

COMMUNITY AND DEMOCRACY: SYRACUSE REFLECTIONS

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The articles in this issue of the *Syracuse Journal of International Law and Commerce* were prepared for a Conference held at Syracuse University College of Law on April 16-17, 2005. With the generous support of Dean Hannah Arterian, of the Syracuse University's College of Law, we brought together forty people to address the topic "Legal Evolution: Toward a World Rule of Law." The editors have asked me to write the foreword to this symposium issue.

The articles speak for themselves. They represent scholarly responses to the question, "How does the American experience with democracy contribute to our understanding of the prospects for, and paths to, democracy worldwide?" Another half of the papers prepared for the Conference deal with the experience of other countries, many of them moving toward rule-of-law democracy.¹ Taken together, they represent a sample of our present knowledge—and they suggest new directions for future research.

The Conference in Syracuse underlined for me the significance of community as a basis for democracy. This foreword to the Symposium gives me the chance to jot down and share some thoughts along those lines. My thesis is that communities with certain qualities contribute to the development and sustaining of democracy. The qualities to which I refer include: *mutual respect* across lines of division and the *creative composition of differences*.

At Syracuse, we saw two kinds of community: local and scholarly. Within the large community of greater Syracuse, there are many smaller communities that also foster mutual understanding and joint effort. People in this area have formed many different kinds of groups that cross lines of division, search for common ground, and frequently

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1. See generally 603 *ANNALS AM. ACAD. POL. & SOC. SCI.* 1 (2006).

succeed in finding it. Many of these are informal and casual, but several have regular meetings, agendas, and programs. Size is a major factor in determining how these groups operate. In the first part of this foreword, I will give some examples of how this type of local community works.

The second type of community, also evident at the Conference, is the community of socio-legal scholars. They assembled at Syracuse as a group interested in the potential for worldwide proliferation of rule-of-law democracy. They shared a common culture in which factual information is formally presented and analyzed. They considered the topic of change toward (or away from) rule-of-law democracy in several countries and exchanged views as to the factors contributing to such change. They differed on a variety of issues—among them, the value of “evolution” as a concept in analyzing socio-legal change, but differences of this kind were handled with civility and a tacit commitment to understand opposing positions.²

Both types of community can tell us something about how democracy works. When Alexis de Tocqueville wrote his remarkable study of *Democracy in America*,³ he emphasized the significance of local groups in America—in contrast with France where, he thought, democracy suffered from the scarcity of such groups. The tendency of Americans to be joiners has continued from then until now.

The scholarly socio-legal community can also tell us something about how democracy works. Its method of doing so, however, is very different from community at the local level. It seeks to discern through analysis and observation what is happening in America and in other countries that relates to the growth or decline of democratic governance. On the basis of such observations, differences can be identified and sometimes resolved.

Between these two types of community there are differences of qualification, status, knowledge, and style. Local communities tend to welcome volunteers, to vary from one group to another in social status, to rely more on common sense than systematic book learning, and to cultivate informality. Scholarly communities differ from the local communities in all of these regards.

My main purpose in noting the contrast is to suggest that the involvement of both types of community *can* strengthen democratic values. When local communities overcome prevailing differences, when

2. Richard E.D. Schwartz, *Sociolegal Evolution: An Introduction*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2006).

3. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

they cultivate civility and mutual understanding across traditional lines of isolation or hostility, their interaction can strengthen the commitment to a functioning democracy. We need to know much more than we now do as to when and whether that proposition is true. If it is sometimes the case, then the cultivation of community involvement at the local level could lead to stronger democracy.⁴

How does this thesis relate to rule-of-law democracy in other countries? A sense of national community seems essential if democracy is to flourish. Nation states can be torn apart if the differences among segments of their populations become excessive. Or such differences can lead to the establishment of authoritarian governments that use the power of the state to suppress dissident segments of the population. Examples of both such processes are found in Iraq. The separatism of the Kurds led to radical suppression by Saddam Hussein. Since Saddam's fall, the dissidence of the Sunnis now appears to block the emergence of a functioning democratic nation.

In America, such extremes do not imminently threaten the Republic. Yet the challenge posed by terrorism could dramatically threaten the stability of our social order. To secure the advantages of true democracy in a troubled world, we should search for ways of strengthening the culture that supports it. A healthy practice of community participation can strengthen the body politic—as physical exercise strengthens the individual body.

All of this is speculation, to be sure. Even communitarian literature has not yet included substantial empirical research that goes beyond illustration.⁵ What we have so far are interesting examples and specialized studies. Much more scholarship is needed to expand our knowledge of the relation between community and democracy—in this country and in other places where democracy exists or where its development is to be encouraged.

What I would like to do in this introduction is to illustrate communities at work. This is not the place to report a study of community in Syracuse, or any other locality. Nor is it the place to record or develop research and theoretical ideas on the relation of community to democracy. All I can do here is to register some

4. *See generally* BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

5. *See generally* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* (1993); *see also* AMITAI ETZIONI, *FROM EMPIRE TO COMMUNITY: A NEW APPROACH TO INTERNATIONAL RELATIONS* (2004); *see generally* PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992); *see also* PHILIP SELZNICK, *THE COMMUNITARIAN PERSUASION* (2002).

impressions stimulated by both types of community at the Syracuse Conference in mid-April, 2005.

LOCAL COMMUNITY: SOME EXAMPLES FROM SYRACUSE

When Dean Arterian invited me to prepare a Conference on a subject of my choosing, she also arranged and supported a dinner to which she suggested that I invite people I had known in the community. This was a delightful part of the preparation for the Conference, since so many people from the local community could join with the Conference participants in a kind of testimonial dinner. I am not one to enjoy being “honored”—not that I have had many such occasions—but it was wonderful to see all of these folks at one time. Many had become friends in the course of our living, working, and playing together during the twenty-five years that we—my wonderful wife, Emilie, and I—lived there.

That dinner in some way summed up for me the value of a functioning community. It reminded me of the personal satisfactions of meeting people from different backgrounds—and the importance of those interactions that we summarize (often too glibly) as community. When these interrelationships lead to positive results, one realizes more clearly how vital such contacts can be. Multiplied many times they can provide an important component for a functioning democracy.

I learned a lot about the local community from my twenty-five years in Syracuse. In both the University and in greater Syracuse there was a spirit of creative compromise that enhanced one’s understanding of other points of view and strengthened people’s capacity to work together toward shared goals.

In the University, I had the great good fortune of working with the late Melvin Eggers on a plan regarding the future of the University. Chancellor Eggers was a very shy man, who did not like to impose his views on the faculty—except when he was convinced that it was fundamentally necessary for the future of the University. Mel Eggers understood and practiced ways of satisfying multiple needs through creative compromise. He made it clear that he valued citizenship within the University—and beyond. That attitude encouraged me to work with Syracusans, in a number of settings.

As I reflect on the years spent in Syracuse, one feature of the community stands out. It is a place where the active citizens know each other and relate in a mutually understandable and often highly beneficial way. There are many communities where this is the case, but there are others where it is not. There are still many places in America

where some categories of people are totally excluded from “the action” because of factors that should be irrelevant, such as religion, race, class, and ethnicity. I did not see such total exclusion in Syracuse.

The community is, to be sure, far from being perfectly inclusive. It is no utopia. There are, however, trends that move toward stronger, more inclusive community. There are many occasions when people in Syracuse get together—across lines of religion, class, race, and ethnicity—to share and to help in one way or another. Many such activities become organized, with regular meetings, officers, and budgets. That is a tendency of successful efforts that start informally. Maintaining the qualities of informality as organizations grow is difficult but not impossible. Syracuse has a good record on that score.

Describing the community organizations of Syracuse, or systematically sampling them, would be a monumental (though worthwhile) task. Celebrating them is another matter. They deserve to be praised in the present context, not only for the good work they do, but also because they illustrate the kind of community culture needed to support strong democracy.

The basic idea of democracy, distinguishing it from authoritarian modes of governance, is that ordinary people have a say in how the society functions. Voting alone is not enough to maintain a strong democracy. If people were to vote solely according to their own individual interests, caring nothing for the general welfare, the capacity of the society to hold together and to meet the most urgent legitimate needs of its citizens would be jeopardized. As Robert Post points out, mediating between individual needs and collective responsibilities is a fundamental task of effective democracy.⁶ For that mediation to be understood, appreciated, and acted on is one of the central requirements for a democratic culture. And it is that job that can most effectively be done at the community level. Syracuse has many examples that illustrate that spirit of community. One example is the Syracuse Area Middle East Dialogue (SAMED).

In 1979, a group of six people interested in the Israeli-Palestinian conflict met in Syracuse to form a discussion group that might agree on a position regarding that long-enduring conflict. The six included two Arabs; two Jews; and two “Others.” Some such group had existed earlier, but had not continued meeting.

Agreeing on procedures and goals, the planning group set about

6. Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24-36 (2006).

filling five additional places for each side. That effort turned out to be difficult for each of the categories. Jews who joined risked condemnation as being unduly friendly with, or sympathetic to, the Palestinians. Finding Palestinians willing to be identified as such proved difficult, because they feared prejudice. It was safer to be identified as “from the Middle East,” or better still to be seen as undifferentiated Americans. As for the “Others,” only a few overcame the response heard frequently that “We have enough problems here at home. Besides, what good could we do?”⁷

Eventually, the group reached its goal of twenty-one, and regular meetings began. Deliberations were understood to be private. Public statements were seldom issued, and these were approved after much deliberation. In the early years, a doctoral candidate at the University’s Maxwell School of Citizenship and Public Affairs volunteered to take detailed notes. These were summarized in a dissertation that treated as confidential not only the identity of the participants, but the community as well.⁸

That study gives a detailed account of interactions among the participants, and other materials substantiate that picture. It proved difficult to overcome the antagonism generated by the Palestinian-Israeli conflict. Hard-liners, if not also typical mainstream members, on both sides were outraged at the very idea that there could be merit on the other side. Within the group there was plenty of disagreement—but it could be overcome through regular meetings in which open discussion of differences became the norm.

One reason this worked was due to the resignation of one or two in each category who had a belly full. The “last straw” varied from one departing member to another. One Jewish member resigned in disappointment on discovering that he could not convert the group to his view that Israel had “every right” to the land between the Jordan River and the Mediterranean Sea. A Palestinian member struggled openly with ambivalence and finally resigned with the observation that the group described the conflict as Israeli-Palestinian, rather than as Palestinian-Israeli. And an “Other” member finally gave up when SAMED was unable to move quickly enough toward support of a two-

7. See RICHARD E.D. SCHWARTZ, *ARAB-JEWISH DIALOGUE IN THE UNITED STATES: TOWARD TRACK II TRACTABILITY in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 180-209 (1989).

8. Amy S. Hubbard, *Cross-Culture Conflict Resolution Group: American Palestinians and Jews in Dialogue on the Middle East* (1992) (unpublished Ph.D. thesis, Syracuse University) (on file with the Syracuse University Library).

state solution.

Those who remained continued to try to understand, intellectually and emotionally, the position of the other side. It is that good-faith effort that afforded the group its vitality. It has survived through twenty-five years, and continues to fill vacancies with new members. SAMED proved to be a model for groups of more recent origin that have developed all over the country.⁹

It is reasonable to ask regarding such local-level dialogues, “What good did it do?” The answer, so far, is probably not much—in terms of resolving the Palestinian-Israeli problem. However, it did as the doctors say, “do no harm.” And it demonstrated that ordinary people can temper their group loyalties with an understanding of the experience of others—even if very different from their own. It is this ability that must be cultivated, I suggest, if democracy is to yield its optimum benefits.

It is at least as important for democracy that this kind of understanding be cultivated at the grassroots level as in the chancelleries of the world. Indeed the one can be expected to affect the other. Senator George Mitchell once tried with limited, if any, success to help the Palestinians and Israelis move toward a resolution of their conflict. I had occasion on his return to ask him in a one-on-one conversation whether he had found anyone there who understood the suffering of the other side. “Not one,” he remarked without hesitation, “they are too much overwhelmed with the suffering of their own people.”

Had Senator Mitchell talked with common people he could certainly have found *some* who did so understand. Unfortunately, we have not yet developed the mechanisms of mutual exchange sufficiently to have learned that grassroots communication should have a very high priority even before conflict begins, or at least when such conflict first comes to the surface. To vest responsibility for conflict avoidance entirely in the chancelleries of the world risks that the conflicts will not be resolved successfully, and that disastrous results may follow from the failure. A combination of popular and elite opinion appears to be the surest way to manage conflict within, if not also between, nations.

One important way of achieving sound policy in a democracy is by participation. And that participation should be informed by a full knowledge of the diverse considerations. When people with different perspectives exchange views, there is at least a chance that each will

9. See LEN TRAUBMAN & LIBBY TRAUBMAN, JEWISH-PALESTINE LIVING ROOM DIALOGUE (1992), <http://traubman.igc.org/global.htm>.

learn something from the other. Dialogue can become an effective way of learning valid considerations on the other side of an issue. If town meetings no longer function, and they are an endangered species of government, they should be replaced by equally functional efforts. SAMED's history illustrates how that can be done. That its example has been followed elsewhere should be a source of pride and of emulation.

SAMED's story is not at all unique within Syracuse. There are volunteer agencies that bring together people from different religious or social groups, sometimes in dialogue as in the Fellowship of Congregations and in Women Transcending Boundaries,¹⁰ sometimes in a large organization as in the Inter-religious Council of Central New York and Forging Our Community's United Strength (FOCUS).¹¹ There are citizen groups that join in a covering organization called Greater Syracuse Works (GSW) that assists in getting jobs for those who have difficulty finding employment.¹² In a recent count, GSW had brought together nine originally separate organizations. There is a largely volunteer organization that teaches reading and computer skills to originally illiterate adults. And one could go on to list many more of such active groups. The community seems spontaneously to generate such activities. They are serious entities that are much more reminiscent of Tocqueville than of Sinclair Lewis's satirical *Main Street*.

The value of such groups was demonstrated after 9/11. The Fellowship of Congregations had included in its nine members a mosque as well as a Catholic Church, a synagogue, and several Protestant denominations. They had originally formed for discussion and to assist in a neighborhood job locating effort. But the congregations had several meetings on a variety of topics with speakers—or with discussion among members—that encouraged the sharing of spiritual and practical experiences across traditional religious lines.

After 9/11, members from several of the nine congregations arranged a meeting at the mosque. Their purpose was to assure Imam Kobeisi of their support for him and the mosque in a difficult time. They learned that there had been menacing behavior toward women members of the mosque on the streets of Syracuse. And they offered to accompany the women to ensure their safety.

To be sure, the police were also active in that period to prevent,

10. See WOMEN TRANSCENDING BOUNDARIES, <http://www.wtb.org>.

11. See INTER-RELIGIOUS COUNCIL OF CENTRAL NEW YORK AND FORGING OUR COMMUNITY'S UNITED STRENGTH (FOCUS), <http://focussyracuse.org>.

12. See GREATER SYRACUSE WORKS, <http://graffetto.com/clients/gsw/>.

investigate, and arrest. The courts stood ready to punish for hate crimes. But what emerged was a spirit in the community that was given visible expression, and that minimized the need for police or court action.

Such events in the public, non-governmental sphere leads me once again to realize how important it is for the effective functioning of democracy that the community provide a base on which the law can depend. That dimension may well make the difference between a law that is seen as foreign and imposed versus a law that is understood to work in partnership with the community. Given the variation from community to community—and neighborhood to neighborhood on these matters—it is clear that much needs to be done to render law enforcement a welcomed part of the society that prides itself on the dream of equal justice for all. And if this society has made progress in that direction, it is still very uneven.

For simple societies, as described in classic ethnography, this may be an easier problem because their culture tends to be homogeneous.¹³ Nation states, however, characteristically include many different communities typically opposing each other.¹⁴ With ethnic, racial, religious, and class differences, the retention of community solidarity becomes problematic. All nations struggle with this problem, and in some the existing hostility threatens the very fabric of the society.

Our experience in America provides examples of both types. The Civil War offers a clear example, perhaps the most blatant and damaging in our history, in which compromise satisfactory to both sides received neither elite nor popular support. The human and material costs of the Civil War were enormous, and the War left in its wake bitterness that continues to manifest itself despite noble efforts to work our way out of it.

By contrast, the Founders of the nation did find many ways to resolve difficult conflicts. The famous Connecticut Compromise, when the Constitution was drafted in Philadelphia, is noteworthy for creatively compromising the representational differences between large and small states through the two houses of Congress. It should be noted that the Constitution was ratified only after nine of the thirteen states voted for its acceptance. That arrangement also encouraged the

13. See, e.g., BRONISLAW MALINOWSKI, *CORAL GARDENS AND THEIR MAGIC: A STUDY OF THE METHODS OF TILLING THE SOIL AND OF AGRICULTURAL RITES IN THE TROBRIAND ISLANDS* (Routledge 2001) (1935); see also BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Routledge 2001) (1926).

14. See PHILLIP BOBBITT, *SHIELD OF ACHILLES* (2002) (for a general discussion of how state-nations become nation states).

publication of the Federalist papers, as well as the opposition Anti-Federalist papers, to explain in detail to the voters the reasons for, and against, the proposed Constitution.

If the American experience is to be used as a model for democratic governance elsewhere, we must look first to the adequacy with which we combine popular and elite forces. My impression is that we have an important reform job ahead of us. As the world becomes more complex, we must find ways to better inform the public of the facts and analyses that are needed to keep up with events. Without such information, the idea of democracy can be turned into a mere slogan, lacking the shared meaning, the democratic culture, that we have come to cherish. Our democratic institutions can only function well if we have a public that is well informed and active in initiating, choosing, and supporting policies.

The dynamics of American society surely has an effect on the law, not only as made in the legislature and carried out by the executive, but also as interpreted (if not made) by the courts. In some ways, difficult to describe definitively, the processes of life at the local level do affect the governing institutions of the society. The habits of authority or accommodation are formed and manifested by what goes on in our communities.

A COMMUNITY OF SCHOLARS

The Conference was conceived after 9/11 and motivated by the idea that terrorism might best be abated through the spread of democracy and a rule of law in many if not all countries. The premise that worldwide democracy will reduce the danger of terrorism cannot be confirmed, but a good argument can be made for it. With the spread of democracy and the rule of law, it is reasonable to expect that the answer to that question will become clearer.

There are indications, at all events, that rule-of-law democracy has taken hold in many countries during the past sixty years. Lawrence Friedman spells out in this Journal, three routes to democracy—all of which have been followed during this period. When we reflect on the many examples of nation states converting to democracy, it is tempting to suggest that we might be living at the beginning of a worldwide democratic revolution.

Ideas do sometimes revolutionize human thinking. That was the history of the Scientific Revolution that began in the sixteenth century and has become the standard way of studying physical, chemical, and biological phenomena. What began as suspect activity became widely

accepted as the best way of ascertaining reality. We take that change so for granted that we capitalize the term Scientific Revolution.

We do not yet capitalize the term democratic revolution. Properly so, I would say, because the idea of democracy has not yet achieved the uncontested status of a widely agreed-upon preferred way of governance. Within a given nation state, the democratic idea can achieve that kind of acceptance—as it has in the United States. And the spread of democracy, as a governmental ideal, suggests that we might be on the way toward worldwide acceptance of democracy. Even so, it would be premature and misleading to declare a Worldwide Democratic Revolution. We do not know if that term will ever be justified.

There is another important reason for caution. Democracy is an idea that has many different meanings. The terms Democracy and Republic have an emotional appeal strong enough to be used by the most authoritarian of governments. North Korea, for example, currently describes itself as the Democratic Peoples Republic of Korea—although most observers would, by any conventional criteria, describe it as neither a republic nor a democracy.

Defining the essence of democracy is not easy. One can use overt criteria such as choice of leaders by election, protection of rights of minorities and women, free circulation of information, and due process of law. All of these are necessary aspects of democratic governance. They are characteristics that *tend* to cluster in fully developed democratic systems.

But the underlying dynamic of democracy requires clarification. That question has been explicitly addressed by Robert Post in a paper published in the *Annals* issue of January 2006, where many of the Conference papers will appear. Post's thesis is that true democracy requires that collective will and the will of the individual citizens must interact with each other in determining the course of government in the broadest sense.

Describing such interactions is complicated. Dependable methods for rigorous description have yet to be developed. So far, these phenomena have largely been perceived in literary terms. Democratic ideals have been expressed in memorable phrases like a government "of the people, by the people, and for the people." Compared with such soaring rhetoric, the language of the public-opinion pollsters seems not only mundane, but also lacking in the subtlety needed to describe the connection between individual and collective aspirations. It is this problem that led an experienced pollster, Daniel Yankelovich, to reflect

on the difficulty of reaching underlying attitudes as opposed to verbally stated opinion.¹⁵

Issues of this kind must find a place in any systematic analysis of democracy. Perhaps we can contribute most effectively to the spread of democracy not only by defining the terms, but also by devising methods for measuring movement in this direction. If so, the Scientific Revolution, and the marvelously successful achievements that followed from it, could become an important part of the effort to spread democracy. There are signs that we may be ready for such an effort.

Studying democracy scientifically requires a kind of consensus that has generally eluded the social sciences. As Thomas Kuhn points out, the social sciences generally lack the kind of agreement on problems and methods that characterize the natural sciences.¹⁶ In those fields, the student learns the basic theoretical ideas, the problems that currently call for research, and the methods by which these problems can properly be addressed. All of these elements, according to Kuhn, are part of "normal science." Taken together, they comprise what Kuhn describes as a paradigm.

Can we develop a paradigm for social scientific research that meets Kuhn's rigorous criteria? Using his description, most theories described in social science as paradigms fall considerably short of his vision. As a discipline advances, however, it often comes closer to meeting Kuhn's criteria. In the field of law and society, we have made considerable progress in that direction. And the times may be appropriate for more advances of this kind.

The advance of a field increases with the numbers of researchers focusing on a common set of problems, studied in different settings. The more such researchers can exchange information regarding their own studies, and the quicker they can do it, the better. In that light, it was very good of Dean Arterian to have supported a Conference that did just that.

The people who were brought together at the Syracuse Conference were looking at the same subject, rule-of-law democracy, in many different settings. They were motivated not only by scholarly curiosity, but also by the hope that their work could contribute to the solution of a problem. That problem might be described in two sentences: What makes rule-of-law democracy work? What are the effects of such

15. See generally DANIEL YANKELOVICH, *COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD* (1991).

16. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. University of Chicago Press 1970).

democracy for the people of a nation and for the world community? The articles in this Journal and in the companion issue of the *Annals* focus on these issues. The collective product, we all hope, will advance our ability to handle these questions effectively.

One of the effects of reading these articles should be an awareness of how much territory must be covered. It would certainly be incorrect to claim that agreement on a paradigm for research in this field has been achieved. Still, these articles taken together provide good material for advancing both theory and method. I am encouraged to find so many of my colleagues in law and society, this relatively new field, interested in a common problem. Perhaps a next step is to explore more fully the methods of research that can yield findings to test emergent theory. And the process can work the other way as well: as testable theory develops, improved methods will also emerge.

Here I want to suggest some possibilities, not fully developed in the Conference, but implicit in many of the papers. It is widely recognized that legal effectiveness depends on the sense of legitimacy of the system of governance.

To understand the nature of legitimacy, one must look to the social and cultural basis of the society.

Every complex society is held together by authority *and* mutually satisfactory exchanges. Law can and does support practices that fall primarily under each of these headings. When either principle becomes overwhelmingly dominant, law can restore the balance between them—or can give way and support the triumph of one principle over the other. When the authority is excessive or when the exchanges are no longer mutually satisfactory, law sometimes can restore balance between the two principles. If it fails to do so, the society can be in for trouble of various kinds.

This is not the place to develop these themes in detail. Our deliberations at the Conference were, for the most part, dealing with law as it appears to vary from one society to the next. We still lack the kind of theory that could sum up, in a general model, the interaction of law and society in complex societies.

If we see this Conference as a step in that direction, it seems reasonable to review the classic works that first opened up the relationship between law and society. Each of the participant disciplines starts with some fundamental ideas that can help toward a general theory. In my field, sociology of law, we properly go back to the classic writers already mentioned. Accordingly, I think it worthwhile to discuss briefly the contribution of these sociologists to the general mix of socio-

legal ideas.

Sociology of law was conceived in the late nineteenth and the early twentieth century, and it has developed in the intervening years. Emile Durkheim and Max Weber made crucial contributions to the field, each of them included in their publications a major treatise devoted to law: Durkheim in his *Division of Labor in Society*,¹⁷ Weber within the corpus of his *Economy and Society*.¹⁸

While these works merit close attention, credit for naming the field belongs to Eugen Ehrlich, a legal scholar working before World War I in Czernowitz, in the eastern reaches of the Austro-Hungarian Empire. Ehrlich not only introduced the term,¹⁹ he also gave a definition which he declared was “the substance of every attempt to state the fundamental principles of the sociology of law.”²⁰ Ehrlich’s definition was this:

At present, as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.²¹

For Ehrlich, this definition provided a basis for his concept of “the living law” which he located within the structures of society.²² In each institution, there develops a set of standards that Ehrlich called “the inner order” of the association.²³ It is these inner orders, taken together, that comprise the living law. This living law, he maintained, is not dependent on the state. Indeed, he argued, the living law exists in societies that do not have a state. It is with the rise of a state, Ehrlich maintained, that state law can come to diverge from the living law. Such divergence he saw as a source of difficulty when the positive law of the state interferes with the living law.

Ehrlich’s formulation provides a rationale for asking several

17. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., The Free Press 1984) (1893).

18. MAX WEBER, *ECONOMY AND SOCIETY, AN OUTLINE OF INTERPRETIVE SOCIOLOGY, VOL. I & II* (Guenther Roth & Claus Wittich eds., Ephraim Fishchoff, Hans Gerth, A.M. Henderson, Ferdinand Kogler, C. Wright Mills, Talcott Parsons, Max Rheinstein, Guenther Roth, Edward Shils & Claus Wittich trans. 1978).

19. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll, trans., 1936).

20. *Id.* at XV.

21. *Id.*

22. *Id.* at 486-506.

23. *Id.* at 341-65.

interrelated questions:

1. Why does state law develop?
2. What are its distinctive characteristics?
3. How is its content affected by the culture and social structure of the society?
4. To what extent can law effect change in society?
5. As these questions are partially answered, what can be inferred concerning future socio-legal developments?²⁴

In writings before and after Ehrlich, many scholars have addressed these questions in whole or in part.²⁵ Indeed the recent literature has shown remarkable profusion as scholars in every social science have turned their attention to the social study of law. Current work builds, as it must, on important works going back to formative years of sociology.

In those formative years, leading scholars sought perspective on the society around them by drawing the contrast between simple and complex societies. Anthropological treatises in particular suggested this kind of contrast, and conceptual comparisons were impressively provided by such comparative sociologists as August Comte,²⁶ Ferdinand Tonnies,²⁷ and Herbert Spencer.²⁸ Their speculations provided a background for work on legal institutions, but did not focus on law as a distinct institutional entity. Nor did the earlier work of Montesquieu²⁹ or Maine,³⁰ both extremely valuable, provide the intellectual beginnings of sociology of law. For this beginning, credit must be accorded to Emile Durkheim and Max Weber. The work that followed theirs was invariably affected by their perspectives.

24. See generally EHRlich, *supra* note 19.

25. See THEODORE ZIOLKOWSKI, MIRROR OF JUSTICE, LITERARY REFLECTIONS OF LEGAL CRISES (1997).

26. See generally AUGUSTE COMTE, THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE (Harriet Martineau, trans., AMS Press 1974) (1855).

27. See generally FERDINAND TONNIES, COMMUNITY AND SOCIETY (1957).

28. See generally HERBERT SPENCER, THE PRINCIPLES OF SOCIOLOGY (Authorized ed., London, Appleton 1896).

29. See generally CHARLES LOUIS DE SECONDAT DE LA BREDE ET MONTESQUIEU, THE SPIRIT OF LAWS (Anne E. Cohler, Basia Carolyn Miller, Harold Samuel Stone trans., Cambridge University Press 1989) (1748).

30. See generally HENRY SUMNER MAINE, ANCIENT LAW (Henry Holt & Co. 1864) (1861).

These two scholars addressed the problem that had intrigued others, that lies at the core of sociological inquiry: the problem of social solidarity or what holds society together. They also had in common the method of contrasting simple with complex societies. They differed, however, in the answers that they found in the contrast.

EMILE DURKHEIM

In his *Division of Labor in Society*, Durkheim found the answer in two contrasting mechanisms of social solidarity: mechanical and organic.³¹ Mechanical solidarity held people together in a society where all were similar in heredity, appearance, and culture. While there was a simple division of labor (as between men and women), the common understandings and experiences they shared led them to judge proper conduct in a broad consensus. Thus, if a member of the tribe acted counter to these standards, they would have incurred the anger of the whole group. The punitive sanctions that followed, Durkheim contended, reflected that anger and reinforced mechanical solidarity.³²

By contrast, said Durkheim, such common standards erode as society becomes more diverse. With the division of labor, in particular, members of a complex society have different experiences—leading them to have different standards or to suffer anomie. That does not mean that the society falls apart. It does, however, require a different way of explaining why it stays together. That explanation is to be found, he tells us, in the very diversity that undermines the mechanical basis of solidarity. If people are that different from each other, are they not likely to have different ideas of what is right?

The answer Durkheim gives is to the effect that a different basis of social order, which he calls organic solidarity, emerges to take the place of mechanical solidarity. It is precisely the opposite of the mechanical principle. Organic solidarity arises from the *differences* that people have—which create the potential for people benefiting from what they can do for each other. The term “organic” arises from the analogy of the human body, in which differentiated organs each contribute something different to the general functioning of the body—an idea found in the earlier work of Herbert Spencer, but here pressed to

31. See DURKHEIM, *supra* note 17.

32. Compare Richard E.D. Schwartz & James C. Miller, *Legal Evolution and Societal Complexity* 70 AM. J. SOCIOLOGY 159-69 (1964); and Richard E.D. Schwartz, *Legal Evolution and the Durkheim Hypothesis: A Reply to Professor Baxi*, 8 LAW & SOC'Y REV. 653-68 (1974); and Upendra Baxi, *Durkheim and Legal Evolution: Some Problems of Disproof*, 8 LAW AND SOC'Y REV. 645 (1974).

a different use.

In using the concepts of solidarity, with the two specified types, Durkheim acknowledges that he has no direct way of measuring this hypothetical construct. Committed as he is to empirical methods to test theory, he searches for an observable indicator that can substantiate his theory. The indicator he comes up with—and this is where he uses law most creatively—is to assert that the type of legal sanction most used in these different societies overtly expresses the different types of solidarity.

In a simple society, Durkheim expects that the prevailing mode of sanction to be directed against wrongdoers will be repressive and punitive. Thus, he reasons that the prevailing sanction in such societies will be punitive, designed to inflict pain on the miscreant and to deter others who might stray from the commonly accepted standard. Although his assumptions about simple societies have been debated, his basic quest—toward explaining law as a product of society and culture—remains central to sociology of law.

In complex societies, Durkheim reasons, individuals depend on what they can do for each other in the kind of exchanges that Adam Smith and many subsequent economists have placed at the very core of their discipline.³³ That being the case, Durkheim looks to the exchanges that people make and uses them as evidence of reciprocity. In his original formulation, Durkheim sees contract as an important device that expresses the commitment to reciprocal exchange. Yet he has reservations as to whether the power of the state is an adequate device for maintaining reciprocity. Here is how he puts his concerns:

[Contract] law's sole purpose is to ensure the regular cooperation of functions that enter into relationships. . . . But in order to achieve this result, it is not enough for the public authority to ensure that undertakings entered into are kept. It must at least in roughly the average number of cases, see that they are spontaneously kept. If contracts were only observed by force or the fear of force, contractual solidarity would be in an extremely parlous state.³⁴

Doubtful that the state can carry such a burden and concerned lest tyrannical rule might result were the state charged with responsibility

33. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (P.F. Collier & Son 1902) (1776).

34. See DURKHEIM, *supra* note 17 at 316-17.

for enforcing many broken contracts, Durkheim seeks another solution. In the preface to the second edition of *Division of Labor*, he urges that serious consideration be given to the reestablishment of guilds of a type known in Rome and in medieval times.³⁵ By this device, he hopes that workers could make orderly progress from apprentice to journeyman, to master craftsman. This is one way, he suggests, that might fulfill the need for social ordering for want of which complex societies suffer from normlessness or anomie. (In a later book, *Suicide*, he gives evidence that anomie is a significant factor in precipitating suicide, particularly among upwardly mobile people who give up their place in the stratum they leave, but cannot find normative coherence in their newly achieved, higher class position.)³⁶

Having used contract law, with its principle of restitution as an indicator of organic solidarity, Durkheim also expresses reservations as to whether this legal instrument can by itself satisfactorily do the job. Rather, he would see changes in society that would relieve law of too heavy a burden of social control. In this, his position is reminiscent of Montesquieu who in *The Spirit of the Laws* urges that state criminal sanctions be minimal, just enough to signal state displeasure, so that social disapproval can deter future antisocial acts and so that the public will approve state action as it might well not under a more Draconian regime.³⁷

The position of Durkheim regarding complex societies runs parallel to that of Ehrlich. In proposing a return to the guild, Durkheim suggests that state law alone cannot be counted on to regulate society—unless aided by the structure of society. Ehrlich differs from Durkheim, in that Ehrlich does not call for social changes. But the two writers have in common that they both urge a harmonization of relations between state law and social structure or, in Ehrlich's phrase, the inner order of associations.

MAX WEBER

The contributions of Max Weber also focused on the problem of order in complex societies. His focus, however, was on the structure of legal institutions. Weber began his scholarly career, as a prelude to teaching at the University of Berlin, with a monograph on the effects of

35. See generally *id.*

36. See generally EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (George Simpson ed., John A. Spaulding & George Simpson trans., 1951).

37. See generally MONTESQUIEU, *supra* note 29.

Roman agrarian history on the development of Roman law.³⁸ Fascinated with the historical development of Western European economy and society, he did try to explain why capitalism distinctively occurred in Western Europe. In his best known work, *The Protestant Ethic and the Spirit of Capitalism*, he gives a fascinating account of how Protestant—especially Calvinist—religion promoted in-the-world asceticism, providing a moral sanction for entrepreneurial activity.³⁹

Weber's interest in law, however, soon took the form of describing at length its formal properties. To him, a formal, "bureaucratic-legal," system of government was the only way that complex societies could maintain order. Custom might do for simple societies, and religion-based systems could suffice for Chinese, Hindu, or Islamic societies according to Weber. But these could not, in Weber's view, sustain the complex economies nor suffice as mechanisms of control for the complex societies of the West. Starting with the Roman Empire and its efforts to provide a law that could cover the nations it dominated and generate a natural law to cover them all, law in the West, Weber maintained, depended for its acceptance on its formal rationality, i.e., its predictability. This was achieved by the allocation of fixed and official jurisdictional areas, ordered by explicit rules implemented by office holders hierarchically organized to accept orders from above and give obedience from below. Formal rationality was particularly vital, he maintained, in providing the legal base for a complex, capitalist economy.

Intrigued with this notion, Weber struggled to understand a glaring paradox: the common law. According to Weber, the system of judge-made law developed in the English courts would not have been expected to engender the kind of predictability that he considered vital for rational economic activity. The paradox of successful English capitalism might have been explained by Weber in terms of English imperialism, but he did not carry his analysis to that extreme. There were additional reasons for the English to accord legitimacy to their legal system, but Weber did not get to them in a way that explained this exception to the satisfaction of subsequent scholars.

Working with the continental model, Weber did not emphasize the differentiation between legal and bureaucratic, treating them instead as a

38. See MAX WEBER, *DIE RÖMISCHE AGRARGESCHICHTE IN IHRER BEDEUTUNG FÜR DAS STAATS-UND PRIVATRECHT* (ROMAN AGRARIAN HISTORY AND ITS SIGNIFICANCE FOR PUBLIC AND PRIVATE LAW (1891)).

39. See MAX WEBER, *PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Charles Scribner's Sons 1958) (1930).

substantially similar and integrated decision-making system. Subsequent analyses have suggested the separability of the two systems. In the American case, with the separation of powers between the executive and the judicial branch, this division has become more obvious—and it has often been treated as a distinguishing characteristic of the U.S. legal system. Since this system has been the subject of much work, there is a tendency of American socio-legal scholars to treat law and legal organization as a separate institution—connected closely with the polity and the administrative branches, but following its own distinctive characteristics. That trend is also evident in the work of Niklas Luhmann, the German sociologist, whose *Sociological Theory of Law* treats the law as a distinct and virtually impenetrable subsystem of society.⁴⁰

Weber's analysis did focus on a crucial question: the legitimacy of governmental authority in complex societies. The answer he gave, however, concentrated almost exclusively on the governmental institutions of complex societies as he knew them. What Weber generally left out, as James S. Coleman pointed out in an analysis of *The Protestant Ethic*, was the impact of the bureaucratic-legal system on the people governed by it.⁴¹ Even assuming that legal-governmental orders are created by elites, modern societies do depend over time on the consent of the governed. In Weber's own thinking, governmental authority depends on acceptance by the populace. It is that acceptance that turns power into authority, people thus obeying the legal regime because they accept it as legitimate. Weber implied—perhaps even asserted—that well-organized bureaucratic-legal authority would be accepted as legitimate in complex societies.

What a wonderful debate might have taken place between Weber and Durkheim! They could undoubtedly have refined their views far beyond what I have been able to present. But their basic point of view, I believe would have remained the same. Neither seems likely to have yielded much to the other's principle.

The task of synthesizing these opposing views falls to this generation—and beyond. Societies will develop legal structures that emphasize authority or social exchange. But *both* of these principles will surely be operative in a well functioning legal system. Law cannot determine, but it can guide, the society when such fundamental matters

40. See NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (Martin Albrow ed., Elizabeth King & Martin Albrow trans., Routledge & Kegan Paul 1985) (1972).

41. See James S. Coleman, *Social Theory, Social Research, and Theory of Action*, 91 AM. J. SOCIOLOGY 1309-35 (1986).

enter the legal system. Equally, law in a democracy can and must be guided by the society. The success of law surely depends on the resolution of such conflicts, sufficiently to prevent them from ripping the society apart. To that end, those who would rationally plan to promote democracy in other countries can learn that the task is never easy and never ending. The American experience does not tell how to deal effectively with this problem, and other nations that look to us for answers will come to see that. But we have made a start in *some* of our communities, and I count Syracuse as a place that has demonstrated how to build, sustain, and use a public that can support a legitimate formal authority by cultivating the grass roots from which community grows.

For all we know, the development of community culture in places like Syracuse, as well as in the community of socio-legal scholars, might be the crucial determinant of democracy and rule of law worldwide. I am proud to have been a part of both of these communities.