THE WESTERN IDEA OF LAW, by J.C. Smith and David N. Weisstub, Butterworths, London, 1983, pp. xxix and 685.

Smith and Weisstub are to be congratulated for producing a volume containing such diverse materials tracing the roots of Western legal ideology. The book is organized into four main chapters (Law and Culture; The Mythological Origins of Law; The Foundations of Western Law; Law and State) which are themselves broken down into a number of subsections (e.g. Law of Agreements; Law Without Rules; The Rise of Patriarchy; The Hellenic and Judeo-Christian Synthesis; Law and the Legitimacy of State Power; Equality, Status, and Liberty in the Modern Industrial State). In turn the subsections are comprised of a myriad number of wisely chosen excerpts from writings on law from such disciplines as anthropology, jurisprudence, legal philosophy, the Bible, ancient Hebrew, Greek and Roman sources, sociology and political science (this by no means exhausts the list). These selections, numbering one hundred and ninety-three in all, remind us that our legal heritage stretches not only several thousand years into the past, but, in the minds of visionaries, into a timeless future where rationality in law anticipates perfect rationality in culture and in man's psychological condition. The legal and social philosophies of Maitland, Maine, Gandhi, Fuller, Aquinas, Denning, Rawls, Austin, Hart, Bentham, Dworkin and others, so well known, are unparalleled achievements in legal-rational *humanist* discourse. However, lest the reader think all is optimism and utopia, thinkers such as Marx, Lenin, Bell, Hayek, Cassirer, Wolff, Nozick and others drive home the point that law is the handmaiden of politics and the state. Individual human freedom, however perversely defined, is linked in no mean way to property and economic relations, ideological domination, cultural hegemony, physical oppression and psychological alienation — in short, law is the arbiter of whoever *controls* and *possesses* it. Thankfully, Smith and Weisstub have included no less than ten sources on women in law, politics and society. They recognize the deep prejudice of patriarchal consciousness in law and legal discourse. Law, then, is also the handmaiden of overt sexism.

What is this thing, "law"? Despite the diversity of sources, traditions, historical periods and moral persuasions there is a core of concepts, unique to the West, about law and society and the relationship between the two. Smith and Weisstub have, by their very selection of articles, traced the evolutionary history of these concepts and how they eventually came to be merged in what is now known as the modern rule of law. The idea that the rule of law is a distinct and autonomous part of social life provides the base of this core of concepts. Law is a distinct and autonomous part of social life; it is seen as having an identifiable structure and as performing specific tasks. Under the rule of law, rules which govern social life are not determined by, though they may be derived from, the village, tribe, church, family or association. The legal system in the West is seen as a "superior" social entity, replacing, yet to some extent, absorbing traditional sources of social control. Rules derived from traditional sources are reinstitutionalized, achieving universality and homogeneity by applying regardless of regional, local, cultural or social distinctions.

By not deriving its rules from other entities, it is autonomous from the *loci* of traditional and other sources of authority (e.g. the independent judiciary, judicial review and constitutionalism are also techniques of securing such autonomy). Rules for modern law and the legal order are also valuable for their instrumental utility in producing consciously chosen ends; law can be consciously designed to achieve specific purposes, such as to increase the effectiveness and penetration of official rules in society. Law-making is seen as a rational process where rationality means purposiveness, in turn making law highly predictable and reliable (e.g. "formal-rationality"). In terms of the relationship between law and the state in the West we see in the evolution of law that it is regarded as a means of restraining the power of the state, yet simultaneously the rise of modern law is seen as contributing to the strength of the state. It restrains the state because law is distinguished from power. The legality of principled adjudication eliminates arbitrary exercises of state power. As well, the legal order is autonomous from the state as a source of normative order. At the same time, law and the legal order is created by the state — it is the state that has created the system of rules, courts and associated institutions that are synonymous with modern law. The legal system appeals to reason and equity, enhancing the state's legitimacy and so its effective power. As it legitimates the state, modern law is in turn backed by the state as it imposes specific substantive norms.

Smith and Weisstub have also included articles, for the last two subsections of Chapter 4 (Law and State), to show the contradiction between the extent to which legal rationalism has been achieved, and the legal system's creative capacity to generate the new substantive concepts and institutions that are required by ever-changing social, political and economic conditions. There is a very real conflict between legislation and adjudication, between "government" and "judge" made law. The conflict is based on this fundamental contradiction: While the legal order seeks to increase the instrumental capability of the rules of law, thereby weakening and replacing traditional authority and traditional sources of social control, it tends to affirm the state as the only valid source of goals. This in turn not only tends to undermine the supposed autonomy and neutrality of the law, but the universality of its rules. The result may be that reliance on the state for goals contributes to the law's inability to render social justice — "[w]hen the range of impermissible inequalities among social situations expands, the need for individualized treatment grows correspondingly" so that "[t]he decline in the distinctiveness of legal reasoning is connected with the need administrators and judges have of reaching out to the substantive ideals of different groups".[1]

The Western Idea of Law is a contribution to legal historical studies for precisely the reason that it questions the utility, neutrality and humanity of law in plural settings. The need for the law to be more sensitive to the plurality of interests in any nation-state is of course a pressing contemporary issue. Recognizing inconsistencies and contradictions

1. Unger, *Law in Modern Society*, cited in Smith and Weisstub at 620 and 621.

is a good beginning to change the quality of our law, to create a more responsive[2] — and hence more responsible — law. Smith and Weisstub have pointed to the future by outlining the past.

René R. Gadacz
Department of Anthropology
University of Alberta

2. P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).