

The Sociologies of Law of Marx, Weber and Durkheim:
A Comparison and Critical Synthesis

By:
Austin Kay

A Thesis Submitted to
Saint Mary's University, Halifax, Nova Scotia
In Partial Fulfillment of the requirements for
The Degree of Bachelor of Arts with Honours in Criminology, Sociology

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Abstract

“The Sociologies of Law of Marx, Weber, and Durkheim: A Comparison and Critical Synthesis”

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Abstract: Sociology of law is a rich and multi-faceted field encompassing macro and micro sociological and criminological concepts and addressing issues of law in society. This paper draws upon the law-related works of the three classical sociological thinkers – the “fathers” of Sociology – Karl Marx, Max Weber and Emile Durkheim, in order to synthesize their respective sociologies of law. By developing a thorough understanding of each theorist’s approach, comparing and contrasting the three, and critically appraising their perspectives, this paper strives to accomplish a more well-rounded understanding of the field of Sociology of Law from the various sociological perspectives that the three thinkers represent.

Keywords:

Sociology of Law, Law, Karl Marx, Max Weber, Emile Durkheim, classical sociological theory, legal theory, conflict approach, dialectics structural functionalism, crime

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Introduction

Toward an Understanding of Law from the Perspective of Classical Sociological Theory

For many, the legal system and the laws that it produces are understood as a fundamental product of contemporary society. The assumed democratic nature of the modern Western world implies that legal discourse – necessarily defined by and connected to democracy – may be understood as a means of governing people in an impartial and fair manner. Law, broadly conceived under this understanding, ought to benefit those who abide by it, while punishing those who do not. Laws that intentionally seek to disadvantage some while allocating inequitable privileges to others are perceived as unjust, and this bias suggests that these particular laws are not a reflection of a democratic society. The society, in this case is rather either non-democratic or the unjust nature of the law is an aberration that needs explanation. Through the works of the three sociological “fathers”, this thesis addresses the substantive question of how law is being generated, what its relationship is to major social institutions and society overall, how it is being implemented and what the consequences of such implementation may be.

The sociology of law is the study of law in its relationship with the social system within which law is located. Specifically, it discusses the social factors that shape law; namely, the political, economic, and cultural interests that define the law, as we know it. It also addresses the social effects or implications of particular laws and legal systems, whether intended or unintended. The classical theoretical core of

the sociology of law is constituted by the theories of the three founding fathers of classical sociology, Karl Marx, Max Weber, and Emile Durkheim. These three classical sociologists represent different theoretical and epistemological approaches in sociology (conflict, interpretive, and functionalist respectively). At the same time, they all dealt with law and legal systems in their research. By comparing and contrasting their writings on law, we come to better understand the nuances of their theoretical perspectives (which they apply in conceptualizing law), their differences, complementarities, and possible gaps in understanding law in society. Ultimately, we come to appreciate their respective theories at work in the study of a particular social phenomenon, i.e. law. Restricting one's understanding of this vast field to just one of the three theorists' approach may be problematic, as doing so allows for a narrow understanding of the social factors that are inherently tied to legal discourse. Thus, at the same time, this thesis strives to synthesize the theories of law of the three classical sociologists with the intent to create a more comprehensive understanding of law in society than any of the three approaches by themselves may accomplish.

In this thesis, the three sociologists' approaches to understanding law will be elaborated upon through an in-depth explanation of the complex theories themselves, and at times using contemporary examples of law in society to supplement each sociologist's theoretical points. Firstly, Marx's historical materialist approach to law will be analyzed. As will be seen, within this approach three distinct interpretations of Marxist thought (deterministic, semi-autonomous, and dialectical) will be drawn upon, each producing a different understanding of the

relationship of law to society's economic foundation. Secondly, the Weberian dialectical approach will be analyzed. Despite Weber's intent to engage in a "life-long struggle with the ghost of Karl Marx" (From: Cuff, E. C., W. W. Sharrock and D. W. Francis, *Perspectives in Sociology*, third edition, London, Routledge, 1992, p. 97). As one of Weber's scholars has remarked, this approach shares similarities with Marx's dialectical interpretation. Though Weber is considered the founder of the interpretive school of sociology, his conception of law is quite positivist and he does not utilize his interpretative approach to his understanding of law. Nevertheless, his approach to law is dialectical as the term refers to Weber's understanding of the reciprocal relationship between law and economy. Lastly, the Durkheimian functionalist approach will be discussed. Here, as will be seen, the discussion is quite distinct from the previous two in that Durkheim looks at law (and crime) in terms of its function in society, assessed empirically though abstractly, in terms of grand generalizations of different types of society possessing different kinds of laws. Finally, all three sociologies of law are epistemologically positivist.

Chapter 1

The Conflict Approach and the Three Interpretations of the Law - Economy

Relationship: Karl Marx's Sociology of Law

The various works of Karl Marx and Friedrich Engels discuss the reality of the social world in terms of a fundamental and ongoing conflict, as famously articulated in *The Manifesto of the Communist Party* (1848), "The history of all hitherto existing society is the history of class struggles." (qtd. in: Calhoun et. al. 2002, p. 156). For Marx, in any society, and most notably in the modern capitalist society, a population divides itself into two distinct classes – the proletariat and the bourgeoisie – which are distinguished from one another by their contrasting relationships to the means of production of a society's governing economic structure. These two classes exist in a state of continuous conflict, that is, an ongoing power struggle. The 'conflict approach' in the sociology of law suggests that the existence of all social phenomena is a result of said conflict rooted in a fundamental struggle for economic power. The social definition and implementation of law is no exception to this proposition. This section seeks to provide an understanding of the sociology of law from Marx's conflict perspective, demonstrating the fundamental relationship between socio-economic power and legal discourse.

The distinction between haves and have-nots in a given society may not be solely considered to be a distinction between those possessing the vast majority of material wealth, and their economically inferior, "... The class which is the ruling

material force in society is at the same time its ruling intellectual force.” (qtd. in: Calhoun et. al., 2002, p. 144). This class, claiming ownership of the means of production of society and being the dominant intellectual force of society are not necessarily the same people, however intellectuals express the ideas and interests of the economic elite; the two are therefore synonymous. Indeed, with immense economic and/or material wealth, comes substantial social and cultural influence in a superstructure that is dictated by a materialistic capitalist ideology. The owning class under capitalism (which of course, comprises less than one percent of society as a whole) wields social power that extends beyond the realm of economics “Capital is, therefore, not a personal, it is a social power” (qtd. in: Calhoun et. al. 2002, p. 166). Furthermore, all institutions of capitalist society ought to be considered to be under the far-reaching influence of the minority owning class – Marx’s bourgeoisie. Law, as mentioned, is no exception to this rule; “Law, morality and religion are to him [the proletariat] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests” (qtd. in: Calhoun et. al. 2002, p. 164). Being one of society’s greatest tools of social control and power, law is defined and implemented in line with the interests of the economic elite, and subsequently, the dominant class of society as a whole. In defining law in society, and fundamentally acting out of self - interest (the interests of the class as a whole, not individualized self - interest) the bourgeoisie axiomatically constructs law such that the existing hegemonic structure is perpetuated – a structure that systematically allocates immense social power to those with the most material wealth, and oppresses the vast majority of society. Law, as well as all other social

institutions such as education, even religion, exist under the reign of bourgeois dominance, and therefore promote this existing cultural hegemonic structure of the society in which they exist. This is the “orthodox” deterministic interpretation of Marx’s understanding of the relationship of law to the economic foundation of society.

This section – a Marxist interpretation of the sociology of law – seeks to delve deeper into the notion presented above; that is, it seeks to examine law as a fundamentally hegemonic discourse, defined by the economically elite, thus perpetuating their own class-based interests. The two concepts (power and conflict) are fundamentally linked; “Wherever men live together conflict and a struggle for power will be found” (qtd. in: Quinney, 1970, p. 11). In order to adequately discuss the concepts of social power and conflict, and further, to describe the role of law as it may be seen as a tool of creating or maintaining said concepts, this section will utilize three interpretations of Marx’s theory: Determinist, Semi- Autonomous, and Dialectical. The three interpretations will be discussed separately. The determinist interpretation of the Marxian structure versus superstructure theory discussed law specifically as a tool of economic power of the economic elite. Putting aside all other cultural factors, this approach discusses ways in which laws directly promote the economic interests of the owning class, perpetuating their economic power – a type of power that implies greater *social* power. The semi-autonomy perspective discusses law in terms of its relationship to the economic structure, but looks upon other societal phenomena and forms of conflict beyond class as conducive to the production of social power affecting the formation of laws. Lastly, from a dialectical

Marxist perspective, the relationship between law and economy may be viewed as reciprocal in nature. This way, the biased construction of law is considered to be highly reflexive. While this approach maintains that economic factors ought to be considered to shape the construction of law, the same is true in reverse – the law similarly shapes the economic structure of society. In discussing this perspective, the institution of slavery, and the history of the abolition of slavery will be used as an example; while the existence of an economic system of slavery was largely dependent on law, similarly, the legality of slave ownership was determined by the existence of the slave economy, thus demonstrating the dialectical relationship between law and economy. In combining the three aforementioned approaches, this section will establish the existence of a single power holding social group, which defines legal discourse. This group, though constantly challenged by their subordinates, maintains their social dominance through economic exploitation, largely implemented through law. This immensely wealthy, and culturally homogenous group has been defined as *The Power Elite* (Mills, 1956). The economic, and subsequently, social dominance wielded by the ‘power elite’, here referred to as the modern bourgeoisie, necessarily implies an immense influence on the construction of law from the conflict perspective as discussed at length here.

Law as a Reflection of Bourgeois Economic Interests: The Determinist Perspective

As introduced above, the deterministic approach to the sociology of law suggests that the law that governs a given society is directly related to that society’s economy; specifically, the former is shaped as a direct reflection or consequence of

the latter. The economic superstructure therefore determines the nature of a society's definition of law and criminality. The deterministic perspective discusses the law and the economy from a strictly classical Marxist approach. That is, instead of considering various social factors in the construction of law, the deterministic approach suggests that law is nothing but a reflection of or, is determined by, the economic structure. The same is not true in reverse, as seen in the dialectical perspective. A key theory as presented in Marxist thought that helps to support the deterministic approach is the theory of historical materialism – that is, Marx's materialist conception of history which suggests that history ought to be understood in a purely empirical way – or an understanding of society in terms of its ever changing modes of production and division of labor (Marx & Engels, 1845)

In order to properly situate this discussion, a previously cited quotation from *The Communist Manifesto (1848)* will be elaborated upon. Marx writes:

“Freeman and slave, patrician and plebian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary re-constitution of society at large, or in the common ruin of the contending classes” (qtd. in: Calhoun et. al. 2002, p. 156).

Marx's protracted, poetic opening to his massively influential manifesto sums up the essential concept of historical materialism. From ancient times (defined by the freeman-slave paradigm), through the Middle Ages defined by feudalism (the lord-serf paradigm), and into modernity, Marx suggests that there exists a fundamental binary conflict within society. Regardless of the economic structure that happens to define the society, there will always be a distinction between the 'haves' and 'have-

nots' – the bourgeoisie and the proletariat, respectively. Marx goes on to explain that under capitalism, the ultimate class conflict exists as the economic disparity between the opposing classes reaches its most prevalent form. Therefore, as the economic structure of the contemporary world is dominated by capitalism, the conflict between classes is more intense than during any point in history prior. Furthermore, the percentage of the population that may be considered to make up the bourgeois is lower than ever, which only adds to the binary class antagonism that exists today.

The question that is put forward then is: how exactly does capitalism – the ultimate form of binary class conflict – shape the law? Marx suggests that due to the immense economic discrepancy, and subsequently the discrepancy in social power between the opposing classes, and the necessary struggle on the part of both classes to either achieve or maintain economic and social power, law under capitalism is defined by inequality. Law may be considered to be both a bourgeois tool of economic and social oppression, as well as simply a result of said oppression. In the case of the former, the economically powerful directly influence the politically powerful (it has been argued that the two are indeed synonymous) in creating laws, which seek to protect bourgeois interests, and suppress those of the proletariat. Contrastingly, in the case of the latter, the fundamental and immense inequality that exists in the capitalist structure normalizes bourgeois dominance through law; further, the class consciousness that exists in both opposing classes legitimizes otherwise illegitimate legal practices implemented by the powerful bourgeois. The inadequately organized proletariat, who therefore lack a strong class consciousness

as compared to that of the opposing class, are incapable of voicing their collective displeasure toward the illegitimate laws implemented and normalized by the ideologically 'superior' bourgeoisie. Regardless of which of these two scenarios applies to a given law or legal concept, it may be argued that both are examples of economic issues determining legal issues. In order to discuss the deterministic approach using an empirical instance of an economic phenomenon directly effecting the social definition of law, the remaining part of this section will consider issues of white-collar crime, which might be considered an example of bourgeois influence in the legal system.

The issue of white-collar, or corporate criminality exemplifies the ability of the economically elite to directly influence the construction of law in the contemporary context. The corporate elite – that is, the richest of the rich in modern capitalism – possess the ability to directly shape laws in accordance with their own interests. This ability to actively construct favorable law stems from the previously suggested notion that indeed, the economic elite (in this case the corporate elite) is synonymous with the political elite in terms of their similar interests and values – a result of similar social background, education, and other cultural values and beliefs. The economic elite may explicitly influence politics (through buying votes, lobbying policies, etc.), or implicitly, through longstanding social and cultural connections between the rich and the politically powerful. Quinney (1970) articulates this concept in his discussion of the 'formulation of criminal definitions':

“The interests – based on desires, values and norms – which are ultimately incorporated into the criminal law are those which are treasured by the dominant interest groups in society. In other words, those who have the

ability to have their interests represented in public policy regulate the formulation of criminal definitions” (Quinney, 1970, p. 16-17)

Quinney demonstrates the direct effect that the corporate (or economically) elite – here referred to generally as the bourgeois – have on the construction of criminality and therefore, law itself.

Furthermore, by regulating and defining criminality, the bourgeois reap the benefits of a legal system, which is entrenched in class-based bias. In many cases, white-collar criminality goes without legal reprimand, although the commission of these crimes causes greater social harm than conventional crimes, traditionally committed by the economically subordinate factions of society. Both the legal system itself, as well as the field of criminology as a whole, tend to place less emphasis on crimes committed by the rich, and therefore further associate the poor with criminality:

“Law is like a cobweb; its made for flies and the smaller types of insects, so to speak, but lets the big bumblebees break through. When technicalities of the law stood in my way, I have always been able to brush them aside easy as anything” (Sutherland, 1940, p. 8-9).

Sutherland goes on to explain the meaning of the quote of a Daniel Drew, a man described as a ‘pious old fraud’, “It means only that the upper class has greater influence in molding the criminal law and its administration to its own interests than does the lower class” (Sutherland, 1940, p. 9).

Both Sutherland and Quinney discuss the direct, empirical impact that the bourgeois have on the construction of law. Their immense economic power implies social and political power, therefore fostering the ability to shape laws such that

their own economic profits are not hindered, and those of the proletariat are restricted. In this way, the definition of criminality, and subsequently, law, are once again viewed as tools of maintaining the existing social hierarchy, and sustaining the already immensely significant binary class conflict of modern corporate capitalism. Not only does bourgeois power allow law to be directly shaped by the economically elite, but also the normalization of the immense power discrepancy under capitalism facilitates the legitimization of illegitimate application of said power through law. Law may therefore be seen as a tool of oppression, as well as a result of a fundamentally oppressive economic structure.

Marx's theory of historical materialism suggests that under capitalism, class conflict – between bourgeoisie and proletariat – reaches a pinnacle. At no other time in history has the antagonism between owning and working class been quite as strong as it is under modern capitalism; furthermore, in an era of corporate capitalism, in which class conflict is even more extreme, and the economically and politically elite are indeed synonymous, the laws of society are increasingly influenced by the bourgeois. As discussed through the modern notion of corporate crime, the legal system may be seen to systematically promote the interests of the modern bourgeoisie, the corporate elite. It may be concluded through the use of Marx's theory of historical materialism in conjunction with the deterministic approach to Marx's sociology of law, that the economic structure of society (in this case, one that promotes massive class antagonism under corporate capitalism) necessarily influences the social construction of law, as seen in the example of the lack of legal reprimand in cases of corporate crime. The legal system is indeed under

the direct influence of the economically powerful, making the economically powerful synonymous with the politically and socially powerful – a concept that defines the modern bourgeoisie.

Law as a Tool of Maintaining Cultural Hegemony: the Semi-Autonomy Perspective

Unlike the aforementioned deterministic approach to Marx's sociology of law, the semi-autonomous approach, which will be discussed at some length here, suggests that law is shaped by an array of social and cultural factors. The semi-autonomy approach still maintains the aforementioned Marxist view that law is often used as a tool of social power. Furthermore, it is defined in such a way that the economic interests of the dominant class are protected and perpetuated, maintaining the existing social hierarchy. In this way, this approach corresponds with the deterministic approach in that it maintains the necessary relationship between law and economy – a fundamental characteristic of law according to Marx. The semi-autonomy approach differentiates itself by expanding on the previous approach. Rather than suggesting that law is solely a reflection of the economy, from this perspective, law is shaped by various social factors in addition to economic factors. Miliband (1977) articulates the semi-autonomous Marxist view of conflict as it may be interpreted beyond the realm of economic class conflict:

“The focus, always, is on *class* antagonism and class conflict. This does not mean that Marxism does not recognize the existence of other kinds of conflict within societies and between them – ethnic, religious, national, etc. But it does consider these rivalries, conflicts, and wars directly or indirectly derived from, or related to, class conflicts...” (Miliband, 1977, p. 18-19).

Indeed, the semi-autonomy approach maintains a fundamentally Marxist focus on the concept of economic class conflict. However, in the discussion of the construction and definition of law and in a generalized discussion of Marxist thought as presented above, other social and cultural factors may significantly contribute to the overall social conflict and the struggle for social power. In terms of the sociology of law in particular, law may be considered to be a reflection of economic dominance, and further, socio-cultural factors such as race, gender, and political values may be seen to play a role in shaping law. The minority power group within a society, which has been previously defined as the economically elite, may therefore be defined in this section as the *power* elite – their economic power necessarily implies cultural/social power – a concept briefly introduced in the preceding section.

The social oppression implemented by the power elite, which seeks to actively oppress the subordinate masses in order to perpetuate their own economic and social interests is not coincidental. As discussed, the elite share a common characteristic – immense wealth. It is suggested here, however, that their monetary superiority is not their only common thread,

“... The people who are located in the commanding heights of the state, in the executive, administrative, repressive and legislative branches, have tended to belong to the same class or classes which have dominated the other strategic heights of society, notably the economic and cultural ones” (Miliband, 1977, p. 68).

Furthermore, the elite are what will be referred to here as, culturally homogenous. They tend to be white, conservative males. As the power holding group, their

policies, and indeed, their definitions of law necessarily reflect the interests of said demographics.

“The assumption which is at work here is that a common social background and origin, education, connections, kinship, and friendship, a similar way of life, result in a cluster of ideological and political positions and attitudes, common values and perspectives” (Miliband, 1977, p. 69).

While the elite seek to oppress the economically inferior through biased legal discourse, they simultaneously oppress social and cultural groups that are considered to be outside the culturally homogenous bourgeois. Law is therefore not only a tool of maintaining the economic power of the bourgeois, but their social dominance as well. Racialized and gendered populations, as well as those who hold non-mainstream political views may be defined as the cultural proletariat, as they share a common power struggle and are in constant conflict with the bourgeois; that is, the socio-cultural bourgeoisie.

By expanding upon the previously discussed deterministic approach to Marx’s sociology of law, this section – the semi-autonomous approach – has suggested that not only is the law shaped by issues of economics, and furthermore, the economically elite, but rather, a wide array of social and cultural factors ought to be included in discussing the social production of law. While the deterministic approach has suggested that the political and economic elite are somewhat synonymous due to the direct impact matters of economics have on law, the semi-autonomous approach suggests that in fact, the economic elite similarly wield cultural power. The semi-autonomous approach therefore suggests that the bourgeoisie (which from a Marxist perspective necessarily holds a heavy influence

on the construction of law) defines criminality and law in such a way that it protects their economic interests (and therefore maintains their position atop the social hierarchy), while also defining criminality and law such that it systematically disadvantages racialized, gendered, and politically anomalous populations.

The Reciprocal Relationship of Law and Economy: The Dialectical Perspective

The third and final approach in the discussion of the conflict perspective of the sociology of law is the dialectical approach. In this case, the term 'dialectical' does not refer to Marxist theory, as in the theory of historical materialism, rather, the term 'dialectical' here refers to a particular understanding of the relationship between economy and law. Specifically, from this perspective, the relationship between the two is to be considered to be somewhat symbiotic. Specifically, the two concepts are mutually dependent and the nature of the relationship between the two may be considered to be reciprocal. Unlike the deterministic approach, which suggests that the law is shaped by the economy, and that said influence is unidirectional, the dialectical approach holds that it is likely that the same may be true in reverse – the law simultaneously shapes the economy. The relationship between law and economy still exists as an essential aspect in the social construction of law, however, it is suggested in a somewhat revised manner. The dialectical approach is fundamentally different than the deterministic approach, as previously discussed. It corresponds with the semi-autonomous approach in that it does not restrict itself to the consideration of strictly economically hegemonic concepts in the construction of law but goes beyond that, claiming that law effects

the economy. Rather, as in the semi-autonomous approach, the dialectical approach considers cultural factors in this sense; specifically, racial and economic factors will be discussed here as factors in the construction and definition of law.

To firstly expand on the notion of the role of race and economy as they influence the social construction of law from the dialectical approach, this section will specifically discuss racial minorities – namely African Americans in the United States – in terms of their historical relationship to economic matters, and subsequently, legal matters. Furthermore, this subject will be applied to the dialectical approach in the discussion of the sociology of law.

As introduced above, this particular interpretation, which falls under the conflict approach, suggests that the relationship between law and economy is ‘reciprocal’ in nature – the two simultaneously influence and shape one another. Therefore, in an ever-changing economic superstructure, as described in Marx’s theory of historical materialism, law must be somewhat malleable. Similarly, as the law itself changes over time as a result of influences outside the realm of economics, the economic superstructure itself must also be in flux. The case of race relations in the United States demonstrates this concept, as it will be argued here that the legal and economic roles of African Americans have been continuously altered over the course of history, suggesting the existence of a dialectical relationship between law and economy.

Firstly, it is important to establish the economic influence on law alone, similarly to the discussion in the deterministic section. This relationship will be established through the discussion of slavery in the former confederacy prior to the

civil war. The legality of slavery, which of course separated the North from the South, is largely considered to be the cause of the war itself, however it should also be considered to be a contributor to the demise of the South. In this case, one particular economic elite prevailed over the other (the north over the south), demanding that their ideological values be accepted across the entirety of what would become the United States. Genovese (1973) largely attributes the decline of slavery in the South, and therefore the demise of the Confederacy to economic factors,

“At the close of the eighteenth century, the South stood in equal or superior position to the North in all aspects of economic development. Since then the South had fallen further and further behind. Wherein lay the differences between North and South which could account for this? Slavery obviously was the culprit” (Genovese, 1973, p. 234).

Not only is it argued that slavery ought to be considered a burden to economic growth and output, in fact, slavery directly opposes capitalism itself – an economic structure held dear by the Americans both now and then. Genovese cites the work of Mandle, supporting said notion:

“Mandle squarely faces the contradictory nature of the plantation system as part of world capitalist development and yet as a system in itself with powerful tendencies antagonistic to that development.” (Genovese 1973, p. 144).

Genovese’s argument, presented in his two-volume work, *The Slave Economies*, affirms that the economic system of slavery is in direct opposition to the modern capitalist society. Furthermore, slavery necessarily promotes an anti-bourgeois system that restricts industrialization and mass economic production, both of which were imminent in ante bellum America (Genovese & Fox-Genovese, 1979). Based on

the contradictory nature of slavery as it pertains to the capitalist system, abolition was both necessary and inevitable – as was the eventual Yankee victory. So, it was economic interests (capitalism) that led to change in the law that, of course, changed the economic structure in both the South and the North

In an expansion of the concepts presented above by Genovese (1973), Zimmerman (2012) discusses the transnational move away from a system of slavery in the name of Capitalist development. Furthermore, Zimmerman discusses the creation of what he refers to as the ‘Global South’ – the racialized and highly oppressed third world. Though slavery has largely been abolished over history, as in the American South, Zimmerman argues that in fact, the Global South remains to be the subject of widespread exploitation. In response to the abolishment of slavery, the economic elites of the north have not halted all forms of economic and indeed cultural exploitation of the South, but rather, have created new ways of asserting global dominance,

“In response [to the abolishment of slavery], Elites, both new and old, invented ways to divert this newly won freedom into channels of state power and capital accumulation” (Zimmerman, 2012, p. 237).

Similarly to the preceding argument, Zimmerman suggests that slavery, in light of ever-modernizing capitalism had become a burden to bourgeois accumulation. Abolition ought to be seen not as an independent change in legal discourse, based solely on an increase in recognition of basic human rights, but rather, a reflection of the economic structure.

Contrastingly, it may be argued that the reverse is true, while not necessarily rejecting the deterministic dimension of this concept. Alexander (2010) describes

the African American experience as a history of exploitation, which has taken a variety of shapes which “...cater to the needs and constraints of the time” (Alexander, 2010, p. 21). From slavery came the Jim Crow Era, from the Jim Crow era was born a new, more inconspicuous form of racial exploitation – mass incarceration. Alexander doubts the true ‘emancipatory’ nature of the Emancipation Proclamation, and questions the seemingly unanimous feeling of accomplishment toward the abolishment of the Jim Crow laws as a result of the Civil Rights Movement as she argues, “...Jim Crow is dead, but it does not necessarily mean the end of racial caste. If history is any guide, it may have taken a different form” (Alexander, 2010, p. 21). Indeed racial caste has taken another form, and it is argued here that not only has the racist structure of the American legal system changed, but the economic exploitation of minorities has changed as well. Changes in the former have determined the changes in the latter.

Almost immediately following the abolition of the Jim Crow laws, and transition into a new era of racial oppression, the focus for civil rights leaders became issues of economics. African Americans were soon largely locked in a cycle of poverty, and shortly after, were incarcerated in immense numbers in an attempt to crack down on crime; namely, drug related crime (Alexander, 2010). As argued by Alexander, the intersection of racial and economic oppression that began in the slavery era and continues today into ‘the new Jim Crow era’, African Americans have historically been systematically oppressed. By doing so, the white majority has actively perpetuated their place atop the racial hierarchy, and subsequently, as what has been deemed, the modern bourgeois. In this explanation of the history of

American race relations, it is argued that in fact a changing legal landscape (the reconstruction era, the civil rights movement, etc.) has facilitated a change in the mode of economic exploitation (from slavery to mass poverty/incarceration) of racial minorities as well as the proletariat as a whole. The economic exploitation of racial minorities in the United States may therefore be considered to exist to the extent that the legal norms of the era allow. Slavery, of course, is no longer legal and therefore may not exist. As argued by Alexander though, new forms of racial oppression via economic factors are constantly taking shape in light of a shifting legal landscape.

It may therefore be argued that while it is true that economic factors shape legal concepts, especially when cultural factors are also considered (as presented in the deterministic and semi-autonomy approaches) it may also be true that the reverse occurs simultaneously. Slavery was abolished due to the undeniable economic force of capitalism; therefore the former must be true. Conversely, though not contradictorily, white economic dominance has shifted over the course of American history due to changes in legal discourse (i.e. the existence or lack there of the legal entity of the slave). This reciprocal effect (of economic relations on legal structures and vice versa) illustrates the Marxist dialectical approach in the discussion of the sociology of law.

Conclusion

In the above discussion of the sociology of law from a Marxist perspective, the general argument has been that law and the economy are fundamentally linked. Furthermore, the ongoing societal conflict that arises from an uneven allocation of social power – power, which is a function of economic wealth – results in a fundamentally biased definition of law. The modern Bourgeoisie, which has been defined similarly to Mills' (1956) definition of the *Power Elite*, is argued to define law in line with their own selfish class interest.

The Deterministic perspective has suggested that law is fundamentally a reflection of economic matters. Specifically, this section has discussed the concept of corporate crime, as the economically powerful individuals at the top of the modern corporation have been seen to be less likely to be prosecuted by law; their economic power necessarily suggests political/legal power. Secondly, from the Semi-Autonomy perspective, the prior approach was elaborated upon by suggesting that the law is indeed a reflection of economic matters, however, other cultural factors may be additionally considered in the construction of law (i.e. gender, race, political views, etc.). The economic power of the bourgeoisie suggests a significant cultural dominance. Lastly, from the Dialectical perspective, and discussed in terms of the concept of slavery, it was argued that the economy and the legal system share a reciprocal relationship, a notion that should be considered to be most similar to Weber's sociology of law, which will be discussed in more depth in the next section. The discussion of the three approaches provides a more holistic understanding of the theory of historical materialism and the conflict perspective in the sociology of

law. Though the three interpretations are conflicting, and thus exclusive of one another, when considered in comparison to one another, they provide a more holistic understanding of Marx's sociology of law.

Chapter 2

The Conflict Approach and the Law-Economy Dialectical Relationship: Max Weber's Sociology of Law

Building upon the preceding section, which discussed the sociology of law from Marx's conflict perspective, this section, is an understanding of the sociology of law based on the writings and perspective of the founder of the interpretive school of sociological thought, Max Weber. Nevertheless, Weber constructs positivist sociology of law as well. The typical interpretive focus that seeks to interpret purposeful human action is not the focus of the Weberian sociology of law. Weber views economic matters as crucial to the understanding of the social world. Law, being an aspect of the social world, is therefore necessarily connected to matters of economic life. The relationship between law and economy is a complex one, and can be understood in more than one way.

The basis of this section is a discussion of the nature of the relationship Weber describes between economy and law. Similarly to the dialectical interpretation of the conflict approach, Weber's dialectical approach suggests a reciprocal, or dialectical relationship between the law and the economic structure within which it exists (Käsler, 1988). Furthermore, Weber's sociology of law is also situated within the conflict perspective, as in his historical account of the rise of capitalism Weber also sees different groups and classes competing for power. While a given society's economic structure may pave the way for the introduction of

certain legal institutions, in a similar fashion, the existence of certain legal concepts and institutions may influence, even determine, the economic structure. Weber also largely drew upon historical analyses, particularly, around the development of modern capitalism in his discussion of the development of law, and its necessary relationship to the economy. Specifically, as will be explained, the development of the modern capitalist system suggests an increasingly rational legal system.

In order to fully discuss Weber's dialectical perspective to the law-economy relationship, this section will be divided into two main parts. Firstly, as a reflection of the majority of Weber's early works, the primary focus of this discussion of the dialectical approach will be around the concept of material economic conditions and law in a given society. Many of Weber's early works discuss the emergence of capitalist institutions, as a product of, and simultaneously producer of, particular legal concepts. This discussion will largely focus on the existence of fundamentally capitalist institutions within ancient civilizations. Furthermore, the section will discuss the implications that these capitalist institutions – as they come to exist in a pre-capitalist society – have on the social construction and definition of law in the ancient society in which they exist. Specifically, Weber's *Sociology of Law* will discuss the historical relationship between material economic conditions and the law, as they relate to the emergence of capitalism, largely through the use of Weber's early works including: *Contributions to the History of Medieval Business Organizations* (1889), *Roman Agrarian History in its Relation to Roman Public and Civil Law* (1891), and "The Agrarian Sociology of Ancient Civilization" (1897; 1898; 1909). Additionally, the basis of Weber's conception of the sociology of law may be

found in one of his most influential texts, *Economy and Society* (1922). Secondly, largely through a discussion of Weber's key work, *The Protestant Ethic and the Spirit of Capitalism* (1904-1905), ideological concepts, namely religion, will be introduced as factors that shape the emergence of capitalism, and subsequently determine legal concepts along with the aforementioned material economic conditions. This section will seek to expand upon the aforementioned discussion that suggests that material economic conditions alone determine law. Religion (ideology) and law stand together vis-à-vis the economy (i.e. in a dialectical relationship with it). This section therefore suggests that ideology must at least be considered in the emergence of capitalism, specifically in the American example. Käsler (1988) discusses the multi-dimensional nature of Weber's understanding of the sociology of law in a way that demonstrates that not only should law be considered to share a reciprocal relationship with the economy but in fact, various other social phenomena ought to be considered in the shaping of the economic structure of society,

“... Weber treated the law as an area of historical and social reality, and he analyzed the reciprocal, legal relationships between society, law, religion, economy and domination” (Käsler, 1988: p. 144).

Indeed, Weber's sociology of law should not be understood in a manner which is restricted to matters of economics, but rather it may be understood to include other social factors as discussed above. This being said, it is important to understand that the concept of reciprocity amongst all relevant social factors that are deemed to shape law remains constant. By discussing the material economic conditions that facilitate the emergence of capitalist institutions, and additionally discussing ideological conditions that may be considered to be supplementary factors in this

development, this discussion of the perspective will adequately discuss Weber's conception of the sociology of law in a comprehensive manner.

While class-based economic conflict is not necessarily the sole focus of Weber's work in terms of the construction of law, matters of economics remain crucial. The economic structure of a given society is determined by the law that exists there, however law may also be considered to be determined by the economic structure – the two are therefore necessarily connected, (Tastsoglou, 2015: p. 9). Beginning with Weber's sociological discussion of the transition from an ancient civilization – in which the economy is defined by slavery – into a feudalist civilization, defined by serf labor, and gradually wage labor (in capitalism), this section will seek to synthesize the sociology of law according to Weber, and, ultimately, address the problematic nature of the relationship between law and economy.

Law and Economy: A Fundamentally Dialectical Relationship

To begin, this discussion will point to Weber's first publication, *Contributions to the History of Medieval Business Organizations* (1889), which was published as his doctoral dissertation. The thesis of this work is that Germanic law inevitably replaced ancient Roman law; both of which were very familiar to Weber, having a legal background, and extensive knowledge of both of these types of legal frameworks. The former, Roman law, was described as 'individualistic' in nature, and was necessarily "...displaced by certain assumptions of modern capitalism, which derived from Germanic law" (Käsler, 1988: p. 25). The crucial aspect of

Germanic law, from Weber's perspective, that presupposed it to be the successor to Roman law was the existence of a separate company fund, which would be capable of assuming liability in the case of a company's economic failure. This 'separate fund' is seen to be a fundamental aspect of the modern capitalist company, and as it is absent in Roman law, Germanic law was where it originated. Therefore, Weber argues that the transition from ancient society into a feudal society may be attributed in part to the fusion of Germanic law into the ancient Roman system. While the change in economic structure ought to be attributed to a changing legal landscape, the same is true in reverse – the adoption of Germanic law as a replacement of Roman law may be attributed to the imminent rise of capitalism, and capitalist institutions. The significance of this early work of Max Weber may not be understated. Though it does not present a fully developed version of the dialectical sociology of law, it introduces a theme that remained prevalent throughout the course of Weber's academic career, which is the development of capitalist institutions (Tastsoglou, 2015: p. 8). This concept is key in this discussion of the dialectical perspective of the sociology of law because the rise of the economic institution of the 'separate company fund', and subsequently the rise of capitalism itself, necessarily suggests a shift in law. This is a necessary assumption due to the fact that the two social phenomena (law and economy) are here defined as mutually dependent, or, sharing a relationship that may be considered reciprocal in nature.

As mentioned, the rise of capitalist institutions was a theme that may be found throughout Weber's writings. As discussed, a change in economic structure suggests a change in law, as seen in the shift from Roman to Germanic law. In *Roman*

Agrarian History in its Relations to Public and Civil Law (1891), Weber discussed the emergence of another capitalist institution, as it existed in Rome – the institution of private property – in its specific relationship to the law. Through his historical discussion of land surveying, land taxation, and public vs. private land ownership, Weber suggests that the changing economic and legal landscape of Rome facilitated the rise of large privately owned estates, employing workers, no longer classified as slaves (Weber, 1891). In this work, Weber contends – as an expansion upon his interest in the rise of capitalist institutions and their relation to law – that the increase in private land ownership, a fundamentally capitalist institution, in addition to legal changes in terms of land taxation and land surveying, as introduced above, indeed facilitated the shift away from the ancient economic structure (defined by the urban, coastal dwelling, and a slave-based economy) (Weber, 1896), and toward a feudalist economic structure (defined by large-scale private land ownership, and a semi-autonomous labor force). Law then, is discussed here as a contributor to the new, emerging socio-economic system of capitalism. The demise of the ancient economic structure was inevitable and was a result of the rise of capitalist legal and economic institutions. Late antiquity and the early Middle Ages may be viewed as ‘transitional periods’ – a part of the greater shift to capitalism (Weber, 1896; Weber, 1909).

Weber’s essay, “Die Sozialen Gründe des Untergangs der Antiken Kultur” (1896) – roughly translated from German to “The Social Causes for the Downfall of Ancient Civilization” – further elaborates on his interest in the rise of capitalist institutions out of ancient society, similarly to that which is discussed in *Agrarian*

History in its Relations to Public and Civil Law (1891). It is emphasized that the decline of the Roman Empire may be attributed to various causes, in addition to the aforementioned cause, the increase in privately owned estates, and subsequently the downfall of the slave economy.

“Weber produced a résumé of the historical developments of Antiquity, while confirming the disappearance of its decisive elements: the standing army, the salaried civil service, the exchange of goods between loyalties, the city...”
(Käsler, 1988: p. 34)

Weber therefore emphasized the importance of economic developments in the fall of the Roman Empire, as has been discussed so far. In typical Weberian fashion, the rise of said economic developments, which might be called capitalist institutions, were observed through an ‘ideal typical’ methodology, which sought to compare the economic structures of Antiquity and the Middle Ages, each being a unique ideal type of political economy. Weber (1896) concludes, as an expansion upon previous work, that the decline of the latter may be attributed to – among other factors – the decline of the urban city and a move toward a rural civilization, the free marketplace being replaced by barter, and lastly, the legal entity of ‘the slave’ being replaced by ‘the semi-autonomous worker’ (Weber, 1896). Once again, Weber’s (1896) essay suggests that there is a necessary reciprocal relationship between socio-economic matters (i.e. a shift to rural, agrarian civilization, barter replacing the free marketplace) and legal ones (i.e. the means of production through slave ownership, or lack thereof). The two types of social change indeed occur simultaneously, each having mutual effect on the other.

As in the dialectical Marxist perspective under the conflict approach, where the definition of labor laws – namely regarding the institution of American slavery – was attributed to economic interests, Weber suggests that the end of Roman agrarian slavery was due to the fact that it fundamentally restricted the primary goal of capitalism – the pursuit of elite profit. For slave owners, “... even though slavery had shaped the organizations of agriculture, there were severe disadvantages to the exclusive reliance on slaves” (Weber, 1891; Trans: Frank, 2008: p. 149). Indeed, the slave economy restricts the capital accumulation of the slave owner, or, as they would become known, the landlord. This concept should be considered an example of economic matters ‘driving’ law. Widespread, and large-scale private land ownership – a capitalist institution – may be therefore understood to be a consequence of, as well as a determinant of, legal and social concepts, namely the shift to feudalism through the presence (or lack of) of slave labor.

Indeed, the rise of capitalist institutions – both legal and economic – are key in the various early works of Weber, as discussed here. Weber develops a legal and economic history wherein capitalism is the result. Under the dialectical approach, the rise of institutions such as the modern joint, or limited liability company, private land ownership, and the semi-autonomous labour force have both economic and legal repercussions; furthermore, the existence of said institutions, and subsequently, the adoption of a capitalist system may not be attributed to factors of economics or law on their own, rather, to both simultaneously.

As discussed at length by Käsler (1988), the dialectical relationship between law and economy is crucial to the understanding of Weber's sociology of law.

However, as will be discussed in the succeeding section,

“Also of sociological interest is Weber's inclusion of the importance of an ideological, religious system of values as a safeguard ('guarantees') for changes in the social structure.” (Käsler, 1988; p. 35).

The formation of the social structure, and more specifically for the purposes of this discussion of the sociology of law, the formation of the law, certainly may not be understood from this perspective without a discussion of the dialectical relationship it shares with the economy. However, Weber does not fail to address the importance of ideology in the construction of law, as he discusses the effect of ideology on economic structures and changes. Specifically, the next section will discuss the role of religion (an ideological system of values) in shaping law, as well as economy. Depending on the ideological focus of a given religion, it may be seen to be a supplementary factor in facilitating the rise of capitalism – as in the case of the west – or conversely, may in fact contribute to the preclusion of a society's adoption of a capitalist structure – as in various cases of Eastern religions.

Law and Ideology: The Indirect Ideological Foundations of Law

This section will discuss Weber's understanding of the ideological foundations of the rise of capitalism. This section therefore expands its sociological explanation of law outside the realm of economics. Specifically, in *The Protestant Ethic and the Spirit of Capitalism* (1905), Weber suggests that the rise of Western capitalism may be attributed, at least in part, to the Calvinist doctrines which came

to define seventeenth century American Protestant Puritans, and subsequently, what Weber calls the “The Protestant Ethic”. This system of values, which was strictly adhered to by the American Puritans, is argued to be a precursor to the “the spirit of capitalism”. The economic conditions of prosperity in the new world combined with said ‘Sprit of Capitalism’ – a product of ‘the Protestant Ethic’ – facilitated the rise of capitalism in the West. Therefore, this section, as a part of the dialectical perspective of the sociology of law, will discuss the ability for ideological concepts (namely, Calvinism and the Protestant ethic) to directly effect the economic structure of society (namely the inception of Western Capitalism), when combined with adequate material conditions. Subsequently, due to the dialectical relationship between the economy and law, as discussed in the previous section, the implications ideological concepts have on the shaping of the economic structure may be argued to be also responsible for the shaping of the law. The dialectical nature of this relationship necessarily suggests that in shaping the economic structure, law may be argued to indirectly determine the dominant ideological values of the given society. Since Weber suggests a dialectical relationship between ideology and economic structure, as well as a dialectical relationship between economic structure and law, ideology and law must be in some way connected. Though they are not directly related to one another, Weber argues that they are social phenomena of the same order, or same standing vis à vis the economic structure. Using the rise of western capitalism as the primary example in this section, it will be argued that a shifting economic structure in the way of capitalism suggests what Weber calls the “rationalization” of law, which subsequently results

in absolute legal dominance. Through the use of this example, it will be further proven that a shifting social-economic system necessarily suggests a shifting legal landscape as well.

Weber introduces the concept of ideology (namely religious doctrines) as being related to the rise of Capitalism in his 1896 essay. For Weber though, ideology was not seen as primarily responsible for the rise of capitalism – and therefore capitalist-style law (increasingly rational) – furthermore, ideological, or religious value systems were seen as ‘guarantees’ for changes in social structure, which in combination with the rise of economic capitalist institutions, facilitated large-scale structural change,

“Not until the city had been resurrected in the Middle Ages on the basis of free labour and trade, when the transition to political economy paved the way for bourgeois freedom... only then did the old giant rise up with renewed strength and lift the spiritual legacy of antiquity up to the light of modern, bourgeois civilization” (Qtd. in: Kasler, 1988: p. 35).

While the decline of the roman city, and the move to a rural civilization has been argued to be related to the decline of the ancient economic system and the rise of feudalism, religious ideology – ‘the old giant’ – is argued here to be reciprocally related to re-urbanization in the Middle Ages, and therefore the rise of modern capitalism as well as the legal institutions that it implies. Ideology, specifically that which is tied to religion, is therefore fundamentally linked to social change. The rise of capitalism, being a socio-economic system that includes particular legal structures, is considered by Weber to be caused by the social adoption of particular religious ideologies. Economic, political, and legal ideology for Weber, are all share a

reciprocal relationship with the rise of capitalism., as discussed in a more developed way in *The Protestant Ethic and the Spirit of Capitalism* (1904-1905).

Before discussing this work in more detail, it is important to establish that, “Weber never meant to substitute ideology for material and economic factors in his explanation of the rise of capitalism and theory of social change” (Tastsoglou, 2015: p. 17). The dialectical sociology of law, though it does have an ideological aspect, as will be discussed here, largely tends to focus of the material economic conditions of society as determinants of law through the dialectical relationship that has been described so far. Similarly to the conflict approach, specifically the semi-autonomous perspective, social factors outside economics are not discounted, but should not be considered the focus of the discussion. In fact, it has been argued that Weber’s ideological understanding of social change, as presented in *The Protestant Ethic and the Spirit of Capitalism* (1904-1905) is a direct answer to Marx’s economic determinism. While Marx’s theory (specifically, the deterministic perspective) focuses solely on material economic conditions as determining social change Weber (1904-1905) suggests the importance of ideology. Therefore, the two theorists – one being purely positivistic and the other advocating for the importance of ideology – have often been taken to contradict one another in this way (Birnbaum, 1953). It is argued here, that despite the ideological nature of this work being contradictory to the traditional Marxist understanding of social change, the semi-autonomous perspective within the conflict approach might suggest that the multi-dimensional theories of the two are not necessarily contradictory, but rather, may be considered to be in some way, complementary.

In order to discuss Weber's understanding of the ideological foundations of the rise of capitalism – this time, in the case of the western world – a short summary of the central argument of *The Protestant Ethic and the Spirit of Capitalism* (1904-1905) will be given here. The basis of the work is: separate from the capitalist material economic conditions which he argued to have been largely responsible for the fall of the Roman Empire as discussed previously, religious ideology may itself be a force which can facilitate the rise of capitalism as an economic structure. Calvinism – the notion that strong work ethic and abstinence from worldly pleasures results in other worldly gratification – came to define the 'protestant ethic'. Furthermore, Calvinist doctrines, according to Weber, became the dominant religious-based ideological value system of the American Puritans. Weber called this concept "this-worldly asceticism". The combination of the material economic conditions experienced by the puritans and the "this-worldly asceticism" they had adopted as an ideological foundation of the "protestant ethic", gave rise to what Weber calls "the spirit of capitalism", which inevitably gave rise to modern capitalism itself as an economic structure. In this way, ideology, more specifically religious ideology, may be considered a supplementary factor in determining the rise of capitalism (supplementary, of course to the economic conditions which facilitate social change).

When comparing the "this-worldly asceticism" of the protestant ethic to "other-worldly asceticism" of other religions, Weber suggested that the Protestant focus on the material world, as opposed to the spiritual basis of other traditional Eastern religions supplemented the rise of capitalism (though it is likely that

capitalism could still have existed regardless of religious ideology). Hinduism of India, for example, which placed a great amount of emphasis on the notion of reincarnation (other-worldly asceticism), did not facilitate the rise of capitalism, despite economic conditions that were deemed capable of facilitating similar socio-economic change to that experienced in the West. Weber therefore argues, in summation, that the combination of 'this worldly asceticism' with material economic conditions facilitates the rise of a capitalist system. The presence of the former, however, does not necessarily suggest the inevitable rise of capitalism without the presence of the latter, and the same may be said in reverse. It was the combination of ideology and material conditions that gave rise to modern capitalism in the west, in a very particular social, cultural, and economic context. Furthermore, Weber suggests a reciprocal relationship between Calvinist ideology and the rise of modern capitalism – described as a relationship of 'elective affinity' – similarly to his more broad explanation of the relationship between economy and law.

The question remains: how exactly does the protestant ethic – defined by the Calvinist notion of predestination – facilitate the rise of capitalism? Weber explains the affinity between Calvinism and the spirit of capitalism through his notion of rationality, "Modern capitalism is a great complex of interrelated institutions based on rational rather than speculative types of economic pursuit" (Bendix, 1977: p. 53-54). Further, the worldly asceticism of the protestant ethic, which promotes the ideal that hard work in life will result in gratification in the afterlife, tends to support the fundamental basis of capitalism – the absolute pursuit of economic profit and growth. Weber does not suggest that the goal of Protestant reformation

was to promote capitalist growth, but rather, that the two share a particular affinity toward one another. There is a necessary reciprocal, though unintentional, relationship between Calvinism, the protestant ethic, and the spirit of capitalism.

“None of the great [Protestant] Reformers had any thought of promoting ‘the spirit of capitalism’ but Weber hoped to show that their doctrines nevertheless contained implicit incentives in this direction – especially the Calvinist doctrine of predestination...” (Bendix, 1977: p. 58).

For the Puritans, strictly abiding by the teachings of John Calvin, ‘work’ in a purely worldly and material sense, was not seen as the pursuit of profit, but rather, as service to God. The economic prosperity that resulted from hard work was not viewed as the result of hard work, but rather as God’s worldly reward for the individual’s fulfillment of his or her duty. Regardless of the reasons for the hard work of the Puritans, it resulted in a thriving economic environment, giving rise to both ‘the spirit of capitalism’ and subsequently, the rise of capitalism itself.

Undoubtedly, Weber holds that the rise of capitalism in the west was largely the result of specific material/economic conditions, without which, capitalism would not have come to fruition. However, as explained here the ideological/religious doctrines as seen in the Puritans through their adoption of Calvinism should also be seen as relevant in the discussion.

The rise of capitalism in the West – attributed to the dialectical relationship between economy and law, and as presented in the *Protestant Ethic and the Spirit of Capitalism*, Weber’s openness to discuss ideology as a contributor to the rise of capitalism (law, here argued to be a specific form of ideology) – suggests a societal shift toward rationalization; that is, a characteristic of modern life, similarly to the

socio-economic system of capitalism itself. Rationalization may certainly be seen in the ideological framework of the Puritans (namely the this-worldly asceticism of the Calvinist Protestant ethic), as it was their religious beliefs that promoted extensive labor, and therefore proficient economic production. This ideological value is indeed one that facilitates the rise of capitalism. Subsequently, with increased rationality in modernity, law tends to see a shift toward rationality as well. Specifically, Weber suggests that with the rise of capitalism, and subsequently the rise of a newly economically powerful bourgeois class, a move to legal rationality was inevitable. A formal and predictable legal system exists under capitalism because it is in the best interest of the economically powerful as well as the political powerful. As discussed in Marx's conflict approach, the socio-economic structure of capitalism implies extreme class antagonism between the opposing classes. Legal rationality for Weber is therefore a product of capitalism – as it may be seen as a tool of maintaining bourgeois dominance – however, at the same time, the ideological foundations of rationality in society in general, as discussed here through the example of the Puritans, may be seen as a precursor, and therefore a determinant of the rise of capitalism. Since the rationality of the Protestant ethic suggests legal rationality as well as the maximization of economic production, it necessarily produces the economic structure of capitalism. Ideology and economy, from the dialectical perspective are seen as having a reciprocal relationship with one another; further, as it is argued here that law is indeed a form of ideology, law and economy may be said to be related. Ideological values that give rise to rationality in society have the capacity to shape law, as well as influence the rise of capitalism. Conversely, the rise

of capitalism, and the subsequent increase in class antagonism, indeed hold the capacity to shape law (encouraging increased legal rationality) and therefore shape ideology as well.

Conclusion

The Weberian sociology of law has examined the relationship between economics, ideology (religious ideology, specifically), and law. Specifically, the dialectical perspective holds that matters of economics and those of ideology stand together in a reciprocal relationship with the economy. Like Marx, Weber suggests that economy is the key contributor to the construction of law; however, ideological values – like those of the Puritans, which facilitated the rise of capitalism – are not to be overlooked. Using the examples of the rise of capitalism out of ancient Rome, as well as the example of the rise of capitalism in the West, Weber’s dialectical interpretation of the law-economy relationship and his entire sociology of law, as examined here, was a positivist discussion, situated in a particular historical context like that of his predecessor, Karl Marx. Additionally, Weber’s sociology of law is also rooted in the conflict tradition and therefore, further similarities may be drawn between Marx and Weber as far as their sociologies of law.

Chapter 3

The Functionalist Approach: Emile Durkheim's Sociology of Law

The third and final approach to the sociology of law that will be discussed will be Emile Durkheim's functionalist approach. Here, through various works of Emile Durkheim, concepts of 'law' and 'crime' will be discussed in terms of their role in society; furthermore, the discussion around both of these concepts will be discussed as they relate to the concept of 'punishment'. All social phenomena, whether deemed innately 'good' (i.e. law) or 'bad' (i.e. crime), from the functionalist perspective, contribute something of significance to society as a whole. Wilkinson (1981) cites Durkheim who compares society to a living organism, using what is referred to as the biological analogy,

“Not far below the surface of functionalism and undoubtedly of historical significance has been the biological analogy of social systems as organisms. Organisms as bounded entities composed of interdependent parts can be analyzed for the contribution each part plays in the maintenance of the whole” (Podgorecki & Whelan, ed. 1981. Pg. 67-68)

Law and crime are considered to be contributors to the maintenance of society, as an organism. For Durkheim, law (and the sanctions that it imposes) can be viewed as a means of maintaining social solidarity, and thus maintaining the society as a whole. Contrastingly, crime – though often devalued as a social phenomenon – for Durkheim serves a necessary function in society as well. Crime is a normative aspect of all societies that, much like law, seeks to maintain social solidarity, broadly conceived.

“The boundaries of society have to be maintained and identified [unlike the aforementioned biological organism] and it is for this function that the normality of crime provides” (Podgorecki & Whelan, ed. 1981. Pg. 70).

Without crime, and law, which seeks to define ‘crime’ as such, Durkheim contends that social solidarity would be negatively impacted, contributing to the development of an anomic state. Hence, from the functionalist approach in the sociology of law, both law and crime must be discussed in terms of the role they each play in the maintenance of society as a whole.

In the preceding chapters (Marx’s and Weber’s approaches), law was discussed in terms of its relation to the economy. From those approaches, the economy, that is the means by which individuals sustain and reproduce themselves, is seen as the fundamental and central core of social life. While Durkheim discusses neither political economy in particular, nor the relationship it shares with law, he seeks to address the relationship between law (and crime) and society, more broadly. All three approaches to the sociology of law are indeed discussions of the relationship between law and society. The former two approaches (Marx and Weber) tend to focus on a key component of society as it relates to law (political economy) and the functionalist approach, as discussed here, discusses society as a whole as it relates to the law. Moreover, all three seek to discuss society and law, just in somewhat different ways. Therefore, there are, of course, differences between the three (most significantly between the former two and this one), but there are also similarities, which should not be discounted.

This chapter will begin by discussing Durkheim’s conception of law and its relationship to society, specifically as it correlates to his two types of social

solidarity, as discussed at length in *The Division of Labour in Society* (1839). Secondly, the discussion will move to the notion of crime, which ought to be discussed separately, as it has a unique contribution to society as a whole. Lastly, the concept of anomie will be discussed. Here, the question of what society might look like without law will be addressed. In discussing *Suicide* (1897) in particular, issues of law and deviance will be discussed as they relate to anomie.

Law and Society: Correlating a Binary Legal Framework with the Two Types of Social Solidarity

To begin this discussion of the functionalist approach to the sociology of law – that is, the Durkheimian sociology of law – *The Division of Labour in Society* (1893) will be analyzed, specifically centered on its discussion of the role of law in society. This particular work – being Durkheim’s largest and most comprehensive discussion of social theory – discusses at some length, concepts of social solidarity, (i.e. the conscience collective), and most importantly for the purposes of this discussion, law, crime, and punishment, as they relate to the aforementioned Durkheimian theoretical concept of social solidarity. As will be seen, the key to the Durkheimian understanding of law is the fundamental relationship law shares with the type of social solidarity that exists in a given society. At the root of Durkheim’s discussion lies the question of how exactly the division of labour in a given society (in terms of its complexity) is related to the social solidarity of that society. Further,

“... There exists a social solidarity arising from the division of labour. This is a self-evident truth since in [industrialized, contemporary societies], the

division of labour is highly developed and it engenders solidarity” (qtd in: Calhoun et. al., 2012: p. 221)

Therefore, for Durkheim, in a society defined by a complex division of labour such as the relatively modernized and industrialized society that he observed, social solidarity necessarily exists. A task that was once completed by few workers was now divided among many, thus creating inter-worker dependency, and subsequently, social solidarity. In a society defined by a complex and highly developed division of labour, wherein each individual worker fulfills a task that is highly specialized, and differentiated from his or her colleagues, social solidarity (namely of the organic variety) necessarily exists. Through each individual’s specialized job, which contributes to the completion of the greater task, the workers become dependent on one another, thus creating a sense of solidarity. Contrastingly, in a society defined by a less developed division of labour, wherein the individual workers carry out tasks that are unspecialized, and therefore all individuals are quite similar, solidarity (of the mechanical variety) exists as a result of said lack of uniqueness amongst the workers. Mechanical solidarity is therefore solidarity of similarity, while organic solidarity is solidarity of difference.

Though Durkheim argues that where you find organic solidarity, there will also exist a complex division of labour, the question of the nature of this relationship remains.

“To state the position precisely, at the point we have now reached it is not easy to say whether it is social solidarity that produces these phenomena [complex division of labour; interdependence], or, on the contrary, whether it is the result of them” (qtd in: Calhoun et. al., 2012: p. 221).

As the concept of social solidarity is “... a wholly moral phenomenon which by itself is not amenable to exact observation, and especially not to measurement” (qtd in: Calhoun et. al., 2012: p. 221) and may therefore not be used in isolation to explain the nature of the relationship it shares with social bonds and interdependence (and the division of labour). Rather, Durkheim suggests that an external social fact must be drawn upon in order to understand this concept. That external social fact, among some less significant others, is law. For Durkheim, law – being the fundamental mode of organization of social life, as well as an external manifestation of Durkheim’s conscience collective (Durkheim, 1893) – is a means of measuring social solidarity, and additionally a means of understanding the two types of social solidarity, as they correlate with two types of law.

The functionalist sociology of law therefore revolves around the relationship law shares with the social solidarity of the society in which it exists. A common way to differentiate between various types of law is to categorize law as either ‘public’ or ‘private’. While the former focuses on the legal relationship between the individual and the state, the latter focuses on legal relationships between individuals.

Durkheim contends, however, that this distinction is not useful.

“... When we attempt to define these terms closely, the dividing line, which appeared at first sight to be so clear-cut, disappears. All law is private in the sense that always and everywhere individuals are concerned and are its actors. Above all, however, all law is public, in the sense that it is a social function” (qtd. in: Calhoun et. al., 2012: p. 224).

Indeed, the distinction between public and private law is not worthwhile, since at their core, there is no difference between the two. Durkheim sought to create a new distinction that might facilitate his discussion of how different legal frameworks

correlate with different types of social solidarity, in lieu of the fact that the public versus private distinction has proven to be useless.

Since legal precepts may be defined as a socially constructed behavior that hold socially defined sanctions; and further, these sanctions vary depending on the seriousness of the behavior, now defined as crime, and the extent to which this 'crime' disrupts or conflicts with the conscience collective (a unanimously accepted set of moral values in society), differentiating between types of law ought to be done based on the sanctions, or punishments which they impose. Rather than categorizing law typologies based on their purpose or by whom they are intended to address, Durkheim differentiates between types of law based on the type of punishment they tend to favor. Law may therefore not be discussed from the functionalist approach without including a discussion of punishment.

There are therefore two types of law according to Durkheim. Firstly there are those that impose repressive, organized sanctions, which seek to inflict suffering or punishment on the convicted. Secondly, there are those that do not seek to punish the perpetrator by imposing suffering on them, but rather, they seek to restore the previous state of affairs by restoring social relationships to their original form, thus retaining social solidarity. In contemporary terms these two law typologies may be loosely defined as retributive versus restorative justice, respectively. As will be discussed, these two types of law, based on the types of sanctions they impose, will be discussed in terms of how they correlate with the two types of social solidarity; mechanical, and organic. In doing so, the functionalist sociology of law may be

understood by suggesting that the formation of law entirely depends on the degree (and type) of social solidarity that exists in the society that is governed by said law.

Furthermore, law may be said to be not only a reflection of social solidarity, but may also be seen as an external manifestation of the conscience collective, as it is this that is argued to define the specifics of law and criminality, “Thus, we may state that an act is criminal when it offends the strong, well-defined states of the collective consciousness” (qtd in: Calhoun et. al., 2012: p. 225). Because law is defined by a socially accepted set of intrinsic moral values, common to all members of society, which Durkheim terms ‘the collective (or common) consciousness’, law is subjective in nature. Actions are not inherently criminal; rather, they are socially defined as such.

“In other words, we should not say an act offends the common consciousness because it is criminal, but it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it” (qtd in: Calhoun et. al., 2012: p. 226).

Like the previously discussed theorists, Durkheim maintains the notion that law is a social phenomenon, and further, criminality only exists within a social context. In summation, the functionalist sociology of law firstly seeks to establish a conceptual relationship between law and social solidarity. It states that law is socially defined and is therefore a reflection of the collective consciousness. The latter is especially true in the case of mechanical solidarity, as will be discussed at some length.

Repressive Law and Mechanical Solidarity

As introduced above, mechanical solidarity – which arises from a simple division of labour in society, and thus a lack of individuality of the members of society – suggests a prevalent, rigid, and strictly defined collective consciousness. The similarities of the workers, as a result of a lack of specialized labour subsequently suggests a prevalent collective consciousness (Durkheim, 1893). Law then, specifically the sanctions that it imposes, are emotionally charged and seek to impose suffering on the perpetrator through vengeance (Lukes & Scull, 1983). In doing so, law ostensibly restores a sense of solidarity – mechanical solidarity, specifically – by denouncing any act that contradicts the rigidly defined collective values of society through penal sanctions. Repressive law is therefore, “... a result of the most vital social similarities, and its effect is to maintain the social cohesion that arises from these similarities” (qtd in: Calhoun et. al., 2012: p. 227). Mechanical solidarity is necessarily correlated with penal, or repressive law, a type of law that protects this type of solidarity.

“... It does this by insisting upon a minimum number of similarities from each one of us, without which the individual would be a threat to the unity of the body social, and by enforcing the respect for the symbol which expresses and epitomizes these resemblances [legal codes, and the collective consciousness], whilst simultaneously guaranteeing them” (qtd in: Calhoun et. al., 2012: p. 227).

Indeed, a society that is defined by a minimally developed division of labour, thus having a well-defined collective consciousness, uses law (and punishment) as a weapon to sustain this solidarity, in order to prevent anomie (a concept which will be discussed later). Durkheim has criticized this type of law –a result of mechanical

solidarity – due to the fact that it tends to perpetuate laws that seek to punish acts that are not detrimental to society. In many cases, laws exist as a reflection of the collective consciousness (notably those laws deriving from religious values).

Durkheim suggests that penal law tends to support these laws (which criminalize acts that have no negative impact on society), despite their irrationality, on the basis of maintaining social solidarity. Lukes and Scull (1983) quote Durkheim, “There are a whole host of acts which have been, and still are, regarded as criminal, without in themselves being harmful to society” (pg. 40). They go on to cite various religious-based laws such as eating certain kinds of meat, touching an object that is taboo, etc., suggesting that these laws are often enforced through penal sanctions, though they have no real detriment to society. Rather, these laws reflect irrational values of the collective consciousness, which remain unchanged in a society of mechanical solidarity. Further, under mechanical solidarity, these laws are very difficult, if not impossible to change due to the stringency of the collective consciousness.

Furthermore, it is possible that repressive law tends to underestimate or overestimate the harm of a given crime due to its strict reliance on the subjective collective consciousness. Lukes and Scull (1983) argue further through a quote of Durkheim,

“In the penal law of most civilized peoples, murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganize a community much more seriously than the isolated case of homicide” (pg. 41).

Indeed, mechanical solidarity, which is the result of an under-developed division of labour, and produces penal law, has particular weaknesses. In the case of marijuana

use in the contemporary context, for example, which does not seem to cause social harm, nor harm to the user, remains illegal. This is likely due to deeply rooted religious values that oppose its use, if not traditional conservative political values that do the same. Changing the legality of marijuana use would act as a shock to the political and religious values that dominate society, and tend to shape the collective consciousness. Though modern society has a complex division of labour, and therefore is not necessarily defined by mechanical solidarity, this particular case may be used as an example of a contradiction to the collective consciousness of society resulting in penal sanctions, likely in an attempt to retain social solidarity.

Restitutive Law and Organic Solidarity

The opposing end of the spectrum in Durkheim's binary understanding of law and its relationship to social solidarity is his discussion of restitutive, or restorative law as it correlates with organic solidarity. The latter describes a type of social solidarity that arises from a complex division of labour, unlike the aforementioned relationship between repressive law and mechanical solidarity. Organic solidarity, however, does not necessarily suggest a rigidly defined collective consciousness, since members of society are relatively unique due to the complex division of labour. Said complex division of labour is caused by the industrialization and modernization of society. With an increased economic output – a result of society's eventual shift to a capitalist structure – worker specialization, and the simplification of each worker's tasks are indeed ways to maximize output and profit in an industrial economy. As a result of this high degree of specialization, not only

do their tasks in the workforce differ from one another, additionally, the values and morality (which define the collective consciousness) are also unique, compared to their societal counterpart. As a result, the collective consciousness of the society defined by organic solidarity is less rigid. Furthermore, contradictions to this relatively less prevalent and less strictly defined collective consciousness vis-à-vis criminal activity does not result in penal sanctions, rather, retributive sanctions which seek to restore the social order as it existed prior to the commission of the crime are preferred. As Durkheim puts it,

“The distinguishing mark of this sanction is that it is not expiatory, but comes down to a mere *restoration of the' status quo ante'*... Damages awarded have no penal character: they are simply a means of putting back the clock so as to restore the past, so far as possible, to its normal state” (qtd in: Calhoun et. al., 2012: p. 229).

In this way, organic solidarity – arising from a complex division of labour, and resulting in a less stringent collective consciousness – is correlated to restitutive law, according to the functionalist approach (Durkheim, 1893).

Interestingly, due to the fact that organic solidarity – and subsequently restitutive law – arises from a complex division of labour and thus increased inter-personal specialization, it should not be seen as closely related to the collective consciousness, as was the previously discussed mechanical solidarity, as it related to repressive law. Mechanical solidarity, as has been discussed, is the result of widespread similarities between individuals, suggesting a strong, prevalent collective consciousness. Organic solidarity however, suggests uniqueness, thus, the collective consciousness is less prevalent. Law therefore does not seek to punish acts that directly oppose the collective consciousness.

“... Rules where sanctions are restitutory either constitute no part at all of the collective consciousness, or subsist in it only in a weak state. Repressive law corresponds to what is the heart and center of the common consciousness... Restitutory law springs from the farthest zones of consciousness and extends well beyond them. The more it truly becomes itself, the more it takes its distance” (qtd in: Calhoun et. al., 2012: pg. 230).

Social solidarity is indeed produced in the case of a complex division of labour, though in a quite different manner to that produced in the contrasting model.

Though in the society of organic solidarity individuals are interdependent, the lack of a rigidly defined collective consciousness (through the lack of inter-personal uniqueness) allows for the individual to be disconnected from society – what Durkheim calls anomie – despite the interdependence arising from the complex division of labour.

To summarize this discussion, an analogy which was alluded to at the beginning of this section will once again be drawn upon. Durkheim uses the terms ‘mechanical’ and ‘organic’ with a very specific intention. These terms are used to contrast the two opposing types of solidarity by comparing the former to a machine, and the latter to a living organism. In the case of ‘mechanical’ solidarity – defined by a strong collective consciousness, relative inter-personal uniformity, and resultantly, repressive law,

“The word does not mean that the solidarity is produced by mechanical and artificial means. We only use this term for it by analogy with the cohesion that links together the elements of raw materials...” (qtd in: Calhoun et. al., 2012: pg. 232).

Like in a machine, the members of society (or, the raw materials which make up the machine) in this case, are held together by a strong collective consciousness (the

cohesion the links the various parts together). Conversely, in the case of organic solidarity – defined by a weakened collective consciousness, a complex division of labour, and resultantly, restitutive law,

“This solidarity resembles that observed in higher animals. In fact, each organ has its own special characteristics and autonomy, yet the greater the unity of the organism, the more marked the individualization of the parts” (qtd in: Calhoun et. al., 2012: pg. 233).

Like in a biological organism, each worker (or, organ in the organism) in a society defined by organic solidarity has his or her own specialized job, which contributes to the betterment of society as a whole (or, sustaining the life of the organism). Furthermore, each individual has their own unique system of values and beliefs, not necessarily fully corresponding to the collective consciousness. Law therefore necessarily corresponds to the type of society in which it exists, as has been discussed.

Crime and Deviance: A Functionalist Understanding

As the name of the approach suggests – that is, the ‘functionalist’ approach – all social phenomena serve a particular function in society. Of course, it may be generally accepted that law seeks to protect the interests of society, whether that society is defined by mechanical or organic solidarity, as discussed previously, and is thus viewed as being generally beneficial to society. That is also to say that those social phenomena traditionally considered to be detrimental to society must also be seen as functional, i.e. useful and necessary. The antithesis of law, that is crime, ought to be considered to be a social phenomenon that is logically considered to be

problematic in society. Perhaps it is the result of a certain failure of society, or should be considered to be an act of an individual that is a social anomaly, but regardless, crime – being a form of social deviance – is often viewed as a social problem. Durkheim, being a functionalist, would suggest quite the contrary. Crime, like law, is not only considered to be an unavoidable, and highly normalized aspect of society, but indeed serves a particular function for the betterment of society as a whole. Durkheim recognizes the common view of criminality as a social problem, and seeks to contest said notion in “The Normality of Crime” from *The Rules of The Sociological Method* (1895),

“If there is a fact whose pathological nature appears indisputable, it is crime. All criminologists agree on this score... However, the problem needs to be treated less summarily” (Lukes & Scull, 1983. Pg. 70).

Durkheim therefore seeks to discuss the nature of crime, and the criminal, in terms of their functions in society. Durkheim’s understanding of the usefulness of crime is two-fold. Firstly, Durkheim suggests that a society’s definition of crime necessarily restricts that society’s members from committing far more severe actions. Further, criminal definitions preclude a society from punishing a less severe action with unnecessarily harsh consequences. Since deviance and crime are social facts that necessarily exist in all societies, crime cannot ever truly disappear, but rather, can only change forms. The abolishment of one crime only brings about another, likely of greater severity in terms of social harm.

“For murderers to disappear, the horror of bloodshed must increase in those strata of society from which murderers are recruited; but for this to happen the abhorrence must increase throughout society. Moreover, the very absence of crime would contribute directly to bringing about that result, for a sentiment appears much more respectable when it is always and uniformly

respected” (Lukes & Scull, 1983. Pg. 72).

The removal of murderers would not be beneficial to society because it could only be possible by increasing the strength of the collective consciousness, and thus increasing society’s ill-feeling toward crime, broadly conceived. In doing so, society becomes more sensitive to crime, and due to the removal of murderers (previously considered to be the worst kind of criminals, deserving severe punishment), society will punish less severe crimes with unnecessarily harsh sanctions. Murder, as an example of extreme crime, is therefore functional in society as it regulates the sanctions that society associates with other forms of less severe crime.

A second function of crime is that it systematically controls the strength of the collective consciousness. In a hypothetical extreme case of mechanical solidarity (as previously discussed), wherein the collective consciousness dominates all members of society, demanding uniformity, originality is impossible. In this hypothetical society, the rigid, and strict collective consciousness is not capable of developing in a progressive manner due to its very nature. Consequently, society itself is not capable of bettering itself. The same is true of criminality – another form of challenging the norms of the collective consciousness.

“For [the collective consciousness] to evolve, the individual originality must be allowed to manifest itself. But so that the originality of the idealist who dreams of transcending his era may display itself, that of the criminal, which falls short of the age, must also be possible. One does not go without the other” (Lukes & Scull, 1983. Pg. 74).

Indeed, in order for society to move forward in a positive manner, by challenging the collective consciousness (which must be somewhat weak in order for this to be

possible), crime must exist, as it also seeks to challenge the collective consciousness in a similar fashion. Durkheim draws upon the example of Socrates, in order to further establish his point.

“According to Athenian law, Socrates was a criminal and his condemnation was entirely just. However, his crime – his independence of thought – was useful not only for humanity but for his country” (Lukes & Scull, 1983. Pg. 74).

In the specific case of Socrates and his revolutionary thought – once considered a crime – his criminality was in fact a contributor to the betterment of society.

Therefore, not only is crime necessary if society wishes to progress, but in fact, crime itself is capable of contributing to the beneficial progression of the society in which it exists. From the functionalist perspective, crime is therefore beneficial in two distinct ways; it firstly regulates punishment in terms of severity (as discussed through the example of the removal of society’s murderers), and secondly, it facilitates, and in some cases actively contributes to the betterment and progression of society.

While a powerful, stringent and prevalent collective consciousness – as it exists in a society defined by mechanical solidarity – may indeed be a detriment to society due to the fact that it restricts social change and progress (as well as crime), so too can the other extreme, that is, a weak, seemingly non-existent collective consciousness. In a society defined by extreme organic solidarity, wherein solidarity arises from the division of labour, not through similarity, thus having a weak collective consciousness, what Durkheim called ‘anomie’ is more likely to occur. When an individual becomes completely disconnected from the society in which

they live they experience anomie. *Suicide* (1897) discusses the concept of anomie as it relates to the commission of suicide. Specifically, the latter two forms of suicide that Durkheim discusses – egoistic and anomic – are a result of an individual being disconnected from society.

“In egoistic suicide, it is deficient in truly collective activity, thus depriving [the individual] of object and meaning. In anomic Suicide, society’s influence in the basically individual passions, thus leaving them without a check-rein” (qtd in: Calhoun et. al., 2012: pg. 264).

Suicide ought to be considered a form of deviance, and perhaps criminality.

Historically, both religious doctrines as well as legal ones have prohibited suicide, as it is unanimously considered to be a breach of the collective consciousness (Lukes & Scull, 1983). At the very least, suicide ought to be considered “... an act indifferent to morality” (Lukes & Scull, 1983. Pg. 135). Durkheim’s discussion of the concept of suicide helps to illustrate the link he perceives between a lack of social connectivity within the individual and that individual’s likelihood of deviating from the norms of the collective consciousness. Therefore, Durkheim argues that in an extreme case of mechanical solidarity (having an overly powerful collective consciousness) as well as in a case of extreme organic solidarity (having a drastically weakened collective consciousness), society is harmed. Additionally, both of these extremes are fundamentally linked to the concept of crime and deviance.

Conclusion to the Functionalist Approach

To summarize this chapter, which discussed the functionalist approach to the sociology of law, it began with an outline of Durkheim's binary understandings of law and social solidarity (repressive/restitutive, mechanical/organic). Here, Durkheim suggested that each type of law corresponds with a particular type of social solidarity. Law is therefore a means of measuring social solidarity, which is a concept that cannot be observed or measured as such. Specifically, mechanical solidarity (that is solidarity based on similarity, and arising from a under-developed division of labour) corresponds with repressive legal sanctions. Since the collective consciousness in this case is very strong, repressive sanctions are necessary to punish those who contradict it. Conversely, organic solidarity (that is solidarity which arises from inter-personal dependence, and a highly specialized division of labour) correlates with restitutive legal sanctions. The collective consciousness in this case is quite weak, and therefore penal sanctions are not necessary. Since these relationships (repressive law and mechanical solidarity/ restitutive law and organic solidarity) are also related to the collective consciousness, law ought to be considered an external manifestation of the strength of a given society's collective consciousness.

After discussing law, this chapter sought to additionally discuss the concept of crime, as a functional social phenomenon. As was discussed in more detail, crime is seen, from this perspective to be beneficial to society in a two-fold manner. It firstly acts as a regulator of the harshness of legal sanctions, and secondly it

facilitates the growth and development of society's collective consciousness. This section went on to suggest that crime and deviance are largely the result of anomie. This was done through the use of *Suicide* (1897). Overall, the functionalist sociology of law ought to be considered to be a general understanding of the relationship between society, and the law that governs it.

Conclusion:

A Critical Comparison and Synthesis of the Sociology of Law

The sociology of law from the perspective of classical theory should not be simply considered to be an analysis of the social construction and definition of law, but rather a multidimensional sociological examination of law in society. By examining the various works of the three founding fathers of sociology – Karl Marx, Max Weber, and Emile Durkheim – in order to understand their respective sociologies of law, this paper has discussed the field from three separate epistemological frameworks (conflict-determinist, conflict-dialectical, and functionalist) in an effort to create a well-rounded understanding of the relationship between law and society. While the three theorists have approached and understood the subject in different ways, what remains constant and is indeed crucial to the subject of the sociology of law as a whole, is said relationship between law and society. This concluding section will seek to first summarize the three approaches to the sociology of law. Secondly, differences will be pointed out between the three to further emphasize the fact that they are indeed quite distinct. As already argued, understanding all three is crucial to a comprehensive understanding of the field. Therefore, the final aspect of this section will seek to draw all three together, creating a singular, holistic understanding of the sociology of law, largely through a commonality that remains constant in all three approaches; that is, the positivist approach that all three sociologies of law tend to utilize.

Summary of the Three Contrasting Approaches

In summation of this thesis, we discussed the sociology of law – that is, the fundamental relationship between society and law – from the conflict-determinist (Marxist), conflict-dialectical (Weberian), and Functionalist (Durkheimian) approaches.

The conflict approach to the sociology of law introduced the concept of class conflict, as it pertains to the construction of law. Specifically, from this approach, law is seen as a hegemonic discourse that is defined by the economic elite (the bourgeoisie) in such a way that seeks to maintain the existing social and economic hierarchy, thus perpetuating the exploitation of the economic underclass (the proletariat). Therefore, the relationship between law and the economy was introduced here. This approach was divided into three distinct variants, representing various schools of Marxism, all focused on class conflict. According to the first perspective – the deterministic perspective – law is seen solely as a reflection of elite economic interests, and is therefore a tool for perpetuating bourgeois dominance. The second perspective – the semi-autonomy perspective – expanded upon the deterministic perspective by suggesting that not only is law a tool of perpetuating *economic* dominance, but in fact, *cultural* dominance as well. Therefore, law is seen from this perspective as a tool of oppression along lines of race, gender, and political values. While maintaining the notion that economic class conflict remains central to the discussion, this perspective suggests that said economic dominance suggests cultural dominance, further accentuating the immense social power of the bourgeoisie. Lastly, the dialectical variant comes close

to Weber's conflict- dialectical approach to law. As the similar title to the latter perspective of the conflict approach suggests, the relationship between law and economy is seen here as reciprocal in nature. While economic factors indeed hold the capacity to determine (or at least effect) legal definitions as discussed in the previous two perspectives, the same may be true in reverse. Changes in legal definitions, from this perspective, in some cases affect or precipitate changes in the economic structure.

Unknowingly following this variant of Marx's interpretation of the historical materialist theory, Weber maintains the importance of the relationship between law and economy, and similarly to the dialectical perspective discussed above, the relationship between the two is seen by Weber as reciprocal. Similarly to Marx, much of Weber's work is situated within a particular historical context and his theories of law derive from well-grounded historical research and analysis. Weber's approach was divided in this paper into two sections, both of which sought to discuss the rise of capitalist institutions (and the economic structure of capitalism itself), which was viewed as an economic change, fundamentally tied to the law in a reciprocal manner. Firstly, through empirical economic and historical research the dialectical relationship between law and economy was discussed through the use of the rise of capitalism out of ancient Rome. Here, in Weber's early works, the rise of various capitalist institutions, the eventual shift to a capitalist structure, and the fall of the ancient economic structure were seen as determinants of legal changes, while simultaneously being determined by said legal changes. This paper's second section under this approach discussed the ideological implications and foundations of law.

While maintaining that empirical economic factors are central to the rise of capitalism, this section suggested that ideology (namely religious ideology) ought to be viewed as a supplementary factor in this type of economic transition. Using the example of the rise of modern capitalism in the West, the Calvinist 'Protestant Ethic', which was adopted by the Puritans, was seen to be a contributing factor to the rise of Western capitalism. Law, as a reflection of the logic of the Protestant ethic and a form of ideology, is reciprocally related to the economy.

The functionalist approach is significantly different from the previous two. Durkheim's understanding of law discusses law and crime in terms of their functions as social phenomena. In doing so, Durkheim sought to classify different types of law, and correlate them with one of his central theoretical concepts, social solidarity. With a focus on the sanctions that law imposes, as opposed to the specifics of the laws themselves, Durkheim suggests that law may be classified as either repressive or restitutive (retributive and restorative respectively, in contemporary criminological terms). These two ideal types correspond to his two types of social solidarity, and are the external manifestations of, and measures for, social solidarity. Repressive law tends to exist in a society defined by mechanical solidarity (an undeveloped division of labour, and stringent collective consciousness) since penal sanctions may be used as a means of punishing the perpetrator, and thus retaining the social solidarity, which in this case arises from inter-personal similarities. Restitutive law tends to exist in a society defined by organic solidarity (a complex division of labour, and weak collective consciousness) as restitutive sanctions seek to restore the previously existing social conditions that

existed prior to the commission of the crime. In doing so, social solidarity, in this case arising from inter-personal uniqueness, is effectively strengthened. From the functionalist perspective then, law is seen as an external manifestation of the relative strength of the collective consciousness of a given society, as well as an indicator of the type of social solidarity that exists there.

In addition to this discussion, the concept of anomie – that is the lack of social connection – was discussed as it pertains to a particular form of deviance, suicide. Here, the lack of social connection within the individual was discussed as a contributing factor to deviance, i.e. suicide and criminal activity. While the previous two approaches seek to discuss the particular relationship between law and the economy, the functionalist approach discusses the relationship between law and society more broadly. As will be seen, these ostensibly different foci are in fact fundamentally quite similar.

Of course, each of the three sociologies of law has its advantages and drawbacks. The critique of the Marxist approach that was presented here is that Marx's sociology of law focuses solely on social conflict (regardless of the particular understanding of Marxism within the conflict approach). In assuming that law is a reflection of the economically dominant class of a given society, Marx's sociology of law fails to consider the multi-dimensional aspects of the social construction of law. Certainly, matters of economics should not be considered to be the sole contributors to the shape of law in society. Weber's sociology of law, also being primarily focused on conflict at its foundation (specifically economic conflict) is also subject to a similar criticism as discussed pertaining to Marx. Though Weber discusses a

dialectical relationship between law and economy, his sole focus on conflict (like Marx) restricts his discussion similarly to his conflict-oriented predecessor. The criticism of Durkheim's functionalist approach is that it employs a teleological reasoning. Crime, for example, from the functionalist approach is argued to be beneficial to society as a whole; that is, crime has a specific 'function' in society, as was described in chapter three. While crime (or law) is seen as having a function in society, this function is not its cause, though the functionalist perspective blurs the two.

Convergences and Divergences Between Marx, Weber, and Durkheim

This final section will seek to identify particular convergences and divergences in the understandings of law of Marx, Weber, and Durkheim in order to facilitate the concluding synthesis. In order to do so, this section will firstly discuss the focus of each of the sociologies of law (while Marx and Weber focus on the relationship law shares with the economy, Durkheim focuses on the relationship it shares with society, more generally). Secondly, it will discuss how each sociological thinker explains law (while Marx and Weber discuss law based on empirical historical research and search for causes, Durkheim discusses law in terms of broad, a-historical ideal types and law's function in society). Lastly, to bring all three together, this section will discuss the positivist nature of all three sociologies of law. Despite their differences, Marx, Weber, and Durkheim all use a positivist framework in their respective conceptualizations of law.

It has been well established that the conflict and dialectical approaches focus their respective discussions on the relationship between economy and law while the functionalist approach discusses the relationship between law and society, more generally. While this may be perceived as another distinction between the former two and the latter, it is argued here that all three seek to discuss the fundamental relationship between law and society at their foundations. For Marx and Weber 'the economy' is a rather broad term, referring to the means by which individuals sustain themselves, and subsequently, 'the economy' is the very fabric of society; the economy is indeed what defines and perpetuates the existence of society. Therefore, while Marx and Weber focus on the economy as it relates to law, at the foundation of both sociologies of law is a discussion of the relationship between law and society, much like Durkheim's generalized discussion in the functionalist approach. All three approaches, though ostensibly different, indeed discuss the necessary relationship between and law and society, and are therefore quite comparable, and are all considered significant theoretical approaches in the greater field of the sociology of law.

Another key difference that sets the conflict and dialectical approaches apart from the functionalist approach is that the former two derive from historical research and are historically (and empirically) grounded. Marx famously discusses the various changes in economic structure through changes in the mode of production, as they contribute to the eventual rise of the capitalist structure and corresponding legal landscape. Similarly, Weber discusses, with a lot of historical detail, the rise of capitalism out of both ancient Rome, as well as in the more

contemporary Western world. Therefore, both conflict-oriented understandings of law (Marx and Weber) discuss changes in the economic structure of society historically, as being relevant to the larger discussion of the relationship between law and society.

Marx, Weber, and Durkheim, in their respective sociologies of law all use a positivist framework in discussing the macro-sociological relationship between society and law. All three approaches focus on observable social phenomena as they relate to law. Marx and Weber, of course primarily focus on the political economy in its relationship to law. Whether law is considered to be a reflection of the economic interests of the elite, or as having a reciprocal relationship with the economy, in both cases, the sociology of law is discussed in an observable, positivist manner. Interestingly, though Weber is considered the founder of the interpretive school of sociology, his understanding of law is purely positivist, a contradiction to the traditional Weberian sociological approach. Durkheim's sociology of law is also positivist in nature. While the approach does not focus on economic matters as mentioned, Durkheim's understanding of law as an external manifestation of the collective consciousness and therefore an indicator of the type of social solidarity that exists in society suggests a positivist approach to the otherwise abstract theoretical concepts.

In sum, while the lack of historical grounding in Durkheim's sociology of law tends to suggest a certain separation between it and the theories of Marx and Weber, as well as a basic methodological / epistemological disjuncture between the logic of causality versus functional "explanations", all three sociologies of law share

a fundamental focus on the relationship between law and society, examined in a positivist way.

In conclusion, the sociology of law is undoubtedly a multi-dimensional sociological field that ought to consider an array of topics including, but not limited to: economics, race, gender, politics, and religion. The discussion would be incomplete without a thorough understanding of the importance of all social phenomena as they relate to the definition or generation of law in society. Certainly, a well-rounded understanding of the sociology of law in terms of classical theory must incorporate the works of all three founding fathers of sociology. Based on my examination, comparison and assessment of the three classical sociological thinkers respective sociologies of law, I argue in this thesis that a well-rounded and critical sociology of law must include the following components; (1) an understanding of the longstanding historical context of the development of law; (2) an analysis of said historical context that considers the developments of the economic structure as it correlates with the developments of law; (3) particular attention should be allocated to the role of ideology and cultural factors, which contribute to the social construction of law in conjunction with economic factors already discussed (the sociology of law is therefore not restricted to a discussion of the role of the economy); (4) an inclusion of a discussion of the functions of law. When discussing the 'function' of law however, it must be made clear that 'function' is distinct from 'cause'. The confusion between cause and effect, as in the functionalist approach must be avoided in the new sociology of law.

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