



**DISCUSSANT RESPONSE**

by

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to Erich Weede's

**FREEDOM, KNOWLEDGE AND LAW AS SOCIAL CAPITAL**

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SOCIAL CAPITAL'

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"Social capital", we are told by Coleman, "is defined by its function". Paralleling the function of physical capital, it is to determine what economists call 'total factor productivity'. Social capital is simply a portmanteau term for whatever is responsible for those increases in material wealth which cannot be <sup>attributed</sup> ~~inputted~~ to an increased input of any factor of production (labour or physical capital). This definition is useful only if econometrics can reliably isolate changes in output that are attributable to changes in material inputs from those that are not. Supposing, however, that this could be done, the definition would still be unsatisfactory. Knowing what it does (it "causes productivity") may perhaps assist us in finding out what it is, but is not the same as being told. Nor is it more revealing to <sup>learn</sup> that it, or rather the several entities composing it, are "aspects of social structure", "facilitate certain actions" of those "living within the structure", and that they are norms and institutions. The potential content of such words is far too indeterminate to be of much help.

Dr. Weede, rightly seeking to fill empty shells with more definite content, goes on to propose freedom, knowledge and the law as three of the principal, or perhaps the three principal, constituents of social capital. They usefully supplement the functional definition to the extent that they are themselves well defined and understood. His paper in essence is an explanation of how they contribute to what social capital is supposed to do. He devotes, I think wisely, less attention to knowledge and how it works, not because knowledge is less important than freedom or the law, but perhaps because social science is not well placed to understand its ebb and flow (for an attempt to do so, cf. Mokyr 1990).

#### 1. Freedom, "Equal Maximum Freedom", and Collective Decisions

Freedom enters into social capital in an instrumental role. Typically, it will increase productivity in a variety of ways. It may also act to decrease it, notably in weakening authority, making for "too

much" mobility and loosening social structures. However, Weede suggests that since freedom is valuable in its own right, the burden of proof should always be on those who propose to curb it on instrumental grounds. Failing such proof, we take it that social capital increases with freedom, and if we want more of the former, we ought to maximise the latter in some sense.

This is where the difficulty begins. The paper before us, falling in with the practice popularized by Rawls, posits the lexicographic priority of freedom, and calls for maximising it subject only to a distributional constraint: every one is to have the greatest freedom subject only to the same for every other. However, it is not evident that either "maximum" or "equal" freedom have any ascertainable meaning any more than, say, equal happiness. (Maybe equal freedom is simply intended to mean equality before the law, - but if it is, why not say so?) Two different person's freedom may well not be commensurate, and cannot be quantitatively compared. Hence there is no compelling ground for inter-subjective agreement about the greater, equal or lesser freedom enjoyed by different individuals, or in different states of affairs. For some, strengthened in their convictions by the language of "maximum equal freedom", the rich will always be freer than the poor, socialism will always engender more (or more "real") freedom than capitalism. Neither measurement nor dialectic can do anything about this. Equal freedom cannot be identified factually nor, I believe, specified logically. An attempt to postulate the constraints of a variable in terms of itself (roughly, the constraint of maximum freedom is intersubjectively equal freedom) is indeed liable to run into this kind of dead end.

Under the "maximum freedom subject to equal freedom for all" formula, the gates of argument are thrown wide open to claims that the existing "distribution" of freedom is unequal, that, <sup>it</sup> maximisation requires more "positive" freedom even at the cost of less "negative" one, or that freedom can be increased by recognizing more, and more equal, rights. The formula positively invites such claims. We are familiar enough with what they bring in their train. Most of it is adverse, and not only for social capital.

It may be helpful for closer reasoning, not to focus on freedom as the objective, the maximand, but rather, <sup>to</sup> let it emerge as a sort of residual, a product that materializes if we redefine the constraints surrounding it. With respect to a system of deontological rules, a person is free if he can choose, without risk of sanctions, any feasible action available to him that does not violate these rules. Actual prohibitions, defined by social conventions and the law, may or may not con-

form to the deontology. The question of freedom, then, is reduced to fairly down-to-earth critical inquiry into the conformity of prevailing conventions and laws to what we accept as deontological rules.

I largely agree and have little to add to Weede on collective decisions. He is undoubtedly right to submit those resting on prior consent to the same severe criticism as coercion, - though once he has posited the distinction, he might have gone on to explain it, for by no means do we all agree on where the one ends and the other begins.

Now and again, the paper runs the danger of preaching to the converted: "Government by consent is less valuable than the limitation of the scope of government" is a finding I would heartily endorse, but that would count as gratuitous by the values and preferences of those who, by conviction, hope of gain or both, stand in the opposite camp. Do we override them to uphold Weede's finding? - and how do we make them bow to our value judgment? - or can we validate such findings on less contestable grounds? Praise of the "market" does not seem to be either robust enough or sophisticated enough for the purpose.

## 2. Is Law Social Capital?

It has become fashionable to treat the existence of social rules, and more narrowly the rule of codified law, as instrumentally valuable, a sort of intangible capital good that has a positive yield and is worth maintaining and perhaps enlarging, almost regardless of its substantive content. The standard arguments for this view refer to predictability, ease of coordination, and the resolution of prisoners' dilemmas by virtue of the institution of enforceable, credible, binding commitments. It is taken as read that the latter presuppose the rule of law. Weede, while conceding that in some cases predictability may be actually less productive than its absence, seems on the whole sympathetic to this view. He also seems to accept Max Weber's thesis about the rule of law requiring a monopoly of adjudication and enforcement.

Though logically independent, the view that almost any law is better than no law tends to go hand in hand with the idea that law is prior to property, and the state is prior to the "market". The paper before us states baldly that property rights "result from collective decisions to respect them". Strictly, however, rights do not result from decisions to respect them. They are antecedent to any such decisions. They may be respected even in the absence of collective decisions to do so; and

they may exist even if they are not or only imperfectly respected. (Let us note in fairness that a really diehard legal positivist would disagree with this statement, but <sup>I believe</sup> most mainstream legal philosophers would not.)

Property rights, in particular, result from first occupation, and transfer by contract or inheritance. Their respect, in turn, results from a variety of sources, including first of all the efforts of the right-holder to protect his property; its recognition in custom, religion and "culture"; spontaneous mutual aid in reciprocal protection; and so forth. The enforcement of the law of property and contract by a centralized, state-like authority is no doubt an important element, but it is contingent on time and place. It will reduce, though not eliminate, the owner's private costs of protecting his property. On the other hand, by converting a large part of enforcement from a private into a publicly provided good, it may well increase its total cost. It also brings in its wake allocative and redistributive consequences typically associated with public goods. Inefficient delivery, wasteful use, asymmetries between the incidence of costs and of benefits (incl. "rent-seeking") are the notorious ones. They would tend to decrease total factor productivity, hence cannot be conducive to social capital.

The claim that the rule of law, in the sense of "collectively decided" codified norms enforced at public expense by a single authority, is a pre-requisite of the <sup>or of capitalism</sup> "market" is likewise historically contingent. It is trivially valid if "capitalism" and "market" are defined as interactions where binding commitments depend on such authority. But it suffices to recall that in antiquity as in medieval times, markets flourished without publicly provided contract enforcement, and that in modern times both international trade and interstate relations abound in cases of credible, binding commitments without any manifest need for an international government to enforce them (cf. the wealth of empirical evidence cited in Benson 1990).

Far from law in Weber's sense being a necessary enabling condition of capitalism, and far from almost any law being more productive than no law, its contribution to the efficiency of social arrangements can in all likelihood range from the strongly positive to the noticeably negative. Cases that look suspiciously like being located in the <sup>negative</sup> half of the range would include Russia prior to the reforms of Alexander II; Bourbon Spain and most of the Latin American countries which were saddled with her legal and administrative legacy (cf. de Soto, 198 , for horror comics on what a stifling legal system is doing to Peru and the Peruvian poor, whose sole escape route is into the "informal, extra-legal economy"); France, where the

spirit of Colbert and the triumphantly unbroken line of his successors has bred, and keeps in being, an overdeveloped and meddlesome system of civil and administrative law; as well as the United States, whose constitutional evolution has ~~turned~~ the common law into an immensely costly dead weight and subjected society to the wasteful and parasitic reign of lawyers. Moreover, there are reasons to fear that the post-Maastricht European Community is in a fair way to becoming one of these <sup>suspect</sup> ~~counter-productive~~ cases.

Weede admits that "the content of the law itself matters", though one wishes that he had laid more emphasis on this (Benson 1992 complements <sup>him</sup> in this respect). He notes that the productivity of the rule of law "largely depends on whether or not it succeeds in the 'domestication of authority'". Law must not be "arbitrarily" generated nor interpreted by rulers, including democratic majorities. What, however, will stop them from serving their interests by doing so, or (what is apt to cause more harm) from imposing on the legal system a well-meaning but muddled, incoherent conception of the public good? If my reading of Weede's paper is right, he thinks little of constitutions as meta-laws, as guarantors of limited government, and I think the balance of arguments strongly supports him. A constitution can at best reflect the social forces interested in its maintenance and that wish to limit government. It is not in itself a force to limit government. It does not generate any limiting force that was not there in the first place, nor should we expect it to make existing forces more effective.

If so, what appears to follow is that it is not law that domesticates authority, and it is not law that constitutes social capital. Instead, social capital is whatever makes for the rule of good law<sup>1</sup> and minimizes collective decision-making. Despite Coleman's assertion that it is "not located in people" (but among them), it very much looks that in the last analysis social capital, or a large part of it, consists of values, beliefs, standards of conduct that reside, so to speak, in people's heads. They condition their mutual dealings, permit reliance and trust, and determine what they will or will not stand for. This is what ultimately decides the sort of law they will produce, accept and obey, and the kind of government they will get, tolerate and deserve.

### 3. Accumulating Social Capital

Physical capital is accumulated by joint acts of saving and investment. The two must be coordinated, but there are impersonal mechanisms to perform this more or less effectively via income and interest rate adjustments. By

and large, physical capital grows or shrinks as a result of purposive individual decisions. People expect to profit from their own saving and investing activities. This is not or not so clearly the case for social capital. No individual act is obviously and directly designed to increase social capital, and it is hard to see how a person, acting on his own as savers and investors do, could hope to profit from ~~trying~~ trying.

At the same time, whatever the difficulty of defining and measuring it, (except tautologically by total factor productivity), we nonetheless think we can perceive social capital rising or falling both over time and across space, with its major movements being, as it were, visible to the naked eye of the historian. We are perhaps more prone to notice as it shrinks with the decline of civility, public mores and standards, - just as we are more sensitive to <sup>seeing</sup> "tangible" capital shrink with personal dissaving, the fly now, pay later economy, corporate losses and endemic government deficits. But why social capital shrinks or grows when it does, and what are the policy variables that would make it grow rather than shrink, is something we know very little about. Part of the answer <sup>may</sup> lie in the incentives people have for keeping promises, meeting commitments, developing relations of mutual reliance and aid, generally acceptable conventions and their spontaneous enforcement. The growing dominance, not to say intrusion, of statute law and enforcement "from above", the generalization of welfare entitlements and the high proportion of publicly provided goods, however beneficial they might otherwise be, would presumably reduce these incentives, and hence also the personal virtues and the interpersonal ties they generate. Other answers, other reasons are no doubt possible. Dr. Weede did not address this problem; one can only wish that he had tried, and <sup>hope</sup> that he will try next time round.

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## Endnote

1 I use the question-begging term "good law" knowingly. Space does not permit a disquisition on good law. The spectrum from convention, custom, customary law to statute law (cf. Benson's distinction between customary and authoritarian law, Benson 1992 in this volume) is probably well correlated with the spectrum from good law to bad law.

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