1973).

90 Griswold v. Connecticut, 384 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

91 384 U.S. 436 (1966).

92 387 U.S. 1 (1967).

being delineated from the means. This allowed consideration of which means either best contributed to the legally valued ends (as demonstrated empirically) or had been traditionally linked to those ends (as through case precedent). Capital punishment, then, seems not to be an isolated example of the analytical utility of Weber's typology. Moreover, if there is value imparted to the process of legal thought, it has less to do with the private ideologies of the judges than with what was previously or elsewhere adopted in the law. The reasoning process in the opinions is remarkably value-free even though the outcomes cannot be.

IV. Reasons for Formality, Neutrality, and Goal-Rationality

Weber's rich theoretical legacy also provides a basis for expecting value neutrality in Western legal thought. After all, ideas were the basis for social action and there was a general trend toward rationality in the West. Much of that rationality was evidenced in the structures designated to carry out social action which were organized according to rational-legal principles. Central to these organizational principles were such features as procedural rules to channel conduct, a stress of training and expertise as requisites of holding office, and the impersonal, detached performance of the duties of the position. Moreover, rationality was one means by which authority could be obtained and maintained.

The most obvious feature of organizational rationalization is the adoption of abstract explicit rules defining how to proceed—almost a definition of formal rationality in legal thought. *Stare decisis*, statutory construction, and principles of constitutional interpretation all serve that end and were relied on to some extent by all the justices in *Furman*. They are the tools of the trade for appellate judges.

Two other features of rational-legal organization also constrain legal thought and direct it toward formality and value neutrality. Demands both for expertise and specialized qualifications among those who hold office are largely thought to be satisfied by professional legal training. Consequently, an important part of the socialization of judges that Chambliss and Seidman see as detracting from value-neutrality may actually enhance it. The blustery admonition of the inveterate, arrogant Professor Kingsfield of *Paper Chase* fame for law students to learn to think like lawyers has become a part of American pop culture. Although now popularized, the statement is no less accurate. It means three years of training in case study method to learn inductive law-finding, countless lessons in tedious statutory construction to learn deductive procedures, and constant reference to constitutional law to master the basic constitutional doctrines. It means the near infinite regression of

the Socratic teaching method to locate the kernels of law and sharpen logical analysis. It means learning to spot and define issues in strictly legal terms, extralegal matters being irrelevant. It means learning to put personal views aside so one can amorally argue all sides of the issue. It means learning professional norms of zealous but disinterested representation and advocacy regardless of who the client or what the issue. In short, the modern legal socialization and training that provides eventual judges with the expertise and professional detachment required by rational organization to hold office also teaches goal-rationality and logically formal reasoning.[93]

Weber also made this point and clearly linked the type of legal thought with the nature of legal education. Modern legal education in the universities emphasized "legal theory and 'science' . . . where legal phenomena are given rational and systematic treatment."[94] "The legal concepts produced by academic law teaching bear the character of abstract norms, which, at least in principle, are formed and distinguished from one another by a rigorously formal and logical interpretation of meaning. Their rational, systematic character (and de-emphasis of content) result in a far-reaching emancipation of legal thinking from the everyday needs of the public."[95] It seems that Weber joins Engels[96] in seeing a rationality or principled consistency in legal development which enables law to attain considerable independence from even the strongest of nonlegal influences. Here are widely diverse conflict formulations that plainly dispute Chambliss and Seidman's emphasis on the paramountcy of extra-legal inputs.

Value neutrality, formality, and rationality in legal thought probably also arise from another source relevant to both Weber's and Chambliss and Seidman's analyses. Appellate judges in general, and the Supreme Court in particular, confront the problem of legitimacy. They are not elected officials and do not present highly public profiles and so do not have voter or outside constituencies upon which to rely. Neither do they have special interest sponsorships that have to be considered to maintain office. In fact, such commitments (even the mere appearance of them) may actually disqualify judges from hearing some cases or from the bench itself. At the same time, judges find themselves deciding cases—especially "trouble cases"—that potentially affect other govern-

93 For a recent, and most extensive, empirical and systematic examination of legal socialization of law students, see W. THIELENS, THE SOCIALIZATION OF LAW STUDENTS (1980). *See also* Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85 (1976).

94 M. RHEINSTEIN, *supra* note 7, at 198.

95 *Id.* at 204-05.

96 *See supra* text accompanying note 14.

ment entities in adverse ways even while they depend on the legislature for money (and jurisdiction in many cases) and upon the executive branch for enforcement. Indeed, this separation of powers and specialization of functions parallel important features of rational-legal organization. But because of it, courts are in the weakest position of any major rule-making body to coerce compliance. Consequently, to a large extent they must rely on persuasion and legitimacy to secure cooperation and obedience even while finally deciding some of the most controversial value questions of our time.

Consequently, the organizational situation of appellate courts (one of Chambliss and Seidman's inputs)[97] constrains toward value neutrality because it is the appearance of value neutrality that helps maintain legitimacy. Formal rational thought, especially of the goal-rational variety, helps to maintain legitimacy in societies where there is conflict over values by de-emphasizing values as *ratio decidendi* and accentuating process and procedures. Logically formal rationality is based in part on *stare decisis* appeals to tradition, one of Weber's sources of legitimation of authority. Extrinsically formal rationality can rest on empirical proof via science, one of Chambliss and Seidman's methods of justification or legitimation. The recurrent problem of legitimation, then, may provide a potent explanation for why legal thought seeks to be goal-rational and proceeds along formally rational lines. This structural constraint combines with organizational demands for legal training and socialization and formal procedural rules to help shape modern judicial argumentation.

97 *See* W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 100-05.